THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 3, 2006 and JULY 13, 2006

IN THE

# Supreme Court of Nebraska

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# NEBRASKA REPORTS

## VOLUME CCLXXI

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

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## COURT OF APPEALS
## DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

---

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JANICE WALKER . . . . . State Court Administrator

# 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 E. Bryan, Jr. | Auburn |
| | | Vicky L. Johnson | Wilber |
| Second | Cass, Otoe, and Sarpy | George A. Thompson | Papillion |
| | | Randall L. Rehmeier | Nebraska City |
| | | William B. Zastera | Papillion |
| | | David K. Arterburn | Papillion |
| Third | Lancaster | Jeffre Cheuvront | Lincoln |
| | | Earl J. Witthoff | Lincoln |
| | | Paul D. Merritt, Jr. | Lincoln |
| | | Karen B. Flowers | Lincoln |
| | | Steven D. Burns | Lincoln |
| | | John A. Colborn | Lincoln |
| | | Jodi Nelson | Lincoln |
| Fourth | Douglas | J. Patrick Mullen | Omaha |
| | | John D. Hartigan, Jr. | Omaha |
| | | Joseph S. Troia | 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 |
| | | Marlon A. Polk | Omaha |
| | | W. Russell Bowie III | 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 J. Owens | Aurora |
| | | Mary C. Gilbride | Wahoo |
| Sixth | Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington | Darvid D. Quist | Blair |
| | | John E. Samson | Fremont |
| | | William Binkard | Dakota City |
| 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 |
| | | Karin L. Noakes | St. Paul |
| Ninth | Buffalo and Hall | John P. Icenogle | Kearney |
| | | James D. Livingston | Grand Island |
| | | Teresa K. Luther | Grand Island |
| Tenth | Adams, Franklin, Harlan, Kearney, Phelps, and Webster | Stephen R. Illingworth | Hastings |
| | | Terri S. Harder | Minden |
| Eleventh | Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas | John P. Murphy | North Platte |
| | | Donald E. Rowlands | North Platte |
| | | James E. Doyle IV | Lexington |
| | | David Urbom | McCook |
| 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 C. 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 B. Timm | Beatrice |
| Second | Cass, Otoe, and Sarpy | Robert C. Wester | Papillion |
| | | John F. Steinheider | Nebraska City |
| | | Todd J. Hutton | Papillion |
| | | Max Kelch | Papillion |
| Third | Lancaster | James L. Foster | Lincoln |
| | | Gale Pokorny | Lincoln |
| | | Jack B. Lindner | Lincoln |
| | | Mary L. Doyle | Lincoln |
| | | Laurie Yardley | Lincoln |
| | | Jean A. Lovell | Lincoln |
| | | Susan I. Strong | Lincoln |
| Fourth | Douglas | Jane H. Prochaska | Omaha |
| | | Stephen M. Swartz | Omaha |
| | | Lyn V. White | Omaha |
| | | Thomas G. McQuade | Omaha |
| | | Edna Atkins | Omaha |
| | | Lawrence E. Barrett | Omaha |
| | | Joseph P. Caniglia | Omaha |
| | | Marcena M. Hendrix | Omaha |
| | | Darryl R. Lowe | Omaha |
| | | John E. Huber | Omaha |
| | | Jeffrey Marcuzzo | Omaha |
| | | Craig Q. McDermott | Omaha |
| Fifth | Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York | Curtis H. Evans | York |
| | | Gerald E. Rouse | Columbus |
| | | Frank J. Skorupa | Columbus |
| | | Patrick R. McDermott | David City |
| | | Marvin V. Miller | Wahoo |
| | | Linda S. Caster Senff | Aurora |

# JUDICIAL DISTRICTS AND COUNTY JUDGES

| Number of District | Counties in District | Judges in District | City |
|---|---|---|---|
| Sixth | Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington | C. Matthew Samuelson | Blair |
| | | Kurt Rager | Dakota City |
| | | Douglas L. Luebe | Hartington |
| | | Kenneth Vampola | Fremont |
| 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, Jr. | Kearney |
| | | Graten D. Beavers | Kearney |
| Tenth | Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster | Jack R. 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 |
| | | G. Glenn Camerer | Gering |
| | | James M. Worden | Gering |
| | | Randin Roland | Sidney |

## SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

| County | Judges | City |
|---|---|---|
| Douglas | Douglas F. Johnson | Omaha |
| | Elizabeth Crnkovich | Omaha |
| | Wadie Thomas | Omaha |
| | Christopher Kelly | Omaha |
| | Vernon Daniels | Omaha |
| Lancaster | Toni G. Thorson | Lincoln |
| | Thomas B. Dawson | Lincoln |
| | Linda S. Porter | Lincoln |
| | Roger J. Heideman | Lincoln |
| Sarpy | Lawrence D. Gendler | Papillion |
| | Robert B. 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 |
| J. Michael Fitzgerald | Lincoln |
| Michael K. High | Lincoln |
| John R. Hoffert | Lincoln |

## ATTORNEYS
### Admitted Since the Publication of Volume 270

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Barbara Joy Prince
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Lee Michael Rankin
Megan Eileen Richey
Michele Jo Romero
Mark Alan Schwartz
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Shawntal Marie Smith
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No. S-04-1075: **Rodwell v. State**. Reversed and remanded for further proceedings. Stephan, J.

No. S-04-1311: **Broyles v. Broyles**. Affirmed. Gerrard, J. Wright, J., not participating.

No. S-04-1402: **Eatmon Well Serv. Co. v. Department of Motor Vehicles**. Reversed with directions to dismiss. Connolly, J. Wright, J., not participating.

No. S-05-015: **Agarwal v. Homestore.com**. Affirmed. Per Curiam. Wright, J., not participating.

No. S-05-164: **Jurado v. Agri Co-op**. Reversed and remanded for further proceedings. Gerrard, J.

No. S-05-280: **In re Appeal on behalf of Milam v. Health & Human Servs**. Reversed and remanded with directions. Gerrard, J.

No. S-05-584: **Velehradsky v. Craig Indus**. Affirmed. Connolly, J.

No. S-05-870: **In re Interest of Marqus P**. Appeal dismissed. Per Curiam.

No. S-05-984: **In re Guardianship & Conservatorship of Trobough**. Affirmed. McCormack, J. Wright, J., not participating. Connolly, J., concurring.

No. S-05-991: **In re Guardianship & Conservatorship of Trobough**. Dismissed. McCormack, J. Wright, J., not participating. Connolly, J., concurring.

## LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-04-1340: **Miller v. Douglas Cty**. Stipulation allowed; appeal dismissed.

Nos. S-04-1375, S-05-1115: **State ex rel. Counsel for Dis. v. Muia**. Respondent reinstated to the practice of law in the State of Nebraska.

Nos. S-04-1388, S-04-1389: **Huerter v. Norder**. Stipulation allowed; appeal dismissed with prejudice.

No. S-05-383: **Hiatt v. City of North Platte**. Stipulation allowed; appeal dismissed.

No. S-05-772: **State ex rel. Counsel for Dis. v. Paragas**. By order of the court, respondent reinstated as member of Nebraska State Bar Association effective April 27, 2006.

No. S-05-903: **State v. O'Neill**. By order of the court, appeal dismissed for failure to file briefs.

No. S-05-966: **Uglow v. Neth**. Judgment reversed, and cause remanded with directions.

No. S-05-1505: **Hoien v. Department of Motor Vehicles**. Stipulation allowed; appeal dismissed.

No. S-06-044: **In re Interest of Shelby L**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-06-046: **In re Grand Jury of Platte Cty**. Cause having not been shown, appeal dismissed as moot.

No. S-06-196: **Lawrence v. Gilg**. Cause having not been shown, appeal dismissed as moot.

No. S-06-256: **Rognirhar v. Kinlund**. Motion of appellee for summary dismissal for mootness sustained. Appeal dismissed.

No. S-06-354: **Eicher v. Mid America Fin. Invest. Corp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-06-629: **State ex rel. Counsel for Dis. v. Williams**. Judgment of suspension.

## LIST OF CASES ON PETITION FOR FURTHER REVIEW

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No. S-03-924: **Didier v. Ash Grove Cement Co**. Petition of appellee for further review sustained on February 23, 2006.

No. A-03-1331: **Salber v. Salber**. Petition of appellee for further review overruled on April 12, 2006.

No. A-04-146: **State v. Charles**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-184: **In re Estate of Peters**. Petition of appellee Dennis Egge for further review overruled on April 26, 2006.

No. A-04-184: **In re Estate of Peters**. Petition of appellee Kevin Peters for further review overruled on April 26, 2006.

No. A-04-303: **InfoUSA.com, Inc. v. Berj, Inc**. Petition of appellant for further review overruled on February 15, 2006.

No. A-04-303: **InfoUSA.com, Inc. v. Berj, Inc**. Petition of appellee for further review overruled on February 15, 2006.

No. A-04-502: **C. Goodrich, Inc. v. Thies**, 14 Neb. App. 170 (2005). Petition of appellee for further review overruled on February 23, 2006.

No. A-04-582: **National Programs v. Heritage Admin. Servs**. Petition of appellant for further review overruled on March 15, 2006.

No. A-04-596: **State v. Holzer**. Petition of appellant for further review overruled on April 19, 2006.

No. S-04-627: **Roseland v. Strategic Staff Mgmt.**, 14 Neb. App. 434 (2006). Petition of appellee for further review sustained on April 12, 2006.

No. A-04-683: **Howe v. Hinzman**, 14 Neb. App. 544 (2006). Petition of appellant for further review overruled on May 18, 2006.

No. A-04-735: **Marti v. Marti**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-756: **Precision Enters. v. Duffack Enters.**, 14 Neb. App. 512 (2006). Petition of appellant for further review overruled on April 12, 2006.

No. A-04-774: **Hughes v. Poyko-Post**. Petition of appellant for further review overruled on March 15, 2006.

No. A-04-829: **Messinger v. Forsman**. Petition of appellee for further review overruled on June 20, 2006, as filed out of time.

Nos. A-04-848, A-04-849: **State v. Hernandez-Martinez**. Petitions of appellant for further review overruled on March 29, 2006.

No. A-04-919: **State v. Rye**, 14 Neb. App. 133 (2005). Petition of appellant for further review overruled on March 1, 2006.

No. A-04-984: **State v. Romero**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-1041: **State v. Nunez**. Petition of appellant for further review overruled on February 1, 2006.

No. A-04-1080: **State v. McSwine**. Petition of appellant for further review overruled on June 7, 2006.

No. A-04-1096: **Bob Bennie Properties v. Design Data**. Petition of appellee for further review overruled on June 7, 2006.

No. A-04-1141: **State v. Belk**, 14 Neb. App. 53 (2005). Petition of appellee for further review overruled on February 15, 2006.

No. A-04-1205: **Mickelsen v. Newton**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-1213: **Hibbs v. Nebraska State Patrol**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-1232: **Anderson v. Anderson**. Petition of appellant for further review overruled on March 1, 2006.

No. A-04-1260: **State v. Fountain**. Petition of appellant for further review overruled on May 24, 2006.

No. A-04-1298: **State v. Anderson**, 14 Neb. App. 253 (2005). Petition of appellant for further review overruled on April 12, 2006.

No. A-04-1333: **Cash v. Clarke**. Petition of appellant for further review overruled on January 25, 2006.

No. A-04-1343: **State v. Alameen**. Petition of appellant for further review overruled on February 15, 2006.

Nos. A-04-1357, A-05-105, A-05-388: **Partch v. Partch**. Petitions of appellant for further review overruled on June 21, 2006.

No. A-04-1384: **Roepke v. Roepke**. Petition of appellant for further review overruled on April 12, 2006.

No. A-04-1419: **In re Interest of Travis B**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-011: **Scott v. Drivers Mgmt., Inc.**, 14 Neb. App. 630 (2006). Petition of appellant for further review overruled on June 21, 2006.

No. A-05-011: **Scott v. Drivers Mgmt., Inc.**, 14 Neb. App. 630 (2006). Petition of appellee for further review overruled on June 21, 2006.

No. S-05-069: **State v. Caniglia**, 14 Neb. App. 714 (2006). Petition of appellee for further review sustained on June 28, 2006.

No. A-05-112: **State v. Sargent**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-114: **Grandt v. Douglas County**, 14 Neb. App. 219 (2005). Petition of appellant for further review overruled on February 1, 2006.

No. A-05-134: **In re Conservatorship of Anderson**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-146: **State ex rel. Bonner v. McSwine**, 14 Neb. App. 486 (2006). Petition of appellant for further review overruled on March 29, 2006.

No. A-05-202: **Wells v. Goodyear Tire & Rubber Co.**, 14 Neb. App. 384 (2005). Petition of appellant for further review overruled on March 29, 2006.

No. S-05-212: **State v. Tompkins**, 14 Neb. App. 526 (2006). Petition of appellant for further review granted on May 18, 2006.

No. A-05-214: **State v. Richards**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-250: **State v. George**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-286: **State v. La**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-300: **Hendrix v. Sivick**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-318: **State v. Benish**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-340: **In re Interest of Devin P. et al**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-347: **Gardner v. Negley**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-357: **State v. Parrott**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-370: **State v. Bernhardt**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-377: **State v. Bartunek**. Petition of appellant for further review overruled on February 1, 2006.

No. S-05-425: **In re Interest of Veronica H.**, 14 Neb. App. 316 (2005). Petition of appellant for further review sustained on March 1, 2006.

No. A-05-428: **State v. Arevalo-Martinez**. Petition of appellant for further review overruled on June 5, 2006, as filed out of time.

No. S-05-449: **Zach v. Nebraska State Patrol**, 14 Neb. App. 579 (2006). Petition of appellant for further review sustained on June 14, 2006.

Nos. A-05-481, A-05-482: **In re Interest of Zakary B. & Natasha B**. Petitions of appellee Pamela S. for further review overruled on February 15, 2006.

No. A-05-483: **State v. Howard**. Petition of appellant for further review overruled on June 21, 2006.

No. S-05-529: **State v. Bruna**, 14 Neb. App. 408 (2006). Petition of appellant for further review sustained on April 12, 2006.

No. A-05-569: **State v. Mendez-Lopez**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-588: **Tran-Villarreal v. Villarreal**. Petition of appellant for further review dismissed on June 22, 2006. See rule 2F(1).

No. A-05-590: **Ruzicka v. Dalton's Auto Center**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-595: **State v. O'Hara**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-596: **State v. James**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-610: **Porter v. Neth**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-625: **State v. Ornelas-Perez**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-649: **Buggs v. Britten**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-653: **State v. Rouse**. Petition of appellant for further review overruled on May 19, 2006, as untimely filed.

No. A-05-682: **State v. Stekr**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-685: **State v. Bragg**. Petition of appellant for further review overruled on June 14, 2006.

Nos. A-05-737 through A-05-740: **State v. Greathouse**. Petitions of appellant for further review overruled on February 23, 2006.

No. A-05-741: **State v. Cutshall**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-745: **State v. Head**, 14 Neb. App. 684 (2006). Petition of appellee for further review overruled on June 28, 2006.

No. A-05-790: **State v. Adamson**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-795: **Churchill v. Churchill**. Petition of appellant for further review overruled on June 28, 2006.

No. A-05-798: **Arias v. Board of Parole**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-800: **State v. Sextro**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-804: **State v. Haas**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-815: **Burnham v. Pacesetter Corp**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-815: **Burnham v. Pacesetter Corp**. Petition of appellees for further review overruled on May 18, 2006.

No. A-05-824: **State v. Millan**. Petition of appellant for further review overruled on February 1, 2006.

No. A-05-826: **State v. Allen**. Petition of appellant for further review overruled on February 1, 2006.

No. S-05-838: **Rasch v. Remedy Intelligent Staffing**. Petition of appellant for further review sustained on May 24, 2006.

No. A-05-841: **State v. Young**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-868: **State v. Jensen**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-872: **Homemakers v. Douglas Cty. Bd. of Equal**. Petition of appellee for further review overruled on June 14, 2006.

No. A-05-957: **State v. Evans**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-969: **State v. Baeza**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-972: **In re Interest of Peyton H**. Petition of appellee for further review overruled on March 22, 2006.

No. A-05-995: **Griffin v. Drivers Mgmt., Inc.**, 14 Neb. App. 722 (2006). Petition of appellee for further review overruled on June 21, 2006.

No. A-05-1009: **Billups v. Clarke**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1015: **State v. Arthur**. Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1017: **In re Interest of Amanda J**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1018: **State v. Stewart**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1023: **State v. Conn**. Petition of appellant for further review overruled on March 15, 2006.

No. A-05-1030: **State v. Schmader**. Petition of appellant for further review overruled on March 15, 2006.

No. A-05-1032: **In re Interest of Septembur L. & Jaden L**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1042: **State v. Velazquez**. Petition of appellant for further review overruled on March 15, 2006.

No. A-05-1058: **State v. Hays**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-1068: **In re Interest of Dwight R**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1071: **State v. Rodriguez**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1072: **In re Interest of Chloe L. & Ethan L.**, 14 Neb. App. 663 (2006). Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1072: **In re Interest of Chloe L. & Ethan L.**, 14 Neb. App. 663 (2006). Petition of appellee Daniel L. for further review overruled on June 14, 2006.

No. A-05-1079: **In re Interest of Michael B. et al**. Petition of appellant for further review overruled on May 24, 2006.

No. A-05-1081: **State v. Fletcher**. Petition of appellant for further review overruled on March 29, 2006.

No. A-05-1086: **State v. Beck**. Petition of appellant for further review overruled on May 18, 2006.

Nos. A-05-1089, A-05-1090: **State v. Hansen**. Petitions of appellant for further review overruled on June 7, 2006.

No. A-05-1177: **In re Interest of Casey S. et al**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-1186: **State v. Weiler**. Petition of appellant for further review overruled on April 26, 2006.

No. A-05-1209: **Capital One Bank v. Vigil**. Petition of appellee for further review overruled on April 26, 2006.

No. A-05-1210: **State v. Murphy**. Petition of appellant for further review overruled on February 27, 2006, as prematurely filed.

No. A-05-1235: **Becker v. PBX, Inc**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1241: **State v. Lickliter**. Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1244: **State v. Minard**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-1294: **State v. Matteo**. Petition of appellant for further review overruled on June 13, 2006, as untimely filed. See rule 2F(1).

No. A-05-1302: **State v. Henning**. Petition of appellant for further review overruled on May 5, 2006, as untimely filed.

No. A-05-1307: **State v. Schmutte**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1312: **State v. Cline**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1323: **Lockman v. Diekmann**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1329: **Ruegge v. State**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-1335: **In re Interest of Andrew S.**, 14 Neb. App. 739 (2006). Petition of appellant for further review overruled on June 21, 2006.

No. A-05-1392: **State v. Reid**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-1400: **Jones v. Platteview Apartments**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-1413: **State v. Biloff**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1440: **State v. Latzel**. Petition of appellant for further review overruled on June 28, 2006.

No. A-05-1447: **State v. Cook**. Petition of appellant for further review overruled on May 24, 2006.

No. A-05-1470: **Martin v. Department of Corr. Servs**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-1471: **Martin v. Board of Parole**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-1528: **Saylor v. Department of Corr. Servs**. Petition of appellant for further review overruled on March 15, 2006. See *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-06-010: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on February 13, 2006.

No. A-06-010: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on March 7, 2006, as premature.

No. A-06-071: **Cole v. Clarke**. Petition of appellant for further review overruled on June 7, 2006.

No. A-06-138: **State v. Hymond**. Petition of appellant for further review overruled on June 28, 2006.

No. A-06-138: **State v. Hymond**. Petition of appellant pro se for further review overruled on June 28, 2006.

No. A-06-365: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on June 20, 2006, as premature.

Nebraska Supreme Court

# In Memoriam

## Justice H. Hale McCown

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
April 27, 2006
2:00 p.m.

Proceedings before:

SUPREME COURT

Chief Justice John V. Hendry

Justice John F. Wright

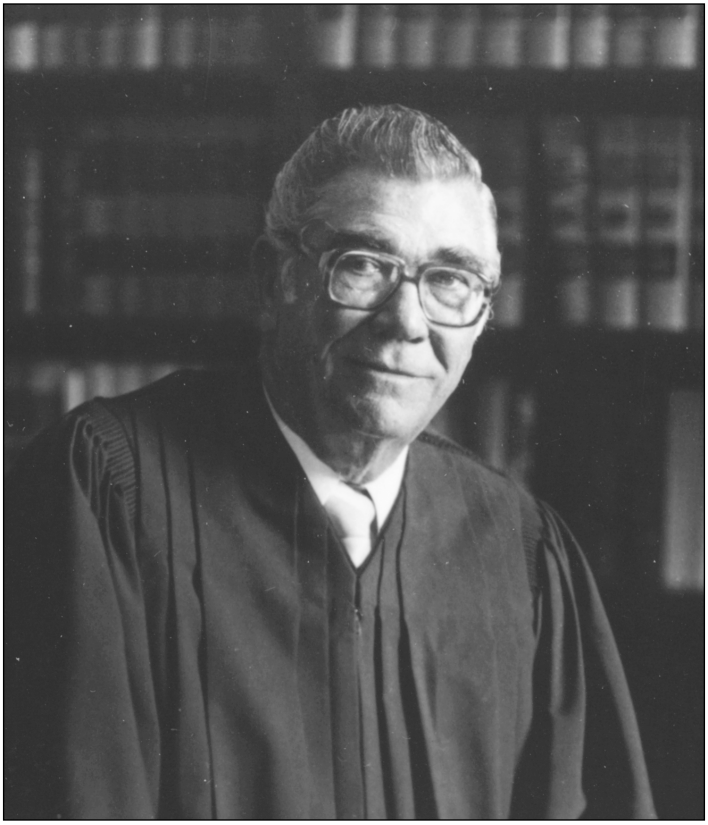
Justice William M. Connolly

Justice John M. Gerrard

Justice Kenneth C. Stephan

Justice Michael McCormack

Justice Lindsey Miller-Lerman



Justice H. Hale McCown

# Proceedings

CHIEF JUSTICE HENDRY: Good afternoon, everyone.

The Nebraska Supreme Court is meeting in special ceremonial session on this 27th day of April, 2006, to honor the life and memory of Former Supreme Court Justice Hale McCown and to note his many contributions to the legal profession.

I would like to take this opportunity to introduce you to my colleagues on the Supreme Court. Beginning to my far left is Justice Lindsey Miller-Lerman. Next to Justice Miller-Lerman is Justice Kenneth Stephan. To Justice Stephan's right is Justice William Connolly. To my far right is Justice Michael McCormack. Next to Judge McCormack is Justice John Gerrard. And to my immediate right is Justice John Wright. And I am Chief Justice Hendry.

The Court further acknowledges the presence of Justice Hale McCown's daughter, Lynn; and son Bill; other members of the family; members of the judiciary; members of the bar; and friends of Former Supreme Court Justice McCown.

At this time the Court recognizes Former Nebraska Supreme Court Chief Justice C. Thomas White, Chairman of the Supreme Court's Memorial Committee, who will conduct these proceedings.

Mr. Chief Justice, good afternoon.

CHIEF JUSTICE WHITE: Good afternoon. May it please the Court, there will be three speakers. The first of these speakers that I'm pleased to introduce is a Former Chief Justice of this Court, the Honorable William Hastings who served with Justice McCown.

Justice Hastings.

CHIEF JUSTICE HENDRY: Good afternoon, Mr. Chief Justice.

CHIEF JUSTICE HASTINGS: Good afternoon, sir.

May it please the Court, William Hastings appearing as a member of the committee to honor and memorialize former judge of this court, H. Hale McCown.

Hale McCown was born January 19th, 1914, and died September 1, 2005.

He served with distinction on this court from 1965 until his retirement in 1983, having been appointed as the first Supreme Court Judge so appointed under the merit plan of selection.

During his tenure he authored more than 750 opinions, of which over 200 were dissents. I remember particularly his comments on many occasions when it came his turn to speak during consultation following oral arguments he would say something like, "Well, I look at this a little differently." You almost could be sure he was going to write a dissenting opinion.

In an interview by the Omaha World-Herald, Former Governor Frank Morrison ruefully recalled his judicial appointee's integrity, when after having signed a controversial tax bill appealed to the Nebraska Supreme Court, he said, quote, My own appointee wrote an opinion that my actions were arbitrary and capricious, end of quotes.

Hale graduated from Hastings College in 1935 and from Duke Law School in 1937. It was while a student at Duke that he became a friend of Former President Richard Nixon. It was that friendship that probably cost him an appointment to the United States Court of Appeals. During the presidential campaign, Hale, although a registered Democrat, chaired a Democrats for Nixon Committee. Unfortunately for him, Johnson was elected president and he was not about to appoint a friend of Nixon's.

During World War II, McCown served in the Pacific as a lieutenant of the United States Navy. Following his discharge from service he returned to private practice of law in Beatrice, Nebraska. During that time he was active in the Nebraska Bar Association, serving as chair of the House of Delegates from 1955 to '56 and as president from 1960 to 1961. He was vitally interested in continuing legal education. He served as a fellow of the American College of Trial lawyers, as a member of the Legal Ethics Committee of the American Bar Association and was elected to the American

Law Institute in 1957 and served on its governing council from 1969 to 2000.

Hale McCown has been listed in Who's Who in America since 1961 and was recognized by Hastings College in 1981 with an Outstanding Alumni Award and was honored by Duke University in 1986 with the Charles S. Murphy Award for outstanding public service. In 1996 the Nebraska State Bar Foundation presented him with the Legal Pioneer Award for a lifetime of achievements of a lawyer who makes innovative contributions to the improvement of justice.

On a personal note, Hale was a consummate gentlemen, avid world traveler and a lover of fine food and Scotch whiskey. His and his wife Helen's annual football season opener luncheon co-hosted with Carl Olson and his wife was a party that many of us looked forward to each year. We all miss his pleasant, gentlemen ways as he lived up to his credo of "treat others with respect, not necessarily because they deserve it, but because you are a gentleman."

Thank you.

CHIEF JUSTICE HENDRY: Thank you, Chief Justice Hastings.

CHIEF JUSTICE WHITE: May it please the Court, the next speaker will be Mr. Thomas Davies, a lifetime colleague and friend of Judge McCown's, a distinguished member of the bar and a fine practicing lawyer.

Mr. Davies.

CHIEF JUSTICE HENDRY: Mr. Davies, good afternoon, sir.

MR. DAVIES: Good afternoon.

May it please the Court, my name is Thomas M. Davies, and I am a member of the Lincoln law firm of Mattson, Ricketts, Davies, Stewart & Calkins.

Hale McCown was my friend, and my assignment is to talk not about the honors that he accumulated, and Judge Hastings has covered all those. My assignment was to talk about Hale, the individual, and the personal things in his life, and I'll try to do that.

There was a family dinner last night and the whole family is here, as you might know, and many others, and friends, and

the — you could — the nostalgia was so thick you could cut it with a knife, but it was a delightful evening and we heard a lot of things. I revised my notes after last night's meeting to bring them up to date.

Now, I cannot discuss Hale McCown without discussing his wife of 67 years, Helen, a beloved wife who was very supportive of Hale, and also of his three children, Bob, who is now deceased; and Bill and Lynn, both of whom are here today.

I first met Hale before World War II, and my vintage rates everything before World War II or after World War II. I knew him before World War II but not well. As you have heard, he and Helen graduated from the same Duke law class in 1937 with other outstanding persons, including Nixon and his wife Pat, and they were good friends of theirs.

Helen, by the way, was the fourth woman to graduate from Duke Law School.

When I graduated and was admitted to the bar in 1937, one of the outstanding law firms in the state was the Beatrice firm of Rinaker, Delehant and Hevelone. Rinaker was deceased, and the law firm looked — needed help and they reached out to Hale because he had grown up in Beatrice, had gone through Beatrice High School and was well known. And Morris Hevelone met Hale, who was coming from the West Coast, and he was coming from Nebraska, they met in Greenriver, Wyoming, and it was decided at that time that Hale would become a member of that firm, and the family did move back to Nebraska.

We were all in World War II and Hale served in the Navy on a CVE, which is an escort carrier. We called them Jeep carriers — I was in the Navy — he told one story, so you'll hear one war story. They were at the time in the Philippines and it was at the landing at Leyte Gulf, and a Japanese shell hit their ship, went through — on through and out the other side and did not explode, so that was something that was riding with him at that time.

He returned to Beatrice after World War II. At that time the Nebraska State Bar Association had a sort of a tax seminar that toured the state and it was sort of a circus in a way. The president of the bar always attended and, of course, talked to the people about the Bar Association and how important it was.

And Hale and Flav Wright were often on that, and I also was on that panel for several years. And it was good.

By the way, George Turner was a clerk of this Court but he was also secretary of the Bar Association, something that you would not do now, but at that time — and he'd been with the circus that headquartered in Fairbury and so he knew how to set up a seminar and make reservations, and we traveled by bus and train and it was quite a deal. And I mention it because that's where I knew Hale. That's where I became acquainted with him.

Now, the one thing to mention on the McCown family is the polio that struck in 1953 and it hit the McCown family. Now, Lynn had it but she was telling me that she had no residue. Bill had a residue for a while; in other words, one side was — he had a problem with one side, but it went away. But Bob had severe paralysis and it never went away and was with him during all of his lifetime and this was a tragedy that was with Hale and Helen and Bill and Lynn all during the time that he was alive. He was an outstanding fella. I'll tell you about him.

We had him in our family for two weeks during one summer when the family went on vacation and it was a great time. We got to know him. I'm sure that he was down quite a bit but we never saw it. He was always upbeat. And imagine that young man lying flat on a hospital bed, or he finally — they were able to work it out that he could be in a wheelchair for part of the time. Had a brilliant mind. He graduated from Hastings College and then had a Ph.D. in physics from Stanford.

Lynn was telling me that they were — that Hale and Helen were looking around for a place where they could handle somebody that was handicapped. The University of Illinois said they could. Then they took Hale — I mean Bob — Hale took Bob to the University of Illinois and they took one look at Bob and said we can't do it. He's too badly paralyzed.

Then they somehow hooked up with Stanford and they went there and Stanford said, well, we're not set up. We really aren't set up for this, but we'll do it. And so they did. And I think during the times that he was in Hastings and also at Stanford, the way they handled it, they had one of the students hired to be with him all the time and take care of him and see that he

got to class, and, of course, that student probably was getting through school with that job.

My son, Tom, Jr., remembers that our family visited the McCowns in Beatrice and my son was in junior high. He remembers playing golf with Bob and that was just before Bob was struck with polio.

Now, Helen and Hale built an addition to their house for Bob. It was his separate room and they had also built a swimming pool and Helen was out every day that it was possible with Bob in that swimming pool for therapy.

Now, the other children, Bill and Lynn, were very supportive of Bob. Bill graduated from the Nebraska College of Law and went with Northwestern Mutual Life Company in Milwaukee and became a vice president in charge of investments before his recent retirement.

Lynn went to Smith College, the University of Nebraska and graduated from Antioch. She married, had three children and has been active in astrology.

Helen and Hale were great travelers and I think they went to something like 67 countries. I was privileged to go with them, they asked me to go, and I think we were the only three from Nebraska of judges and lawyers. It was sort of a, you went and met judges and lawyers from other countries. We went to Poland, Czechoslovakia and Romania.

While we were in Poland there was a side trip that wasn't a part of the main trip, to the Nazi death chamber in Auschwitz. I think we were chicken. We really didn't want to go but we thought that we must. And it was more terrible than we'd ever read about. And since then you've maybe read that people are denying that it happened and some are saying, oh, well, it wasn't as bad as they say it was. It was far worse and it did happen.

Ross McCown is a nephew of Hale, a son of John, who is deceased, and he and his wife, Lynn, are here today. He remarked on Hale and Helen's passion to golf and that they played golf together here in Lincoln very often and that also they played — would play golf on their trips at various places.

Hale was a Big Red fan and a — was interested in all sports. He went to the Drake Relays every year with a group that

he assembled from Beatrice, and son Bill came down from Milwaukee with his special friend, Tom Mayo. Bill and Tom of course are both here today and I think I heard that tomorrow morning they will be going to the Drake Relays, so it's a carry-on of the old tradition. And I was privileged to be a part of that group for several years.

Son Bill commented on Hale's taste for Scotch whiskey and he evidently had some very fine, aged premium Scotch, but he was a rather canny, frugal Scotsman. He very seldom touched that good stuff and he didn't certainly give it to guests very often and he certainly didn't give it to his family, including Bill.

His daughter, Lynn, had a final comment that her father understood gratitude and was truly grateful for his life, his career and his family.

My daughter Joanie had this summary on Hale. He was a gentleman's gentleman, and with that I concur.

Respectfully submitted.

CHIEF JUSTICE HENDRY: Thank you, Mr. Davies.

CHIEF JUSTICE WHITE: May it please the Court, these are the transcribed remarks of Chief — Former Chief Justice Norman Krivosha who is in Florida doing heavens knows what.

"May it please the Court, it is with great respect and deep humility that I join with others today to remember the life of one of our most esteemed colleagues, Hale McCown, who departed this life as he lived his life, quietly, on September 1, 2005, at the enviable age of 91.

"Born in Kansas, Illinois, on January 19, 1914, he received his A.B. from Hastings College, Hastings, Nebraska, in 1935 and his law degree from Duke University College of Law in 1937. While he had a number of classmates who were destined to fame, including President Richard Nixon, he had eyes for only one of his classmates, Helen Lanier, who hailed from the great Northwest, which already told you much about a woman law student in the late thirties. They were married in 1938 and at the time of his death had been happily married for 67 years. Together they had three children, Bob, Bill and Lynn. Bob preceded Hale in death.

"Little needs to be said about Mac's beloved Helen, than to recognize that each was the other's best friend and their life together was a model for any married couple. As they were inseparable in life, so too were they inseparable in death. Within just a few weeks following Hale's death, Helen joined him and those who knew this wonderful couple are sure they are once again together.

"When in 1965, Hale came to the Nebraska Supreme Court, the first appointee to the Court under the newly adopted merit plan for the selection of judges, he brought to the Court a vast and diverse knowledge of the law. He had practiced as a 'country lawyer' in Beatrice since leaving the Navy after World War II and at the time of his appointment he was a senior partner of McCown, Baumfalk & Dalke. While he took unusual pride in calling himself a 'country lawyer,' he was anything but. His knowledge of the law covered all fields. His peers recognized his outstanding trial ability by electing him to the American College of Trial Lawyers, reserved for only the best of the best.

"Additionally, however, he served as a general counsel to a number of corporations who later acquired national recognition. He was truly a full-service lawyer who brought that vast and diverse background to the Court where as a court of appeal as a matter of right, everything was placed upon the docket for the Court's consideration without choice. During the 18 years he served on this Court he wrote more than 750 opinions. More than 100 dissents, a practice with which I can identify. His opinions were clear and concise" — that was Judge Krivosha's observation, Your Honor. "His opinions were clear and concise" —

CHIEF JUSTICE HENDRY: Thank you for clarifying that.

CHIEF JUSTICE WHITE: Yes. Thank you, Your Honor. May I continue?

"His opinions were clear and concise and left none with wondering what he meant, a practice to be emulated by all who are called to render decisions on the law.

"Not only did he devote his legal talent for the benefit of those who brought their claims before the Court, but he likewise gave of his time and talent for the benefit of all in

general. He served the Nebraska Bar Association as its chair of the House of Delegates during 1995, 1956 — 1955, '56 and as its president during 1960, 1961. He was elected as a member of the prestigious American Law Institute in 1957 and elected to its executive council in 1969, where he served until 2000, when he was made an emeritus member of the executive council. A roster of the executive council reads as a who's who in American law and Hale's name was appropriately included among them.

"For me personally, having the experience — the opportunity to serve with Mac on this Court for five years was a chance of a lifetime. While all of the members of this Court were extremely kind to the brass young new Chief Justice whom some of the Court properly called 'Sonny,' Hale was particularly kind and helpful, always being sure that I was pointed in the right direction and warned about where the 'landmines' were located. Although I did not always follow his advice, I had no one to blame but myself. He was always there if I needed him and sought his counsel.

"He was always open to new ideas and tolerant of others, even when he totally disagreed. His dissents were models of civility. He was the prototype of how one could disagree without being disagreeable and he never carried a disagreement beyond the dissent.

"An anonymous psalmist once wrote in part many years ago: 'Even a long life ends soon. But a good name endures forever.'

"While it is true that Hale McCown lived a long life, of greater importance is the fact that he left a good name which will endure forever. When generations in the future years seek to learn of the history of this Court, the name of Hale McCown shall be at the top.

"While we shall miss his smiling gentle face, we shall forever remember his good name. As I suggested at the outset, I am honored to have been selected to be permitted to say a few words in memory of my colleague and friend, Hale McCown. He shall remain in our hearts forever."

That concludes the remarks of Judge Krivosha.

Your Honor, on a brief personal note, I was — served with the Court for a number of years with Judge McCown.

A long time ago a poet or playwright Thomas Bolt wrote of another man who was a warrior, a soldier, a husband, a scholar, a father, a man for all seasons. So was our friend, Judge McCown, a man for all seasons. We will miss him.

This concludes our remarks, Your Honor.

CHIEF JUSTICE HENDRY: Thank you, Chief Justice White.

I would like for the record to acknowledge the presence of a few other people that I see with us today. I see Retired Supreme Court Justice Nick Caporale is here. Current Chief Judge of the Court of Appeals Everett O. Inbody is with us. Retired Supreme Court Justice John Grant is with us this afternoon. Our State Court Administrator, Janice Walker; Retired District Court Judge William Rice; Retired District Court Judge Ronald Reagan; Supreme Court Administrative Assistants, both Jackie Hladik and Bette Johnson, are also with us this afternoon. And we appreciate your presence being here very much.

I take this final opportunity to note for all those present that this entire proceeding has been memorialized by the court reporter. After these proceedings have been transcribed by the court reporter, copies will be distributed to family members and those of you who have spoken on behalf of Justice McCown. We will also forward a copy of the transcription to West Publishing for inclusion in the Northwest Reporter.

On behalf of the Nebraska Supreme Court, I extend this appreciation to Former Chief Justice C. Thomas White, who chaired the Court's Memorial Committee, and who with the assistance of Janet Bancroft from the Court Administrator's Office was primarily responsible for organizing this ceremonial session.

This concludes the special ceremonial session of the Nebraska Supreme Court.

The Court would encourage any of the participants, family members and friends of Justice McCown to remain in the courtroom for a moment to greet each other on this occasion.

CHIEF JUSTICE HASTINGS: Your Honor, may I suggest that there is one more former judge —

CHIEF JUSTICE HENDRY: Yes, please.

CHIEF JUSTICE WHITE: — Judge Bill Rice from Pawnee City, District Judge.

UNIDENTIFIED SPEAKER: Bill Colwell.

CHIEF JUSTICE HASTINGS: What'd I say, Rice?

CHIEF JUSTICE HENDRY: All right. Thank you very much. The record will so note.

All right. With that we are adjourned. Thank you all.

(Proceedings adjourned at 2:31 p.m.)

# CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

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## CLIFTON MCCRAY, APPELLANT, V. NEBRASKA STATE PATROL, APPELLEE.

710 N.W.2d 300

Filed February 3, 2006. No. S-04-395.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Rules of the Supreme Court: Appeal and Error.** A party may move for rehearing in an appellate court based upon any claimed mistakes or inaccuracies in statements of fact or law in the opinion, and any questions involved which the court is claimed to have failed to consider on the appeal.
5. **Statutes: Convicted Sex Offender.** The Sex Offender Registration Act is a civil, nonpunitive regulatory scheme designed to protect the public from the danger posed by sex offenders.
6. **Statutes.** Statutory interpretation presents a question of law.
7. **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.
8. ____: ____. In the absence of ambiguity, courts must give effect to the statutes as they are written. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
9. ____: ____. 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.
10. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.

11. **Statutes: Constitutional Law: Judgments.** A legislative act will not be permitted, even if an intent to do so is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. On motion for rehearing, reargument granted. See 270 Neb. 225, 701 N.W.2d 349 (2005), for original opinion. Original opinion withdrawn. Reversed and remanded with directions.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellant.

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

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

The Nebraska State Patrol (NSP) classified Clifton McCray as a Level 3 sex offender under the Sex Offender Registration Act (SORA), Neb. Rev. Stat. §§ 29-4001 to 29-4013 (Cum. Supp. 2004), and the district court for Lancaster County affirmed the classification. In *McCray v. Nebraska State Patrol*, 270 Neb. 225, 701 N.W.2d 349 (2005) (*McCray I*), we affirmed the judgment of the district court. We subsequently granted McCray's motion for rehearing and ordered that the case be reargued. During reargument, counsel for the NSP contended that an amendment to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2002), which became effective on September 4, 2005, applied to one of the issues presented in this appeal. We requested and received supplemental briefing on this issue from both parties. We now withdraw our opinion in *McCray I*, and substitute this opinion, in which we find merit in McCray's arguments that the NSP erred in scoring his SORA risk assessment and conclude that he is entitled to reclassification as a Level 2 offender.

## BACKGROUND

In 1998, McCray was convicted of three counts of third degree sexual assault. He was sentenced to 75 days in jail on one count, 45 days in jail on another count, and fined $500 on

the third count. These convictions brought him within the purview of SORA, which requires a person convicted of a sex offense to register with the sheriff of the county in which he or she resides. See §§ 29-4003 and 29-4004. The information obtained as a result of such registration is forwarded to the NSP, which maintains a central registry of persons obligated to register under SORA. § 29-4004(9). The NSP is required to determine each registrant's risk of recidivism and assign a notification level based upon the degree of risk. § 29-4013(2)(b) and (e); 272 Neb. Admin. Code, ch. 19, § 12 (2000). If the risk of recidivism is low, the registrant 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); 272 Neb. Admin. Code, ch. 19, § 13.02 (2000). If the risk of recidivism is determined to be moderate, the registrant 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); 272 Neb. Admin. Code, ch. 19, § 13.03. If a person is classified as a Level 3 offender, indicating a high risk of recidivism, in addition to those groups entitled to notice with respect to Levels 1 and 2 offenders, notification must also be given to members of the public who are likely to encounter the offender. § 29-4013(2)(c)(iii); 272 Neb. Admin. Code, ch. 19, § 13.04. See, also, *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

Based upon factors enumerated in SORA that increase the risk of recidivism, the NSP developed a risk assessment instrument which it uses to evaluate all records and data concerning the offender in order to classify every offender in the registry in one of the three risk levels. See *Slansky v. Nebraska State Patrol, supra*. A score of 70 and below on the risk assessment instrument results in a Level 1 classification, a score of 75 to 125 results in a Level 2 classification, and a score of 130 or above results in a Level 3 classification. See *id.*

McCray was initially classified as a Level 3 offender, based upon a score of 155 on a risk assessment instrument completed on December 6, 2000. He requested an administrative hearing to challenge the classification. For reasons which are not entirely clear from the record, a second risk assessment was completed

on September 3, 2002, in which McCray received a score of 195. At the time this risk assessment was completed, McCray's criminal history reflected a number of charges and convictions which were used in scoring. These included convictions for the violation of a restraining order, operation of a motor vehicle without an operator's license, and injury or destruction of another's property, as well as charges for failing to appear in court. McCray's criminal record also included eight sexual assault charges. Of those, three resulted in convictions, three were dismissed, and two were identified as being filed with other citations. In October 2002, McCray filed a request for a hearing to contest his classification.

While administrative review was pending, McCray petitioned the county court for Lancaster County to set aside a 1994 conviction for destruction of property of another, a 1998 conviction for attempted violation of SORA, and a 1999 conviction for violation of a restraining order. See § 29-2264. Section 29-2264(2) empowers a court to set aside certain criminal convictions in which the sentence does not include incarceration. In May 2003, the county court entered separate orders setting aside each of the three convictions pursuant to McCray's petitions.

On October 2, 2003, an administrative hearing was held to review McCray's challenge of his Level 3 classification. At the hearing, McCray challenged the scoring of item 2 on the risk assessment instrument, which assessed 30 points for three or more convicted counts for offenses other than traffic offenses or sex offenses. He also challenged item 14, which assessed 20 points for the fact that 24 months or less had elapsed between McCray's most recent arrest for a felony and/or Class I/II misdemeanor conviction and his prior release from court-ordered confinement or supervision. The parties stipulated that the scoring of items 2 and 14 was based entirely upon the three convictions which had been set aside in May 2003 pursuant to § 29-2264(4). McCray challenged the use of the set-aside convictions for scoring items 2 and 14. He also challenged the scoring of item 9, which assessed 30 points for the nature of his sexual assault behavior, based upon unsworn and unsigned victim statements given to police, which statements McCray argued were not correlated to any specific conviction. McCray argued

that subtraction of the 80 contested points would lower his score from 195 to 115, placing him at a Level 2 risk classification.

On October 17, 2003, the hearing officer recommended that McCray's classification as a Level 3 sex offender be upheld. The hearing officer found that "because an order setting aside a conviction does not completely negate the conviction, proceedings such as sex offender risk assessment . . . may properly consider convictions which have been set aside." With respect to item 9, the hearing officer found that the risk assessment manual does not require that an offender be convicted or even charged for an offense scored under that category. Rather, the hearing officer found that there must merely be officially documented evidence of physical force or restraint. The superintendent of the NSP adopted the recommendations of the hearing officer as the decision of the NSP on October 22, 2003.

Pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003), McCray filed a timely petition in the district court appealing his classification as a Level 3 sex offender. The district court affirmed McCray's classification, and McCray filed this appeal in which he contended that the district court erred in finding that competent evidence supported the scoring of items 2, 9, and 14 on the risk assessment instrument.

In *McCray I*, we concluded with respect to items 2 and 14 that § 29-2264 was intended to operate prospectively and that because "McCray's convictions were not set aside until after his risk assessment instrument was completed . . . the convictions were properly considered." 270 Neb. 225, 230-31, 701 N.W.2d 349, 354 (2005). We expressed "no opinion . . . on what effect the convictions that were set aside would have on McCray's SORA assessment if the assessment had occurred after the convictions were set aside." *Id.* at 231, 701 N.W.2d at 354-55. We did not reach the issue of whether item 9 was properly scored because the subtraction of the 30 contested points from item 9 would still leave a risk assessment score of 165, which is 35 points higher than the threshold for classification as a Level 3 offender. McCray filed a timely motion for rehearing, which we granted.

## ASSIGNMENTS OF ERROR

McCray originally assigned, restated and consolidated, that the district court erred in finding that competent evidence supported the scoring of items 2, 9, and 14 on the risk assessment instrument. On rehearing, McCray assigns that we incorrectly determined in *McCray I* that the orders setting aside his non-sex-offense convictions could not be considered for purposes of risk assessment because they were entered after the risk assessment instrument was scored.

## STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lein v. Nesbitt*, 269 Neb. 109, 690 N.W.2d 799 (2005). 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.*

[4] A party may move for rehearing in an appellate court based upon any claimed mistakes or inaccuracies in statements of fact or law in the opinion, and any questions involved which the court is claimed to have failed to consider on the appeal. Neb. Ct. R. of Prac. 13D (rev. 2000).

## ANALYSIS

### May Events Occurring After Original Scoring of Risk Assessment Instrument Be Considered in Review Hearing Challenging Risk Assessment Classification?

[5] We first address the threshold issue raised by McCray's motion for rehearing, which is whether events which occur after the risk assessment instrument is scored but before the completion of administrative review may be considered by the reviewing officer. SORA is a civil, nonpunitive regulatory scheme designed

to protect the public from the danger posed by sex offenders. *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). The Nebraska State Patrol is required by law to "adopt and promulgate rules and regulations to carry out the registration provisions of [SORA]." § 29-4013(1). Under rules and regulations adopted pursuant to SORA, registrants are granted a limited review hearing to contest their classification. *Slansky v. Nebraska State Patrol, supra*; 272 Neb. Admin. Code, ch. 19, § 014 (2000). These hearings are limited to the appropriateness of a registrant's classification. *Id.*

McCray argues that if our opinion in *McCray I* means that the hearing officer may only review the accuracy of the risk assessment as of the date of the initial scoring, then a reviewing officer charged with determining the appropriate level of classification for an offender could not consider evidence of events occurring after the initial scoring, even if those events involved actual sexual recidivism. In the NSP's original brief, it agreed that the rules governing SORA are not intended to work in such a manner and that the hearing officer is "entitled to consider the latest [post-scoring] information" because the hearing officer's task is "not so much to decide whether the scorer erred, but to use the latest and best information in conjunction with the [risk assessment] Instrument and Manual in order to determine into which Risk Level Classification the offender should be placed." Brief for appellee at 12.

Our review of the regulations existing at the time of the administrative review process in this case, considered in light of the protective purpose of SORA, supports the argument that a hearing officer may consider events occurring after the initial scoring of the risk assessment instrument in arriving at a recommendation of what risk assessment level should be adopted by the NSP. The rules provided that "[n]o community notification based upon classification levels shall be made until the hearing and any subsequent appeals are final or eight (8) working days have passed since the classification notification was mailed to the offender and no request for a hearing has been received, whichever is later." 272 Neb. Admin. Code, ch. 19,

§ 014.03. At a review hearing, the offender "may present information which challenges the application of the classification instrument and which has a bearing on the risk of recidivism." 272 Neb. Admin. Code, ch. 19, § 014.02. The rules permit reclassification "if new information is received that would appear to have a bearing on the risk of recidivism." 272 Neb. Admin. Code, ch 19. § 015.01 (2000). Thus, we conclude that the orders setting aside McCray's three prior convictions could properly be considered by the hearing officer in resolving McCray's challenge to his Level 3 classification. We therefore must resolve the issue which we did not reach in *McCray I*: whether the hearing officer and the district court erred in determining that the non-sex-offenses could be used for purposes of scoring the risk assessment instrument, notwithstanding the fact that they had been set aside under § 29-2264.

### Does Setting Aside and Nullification of Conviction Pursuant to § 29-2264 Preclude Its Consideration for Purposes of Nebraska Sex Offender Risk Assessment Instrument?

At the time of McCray's review hearing, § 29-2264(2) provided:

> Whenever any person is convicted of a misdemeanor or felony and is placed on probation by the court or is sentenced to a fine only, he or she may, after satisfactory fulfillment of the conditions of probation for the entire period or after discharge from probation prior to the termination of the period of probation and after payment of any fine, petition the sentencing court to set aside the conviction.

In determining whether to grant such a petition, a court is to consider the behavior of the offender after sentencing, the likelihood that the offender would not engage in further criminal activity, and any other relevant information. § 29-2264(3). An order granting an offender's petition under § 29-2264 would "(a) Nullify the conviction; and (b) Remove all civil disabilities and disqualifications imposed as a result of the conviction." § 29-2264(4). However, the statute further provided that the setting aside of a conviction pursuant thereto did not preclude proof of the conviction for certain purposes, such as determining the sentence on any

subsequent conviction of a criminal offense. See § 29-2264(5)(a) through (g). In upholding the constitutionality of the set-aside statute, we held as a matter of law that it did not result in the granting of a pardon or partial pardon because it exempted certain civil disabilities from restoration. *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002).

Each of the May 2003 orders setting aside McCray's three non-sex-offense convictions stated as follows:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that defendant's conviction in the above-referenced matter is nullified and all civil disabilities and disqualifications imposed as a result of the conviction are removed, except for those matter [sic] specifically identified in Neb. Rev. Stat. § 29-2264(5)(a-g) (Reissue 1995).

At the time of these orders, § 29-2264(5)(a) through (g) did not specifically provide that convictions which had been nullified and set aside could nevertheless be used for assessment of an offender's risk of recidivism under SORA. However, the hearing officer concluded that because a conviction is not completely negated by a set-aside order under § 29-2264(2), it can be properly counted as a conviction for purposes of scoring the SORA risk assessment instrument. In affirming this decision, the district court concluded that "the use of other convictions in the assessment instrument" was consistent with the other purposes specifically enumerated in § 29-2264(5) for which a set-aside conviction could be used.

[6-10] Statutory interpretation presents a question of law. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). 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. *Id*. In the absence of ambiguity, courts must give effect to the statutes as they are written. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *American Employers Group v. Department of Labor,*

*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. *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005); *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *State v. Warriner, supra*; *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002); *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001). At the time McCray's convictions were set aside, § 29-2264(5)(a) through (g) provided a specific list of purposes for which a criminal conviction could be used notwithstanding its nullification by an order entered pursuant to § 29-2264(4). We find nothing in that statutory language which would permit the use of such convictions for purposes of assessing a sex offender's risk of recidivism under SORA. The fact that such use may be logically consistent with other uses enumerated in § 29-2264(5)(a) through (g) does not permit a court to read such language into the statute.

We have, on one occasion, held that a nullified conviction may be used for a purpose not specifically permitted by § 29-2264(5). In *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991), we held that a felony conviction which had been set aside pursuant to § 29-2264 could be used to prove the substantive element that the defendant was a felon in a subsequent prosecution for felon in possession of a firearm. In reaching this conclusion, we relied in part on the reasoning of *United States v. Germaine*, 720 F.2d 998 (8th Cir. 1983), in which the Eighth Circuit Court of Appeals held that a felony conviction which had been set aside under § 29-2264 could be used in proving a person was a felon for purposes of a federal firearms charge. We cited portions of that court's opinion, noting that the setting aside of the conviction did not alter its legality or establish that the defendant was innocent of the crime for which he was convicted. We further reasoned that under Neb. Rev. Stat. § 83-1,130(2) (Reissue 1987), the right of a felon to possess a firearm is not restored even after a pardon in the absence of an express authorization signed by the Governor, which the defendant had not obtained. Nothing in the holding or

reasoning of *Illig* permits us to read § 29-2264(5)(a) through (g) to authorize the use of convictions which have been set aside for purposes of risk assessment under SORA.

During the pendency of this appeal, the Legislature has addressed the precise issue before us. In 2005, § 29-2264(5) was amended to provide that the setting aside of a conviction pursuant to § 29-2264(2) shall not:

> (h) Preclude proof of the conviction as evidence whenever the fact of the conviction is relevant to a determination of risk of recidivism under section 29-4013; or
>
> (i) Relieve a person who is convicted of an offense for which registration is required under the Sex Offender Registration Act of the duty to register and to comply with the terms of the act.

2005 Neb. Laws, L.B. 713, § 3. Section 29-4013, which is a component of SORA, lists various "factors relevant to the sex offender's risk of recidivism" which the NSP is to consider in determining a sex offender's risk classification. These include "[a]ny criminal history of the sex offender indicative of a high risk of recidivism, including . . . [t]he number, date, and nature of prior offenses." § 29-4013(2)(b). The State contends that the amendment to § 29-2264(5) applies to this case because of a contemporaneous amendment to § 29-2264(6), which now provides that "changes made to this section by Laws 2005, LB 713, shall be retroactive in application and shall apply to all persons, otherwise eligible in accordance with the provisions of this section, whether convicted prior to, on, or subsequent to September 4, 2005." See § 29-2264(6) (Supp. 2005).

[11] We conclude that the 2005 amendments to § 29-2264(5) are not applicable to this case. The orders setting aside McCray's convictions are final judgments which nullified the convictions and removed all civil disabilities which were not exempted from restoration by § 29-2264(5)(a) through (g) as it existed on the date of the orders. See *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002). A legislative act will not be permitted, even if an intent to do so is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court. *Karrer v. Karrer*, 190 Neb. 610, 211 N.W.2d 116 (1973). The 2003 orders vested

McCray with a right to have the three set-aside convictions used only for those purposes enumerated in the statute at the time the orders were entered. Applying the amended version of § 29-2264(5) to this case would have the effect of modifying the judgments to add a new purpose for which the set-aside convictions could be used, thereby impairing McCray's rights. While the Legislature is free to expand the statutory list of civil disabilities which are not restored by a judgment setting aside and nullifying a conviction pursuant to § 29-2264(4), such amendments cannot impair rights vested by judgments entered under prior versions of the statute. Accordingly, we conclude that the district court erred in affirming the NSP's use of the set-aside convictions in scoring items 2 and 14 of the risk assessment instrument used to determine McCray's recidivism risk level.

### Was There Competent Evidence to Support Scoring of Item 9 of Risk Assessment Instrument?

McCray also challenged the assessment of 30 points on item 9 of the risk assessment instrument, entitled "Nature of Sexual Assault Behavior." The scorer is instructed to check all of the seven listed behaviors that apply. The manual for the Nebraska sex offender risk assessment instrument (Manual) includes the following scoring criteria for item 9: "Score the nature of the sexual assault in the current offense and any previous sexual assaults noted in official documentation. Do not score any category more than once." According to the commentary set forth in the Manual, item 9 "is designed to reflect the level of risk posed by an offender who uses varying degrees of force. The greater the amount of force or the more types of force utilized, the higher the score."

McCray was scored 5 points for behavior that fell into the "Fondling/Manipulate/Seduce/Coerce/Authority" category and 25 points for behavior categorized as "Physical Force or Violence/Restrained Victim/Threatened with Weapon or Dangerous Object." The scoring was based on behavior described in exhibits 6, 7, and 8, which are transcripts of unsworn statements obtained by police from three different persons on January 14 and 15, 1997. McCray's attorney objected to the admissibility of these exhibits on the ground that there was no evidence that the

conduct alleged to have occurred in the statements was true, nor was there evidence that the statements were "relevant to any of the third degree sexual assault convictions that were used to score this instrument." McCray's objections were overruled by the hearing officer. Dr. Shannon Black, testifying on behalf of the NSP, testified that for purposes of scoring the instrument:

> We look for official documentation of those 14 items. If something is never charged or it never comes to a final conclusion, then that item would not be scored, but anything else that — if there's founded allegation, for example, in a CPS record, we would score that. So, as long [as] we have official documentation of it and — then we would score that type of behavior of that sexual assaultive incident. So it doesn't have to ultimately be a conviction because, again, we could have plea bargains or other things [where] that specific case [does] not [result in a] convict[ion], but we have official documentation of that behavior when we score that.

On cross-examination, Black admitted that she was unable to correlate any of the victims' statements to any of McCray's convictions.

The hearing officer concluded that the Manual does not require that the offender be convicted or even charged for the behavior that forms the basis of scoring item 9. She opined that there must simply be evidence of physical force or restraint in official documentation. In its de novo review, the district court agreed that item 9 had been properly scored. McCray primarily contends that exhibits 6, 7, and 8 should not have been used to score item 9 because it is unclear from the record whether the behavior described in those statements formed the basis of a convicted charge, or a charge which was either dismissed or withdrawn.

Under SORA, the NSP must consider any criminal history of the offender "indicative of a high risk of recidivism." § 29-4013(2)(b)(iii). The NSP must specifically consider:

> (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.

*Id.* We agree that the criminal history to which the statute refers is not limited to conduct for which the offender has been convicted. However, it does not follow that wholly unsubstantiated allegations are necessarily a part of such history. See *Matter of C.A.*, 146 N.J. 71, 89, 679 A.2d 1153, 1162 (1996) (holding criminal history factors similar to § 29-4013(2)(b)(iii) include nonconviction offenses "provided there is sufficient evidence that the offense occurred").

Item 3 of the SORA risk assessment instrument, entitled "Other Sex/Sex Related Attorney Filed Charges Not Resulting in Conviction," specifically permits the scoring of certain criminal charges which do not result in conviction. The Manual sets forth the scoring criteria for item 3 as follows:

> Total number of misdemeanor or felony sex/sex related attorney filed charges that the subject had but was not convicted. ***No*** **convictions** should be used. Include criminal history from Nebraska and other jurisdictions. This would include any sex/sex related charges associated with the current conviction that were plea-bargained. *Include sex offense charges that have an unknown disposition, juvenile criminal adjudications (if available) and dismissed charges that were part of a plea bargain,* ***but not*** *wholly dismissed, declined, not guilty or nolle prosecute.*

(Emphasis in original.) Based upon the Manual and Black's testimony, it seems clear that under item 9, the scorer could include those behaviors related to the convicted sex offenses scored in item 1 as reflected in the official documentation of those convictions, inasmuch as the conviction would ordinarily establish the truth of the documentation. The scorer could also include

behaviors associated with charged offenses not resulting in conviction which are scored under item 3 because the prosecutor's decision to file the charge and the absence of an acquittal or outright dismissal afford some basis for concluding that the facts reflected in the official documentation are true.

In this case, however, there is nothing in the record to correlate the behaviors reflected in the victim statements to any of the three sex offenses for which McCray was convicted. Moreover, McCray received a score of "0" on item 3 of the risk assessment instrument, indicating that he had no attorney filed sex offense charges not resulting in conviction which could be considered for purposes of determining his risk of recidivism. The comment for item 3 states: "Per pre-hearing conference . . . McCray was convicted of 3 counts [sic] charges were not plea bargained as originally scored 08/27/02 Dr. Black." Thus, the truth of the accounts contained in the victim statements cannot be established on the ground that they were relied upon as a basis for prosecution. Nor is there anything else in the record to establish the truth of the unsworn statements.

Section 84-914(1) provides in part: "An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence." In *McKibbin v. State*, 5 Neb. App. 570, 577, 560 N.W.2d 507, 512 (1997), the Nebraska Court of Appeals concluded in an income withholding proceeding that a court clerk's mere "indication" to an attorney that a father owed back child support was insufficient to establish that fact "even under the relaxed evidentiary rule of § 84-914(1)." Here, we conclude that the unsworn victim statements which were not correlated to any offense for which McCray was charged or convicted and which bore no other indicia of probative value did not constitute competent evidence to support the NSP's scoring of item 9 of the risk assessment instrument.

## CONCLUSION

For the reasons discussed herein, we withdraw our prior opinion, *McCray v. Nebraska State Patrol*, 270 Neb. 225, 701 N.W.2d

349 (2005), and substitute this opinion in which we conclude that the district court erred in affirming the NSP's scoring of 30 points on item 2, 30 points on item 9, and 20 points on item 14 of the risk assessment instrument used to determine McCray's risk of recidivism under SORA. Subtraction of the 80 points erroneously assessed for these three items results in a score of 115, which falls within the range for a Level 2 classification. Accordingly, we reverse the judgment of the district court and remand the cause with directions to reverse the decision and order of the NSP and remand the case to the NSP with directions to reclassify McCray as a Level 2 offender on the basis of a total score of 115 on the risk assessment instrument.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., and WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
RODNEY MASON, APPELLANT.

709 N.W.2d 638

Filed February 3, 2006. No. S-04-852.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
2. **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 discretion a factor in determining admissibility.
3. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **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.

6. **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.
7. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a party's requested instruction where the substance of the requested instruction was covered in the instructions given.
8. ____: ____. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
9. **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.
10. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, 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.
11. **Trial: Rules of Evidence: Expert Witnesses.** 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.
12. ____: ____: ____. The initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony. After the factual basis, data, principles, or methods, or their application has been sufficiently called into question, then the proponent of the expert testimony has the burden of showing that the testimony is reliable.
13. **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.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Andrea D. Snowden, and Ryan Esplin, Senior Certified Law Student, for appellant.

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.

## NATURE OF CASE

Rodney Mason appeals his convictions and sentences in Lancaster County District Court for first degree murder and use of a deadly weapon to commit a felony. Mason assigns error to, inter alia, the trial court's refusal to give certain requested instructions with respect to the testimonies of the State's main witnesses against him and to the trial court's disposition of his challenge to the testimony of the State's firearms expert. We affirm Mason's convictions and sentences.

## STATEMENT OF FACTS

On July 31, 2003, the State filed an information charging Mason with first degree murder and use of a deadly weapon to commit a felony in connection with the April 6, 2003, shooting death of Sergio King in Lincoln. The main evidence against Mason consisted of the testimonies by three eyewitnesses: Nicole Wagy, Prentice Mason (Prentice), and Lolester Mitchell. Prentice is Mason's brother. Wagy and Prentice both generally testified that they were in Wagy's car with Mason and King when Mason shot King. Mitchell testified that he was in another car when he saw King exiting Wagy's car and saw King shot by someone from inside Wagy's car. Mitchell was unable to identify which person within Wagy's car fired the shot and was unable to identify Mason as being one of the people inside the car. The evidence at trial also included testimony by several other witnesses, including expert testimony by the forensic pathologist who performed the autopsy, which results showed that King died from gunshot wounds, and by a firearms expert from the Nebraska State Patrol who testified regarding his examination of the bullets and casings found in or near King's body.

*Testimonies of Wagy and Prentice.*

Wagy and Prentice were the two witnesses who identified Mason as the person who shot King. Wagy testified that she was at a party at Prentice's house on the night of April 5, 2003. Mason was also at the party. Mason and some other individuals

spent the night at Wagy's apartment. On the morning of April 6, Wagy decided to obtain some marijuana and she contacted King, from whom she had previously bought marijuana. Wagy drove her car to meet King, and she brought Mason with her. Wagy and Mason picked up Prentice on the way to meeting King. Mason rode in the front passenger seat of Wagy's car, and Prentice rode in the passenger's-side back seat. Wagy drove to a location where they met King. Another person was in the car with King. King did not want to stay at that location because it was near a police substation, so they drove both cars to some other locations until they arrived at the place chosen by King. King came out of his car and got into the driver's side back seat of Wagy's car. The parties in the car had a conversation regarding the purchase of marijuana, and eventually the conversation turned to a discussion of purchasing crack cocaine. At one point, Mason pulled out a gun and told King, "Break yourself." Mason then fired a shot at King, and Wagy noticed blood on King's hand. King got out of Wagy's car and ran toward his car, and Wagy drove away. Wagy did not recall hearing or seeing a second shot. She testified that she did not know that Mason was going to shoot King.

After the shooting, Wagy drove to Prentice's home, where she stayed for a while before leaving Prentice and Mason and returning to her home. She checked into a hotel that night with some friends and learned from a television news report that King had been killed. After learning of the killing, Wagy and a friend took her car to a location west of Lincoln, where they intentionally crashed and burned the car. Wagy then returned to the hotel room, where she stayed that night and where the police found her the next day and questioned her regarding King's shooting.

Prentice's testimony regarding the events of April 6, 2003, was similar to the account given by Wagy. Prentice testified that when he got into Wagy's car, he did not know there was going to be a drug transaction, and that he learned about the transaction when he heard Wagy make a call to King. Later, as Mason and King were talking about drug transactions in Wagy's car, Prentice stated that he saw Mason pull out a gun. Prentice testified that he knew Mason had a gun with him because Mason had shown it to him earlier, but Prentice stated that he did not know Mason was going to use it. Prentice stated that the gun

was a "Tech-22." Prentice next testified that he heard Mason tell King, "Break yourself." Prentice testified that "break yourself" meant that Mason was telling King to "Give me what you got. . . . Anything you have, give it to me." Prentice testified that King "looked at [Mason] funny" and that Mason then shot King in the hand. King's hand was resting on his thigh. Prentice testified that King then got out of the car and that as King was leaving the car, Mason shot at King a second time.

Prentice testified that Wagy drove the car away immediately after the shootings and that he did not know whether the second shot hit King or what happened to King after they left. According to Prentice, Wagy, Mason, and Prentice returned to Prentice's apartment, and Prentice threw the clothes he had been wearing into a Dumpster. Prentice learned that night from television news reports that King had died. After learning of King's death, Prentice asked a cousin to take him and Mason to Omaha.

Both Wagy and Prentice were contacted by police some time after King's death and each provided various different stories to police before they eventually told the version of events to which they testified at trial and which identified Mason as the shooter. These stories ranged from Prentice's initial denial of any knowledge or involvement to Wagy's identifying people other than Mason as the shooter. Both Wagy and Prentice were questioned at trial regarding their prior inconsistent statements.

During Wagy's testimony, Mason requested that a limiting instruction based on NJI2d Crim. X5.3 regarding prior inconsistent statements be read to the jury at the end of Wagy's testimony. Mason requested a similar instruction with respect to Prentice's testimony. The court denied both requests. In denying the request at the time of Prentice's testimony, the court noted that it had given an expanded introductory jury instruction at the beginning of trial regarding the evidence that can be considered in determining witness credibility and that the instruction covered significant portions of what Mason requested in this instruction. The court also gave a final jury instruction to the effect that the jury could consider prior inconsistent statements in determining the credibility of witnesses; however, the court denied Mason's request to give final jury instructions specifically naming Wagy and Prentice as witnesses whose prior

inconsistent statements could be considered in determining their credibility.

Mason also requested final jury instructions with respect to both Prentice's and Wagy's testimonies that were based on NJI2d Crim. 5.6, regarding accomplice testimony. Instead of the requested instruction, the court gave an instruction stating, "You should closely examine the testimony of . . . Wagy and Prentice . . . for any possible motive each might have to testify falsely." Mason objected to this instruction.

*Firearms Expert Testimony.*

Prior to trial, Mason filed a motion in limine seeking to prevent the State from presenting evidence "regarding firearm examination, toolmark examination, rifling characteristics examination, comparison testing or manufacturer identification completed on bullets or shell casings in this case." He asserted that such evidence did "not meet the foundation requirements set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579[, 113 S. Ct. 2786, 125 L. Ed. 2d 469] (1993) and adopted by the Nebraska Supreme Court in *Schafersman v. Agland Coop.*, 262 Neb. 215[, 631 N.W.2d 862] (2001)." Mason requested an evidentiary hearing to determine the reliability of such evidence and whether the witness who would present such testimony was an expert and would give relevant testimony. In response to the motion in limine, the court ordered the State's expert to submit himself for a deposition and ordered Mason to "file a specifications [sic] of the inadequacies of the expert's testimony in sufficient detail to permit the state to respond, together with all documentary evidence he intends to rely on and a brief in support thereof." The court further ordered the State to respond to Mason's filing, ordered Mason to file a reply to the State's response, and set a hearing date.

The State's firearms expert, Mark S. Bohaty, gave a deposition on January 16, 2004, in which he was questioned by Mason. The State was present at the deposition but did not question Bohaty. Thereafter, Mason filed a second motion in limine in which he argued, inter alia, that the evidence was not relevant because the expert could only testify as to what *might* have happened; that any probative value of the evidence would be outweighed by the

danger of unfair prejudice, because the expert's conclusions were based on conjecture; that reliability of the expert's theory and methodology had not been established, because the expert only provided his opinion as to such reliability and did not provide any documentation of testing of such reliability; and that the expert had not provided documentation to show that the instruments he used were routinely tested and assessed to ensure accuracy. At the hearing on Mason's motion in limine, the State entered into evidence the laboratory report of Bohaty's firearms testing. In addition, because Bohaty had testified at the separate trial of Mason's cousin regarding much the same matters to which Bohaty was going to testify in Mason's trial, the State offered the bill of exceptions from the cousin's trial.

On February 25, 2004, the court entered an order overruling the motion in limine. The court stated in the order, inter alia, that

> the testimony Sgt. Bohaty intends to offer will address the bullets retrieved from the body of the victim in this case, . . . King, shell casings found at the scene of the shooting, the type of firearms that would make the markings found on the bullets, and a comparison of the appearance of those firearms to descriptions of the firearm used in this shooting.

Regarding Mason's challenge to the reliability of Bohaty's expert testimony, the court generally found that there was no evidence to suggest that the methodology Bohaty used to form his opinions was unreliable, that Bohaty appeared well qualified to render such opinions, that the opinions Bohaty intended to offer did not appear to overreach the techniques he used to reach his conclusions, and that the techniques he used were accepted in the firearms identification community. The court therefore denied Mason's motion in limine.

When Bohaty testified at trial, Mason renewed his objection based on the motion in limine. The court overruled the objection and noted Mason's continuing objection. Bohaty generally testified regarding his qualifications and the reliability of the methods he used to form his expert opinions. He testified that he had examined the bullets and cartridges related to King's shooting and that although he could not positively identify the bullets as having come from the same gun, the markings on the bullets were consistent with their having been fired from one gun. Bohaty also

testified that from his examination of the markings on the bullets, he determined that they had been fired from one of two types of guns, one of which was a Tech-22. Prentice had testified that Mason had a Tech-22 with him on the day of the shooting. The Tech-22 was not located. Bohaty was shown a drawing of a gun made by Wagy in which she described the gun Mason had, and Bohaty testified that the drawing was consistent with the appearance of a Tech-22.

*Testimony of Forensic Pathologist.*

During direct testimony by the forensic pathologist, Dr. Matthias Okoye, the State asked that Dr. Okoye be allowed to review his final anatomic report in order to refresh his memory. Mason had no objection upon the initial request. However, after further testimony, Mason objected, stating that Dr. Okoye was "just reading from his [final anatomic] report. He's not testifying from any independent recollection or anything like that at this time."

In connection with his contention that Dr. Okoye was reading from his report, Mason pointed to testimony in which Dr. Okoye stated that a small projectile was recovered in relation to a "gunshot wound of the left anterior thigh area," and then immediately thereafter, Dr. Okoye had corrected his statement saying "Actually, it's a typographical error. It should be right. . . . It was the right thigh. So this is, you know, [a] typographical error. . . . And then on page six, you know, instead of — instead of left it should be right, actually. On the heading should be right." The court overruled Mason's objection, stating, "Well, I'm going to let him proceed. . . . [Dr. Okoye's] not just reading out loud what his report is. . . . I think that's apparent to everybody that he's reading his report and then testifying." Mason did not make a specific objection after this ruling.

*Other Matters at Trial.*

Mason made two motions for mistrial during the course of the trial. The first motion for mistrial occurred during jury selection. Prior to jury selection, the court had granted Mason's motion to allow him to wear civilian clothing and to remove all visible restraints in order to shield the jury from the fact that Mason was

in jail during the pendency of the trial. During voir dire, jurors had been asked if they knew anyone in the courtroom. At the end of voir dire, the State asked if anyone "for whatever reason would answer something different or wants to offer any other opinions." One potential juror stated that "there is [sic] two people that have changed in this room since this morning and I do know one of them fairly close." The prospective juror stated that the person he knew was "[y]our transport jailer." The State did not pursue the issue, and the prospective juror gave no further elaboration. Immediately thereafter, the proceedings were adjourned, and after recess, before the prospective jurors returned, Mason moved for mistrial based on the potential juror's identification of a person in the courtroom as a transport jailer. The motion was denied. Further, Mason rejected the court's offer to instruct the other potential jurors to ignore the comment, reasoning that such instruction would draw their attention to the comment. Jury selection continued.

The second motion for mistrial occurred during Prentice's testimony. Prior to trial, the court had sustained a motion in limine preventing witnesses from testifying about their own or others' participation in gangs. During direct examination, the State asked Prentice why he initially lied to the police. Prentice replied that he was scared, that he was protecting his brother, and that "if — well, where I grew up, if you sit there and tell somebody it can probably mean your life." Defense counsel immediately approached the bench and moved for mistrial, arguing that Prentice's answer violated the motion in limine against testimony regarding gang affiliation. The court denied the motion for mistrial, and Prentice's testimony continued.

At the final jury instruction conference, Mason requested a lesser-included offense instruction on robbery and attempted robbery as lesser-included offenses of felony murder. The court refused the instruction.

The jury found Mason guilty of first degree murder and use of a deadly weapon to commit a felony. The court sentenced Mason to life imprisonment on the murder conviction and to a consecutive term of 10 to 25 years' imprisonment on the weapon conviction. Mason appeals.

## ASSIGNMENTS OF ERROR

Mason asserts that the court erred in (1) refusing to give his requested instructions regarding prior inconsistent statements with respect to Wagy's and Prentice's testimonies; (2) refusing to give his requested accomplice instructions with respect to Wagy's and Prentice's testimonies; (3) refusing to give a lesser-included offense instruction regarding robbery and attempted robbery; (4) overruling his motion in limine and allowing the expert testimony of Bohaty and, specifically, in placing the burden of proof on him and in giving inadequate reasoning for its ruling; (5) allowing the forensic pathologist to testify using his final anatomic report; and (6) overruling both his motions for mistrial. Mason also asserts that there was insufficient evidence to support his convictions.

## STANDARDS OF REVIEW

[1] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005). The standard for reviewing the admissibility of expert testimony is abuse of discretion. *Id.* An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

[5] 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. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[6] 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. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

## ANALYSIS

*Prior Inconsistent Statements Instructions.*

Mason first asserts that the court erred in refusing to give his requested instructions regarding prior inconsistent statements at the time of Wagy's and Prentice's testimonies. The instructions Mason requested with respect to Wagy's testimony read as follows:

> Members of the jury, the evidence that . . . Wagy allegedly made statements that may be inconsistent with her testimony in court was brought to your attention only to help you decide if you believe what . . . Wagy testified to in court and, if so, how much to rely on that testimony. If you believe that she said something different earlier, then it will be up to you to decide if what she said here in court was true. You may not consider what may have been said earlier as proof of [Mason's] guilt or of any fact contained in those earlier statements.

Mason requested a similar instruction with respect to Prentice's testimony.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). The parties do not appear to dispute that the proposed instructions were correct statements of the law, and as Mason notes, the instructions were based on NJI2d Crim. X5.3. It further appears undisputed that the evidence supported the

instructions because there was evidence that both Wagy and Prentice had made prior statements that were inconsistent with their testimonies at trial. Thus, resolution of this issue depends on whether Mason was prejudiced by the court's refusal to give the tendered instructions. We conclude that Mason was not prejudiced and that therefore, the court's refusal to give the instructions was not reversible error.

Mason argues that he was prejudiced by the refusal to give the instructions because it was critical to his defense to emphasize the numerous inconsistent statements made by the two witnesses whose testimonies served as evidence identifying him as the shooter. He argues that the instructions needed to be given at the time of those testimonies in order to properly focus the jury's attention on the significance of the prior inconsistent statements.

[7,8] We have stated that it is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *Id.* In this respect, we note that in both the opening and closing instructions, the court instructed the jury regarding the use of prior inconsistent statements to assess witnesses' credibility. Ordinarily, these opening and closing instructions are sufficient. In the opening instructions, the jury was instructed that it would decide the credibility of witnesses and that in determining credibility it could consider, inter alia, "previously [sic] statements or conduct of the witness that tends to support or to contradict the witness' testimony at this trial." In the closing instructions, the court similarly instructed the jury members that they were "the sole judges of the credibility of the witnesses" and that in determining this they could consider, inter alia, "[a]ny previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial."

Also, contrary to Mason's argument that the jury's attention was not properly drawn to the significance of the prior inconsistent statements, we note that in the cross-examinations of both

Wagy and Prentice there was substantial questioning regarding each witness' prior statements and the inconsistency of such statements when compared to their testimonies given at trial. In addition, Mason's closing arguments focused attention on Wagy's and Prentice's prior inconsistent statements. Because the substance of the requested instructions was covered in both the opening and closing instructions and because the jury's attention was directed toward the importance of the prior inconsistent statements, both in the cross-examinations and during Mason's closing arguments, we conclude that Mason has failed to demonstrate that he was prejudiced by the court's refusal to give the requested instructions at the time of Wagy's and Prentice's testimonies.

*Accomplice Instruction.*

Mason also assigns error to the court's refusal to give his requested instructions based on NJI2d Crim. 5.6, regarding accomplice testimony, with respect to both Prentice's and Wagy's testimonies. We conclude that the requested instructions were not supported by the evidence and that therefore, the court did not err in refusing to give the requested instructions.

The requested instruction with respect to Wagy read as follows:

> There has been testimony from . . . Wagy, a claimed accomplice of [Mason]. You should closely examine her testimony for any possible motive she might have to testify falsely. You should hesitate to convict [Mason] if you decide that . . . Wagy testified falsely about an important matter and that there is no other evidence to support her testimony.
>
> In any event, you should convict [Mason] only if the evidence satisfies you beyond a reasonable doubt of his guilt.

Mason requested an identical instruction with respect to Prentice's testimony. Instead of the requested instructions, the court gave an instruction stating, "You should closely examine the testimony of . . . Wagy and Prentice . . . for any possible motive each might have to testify falsely." Mason objected to the giving of this instruction.

As noted above, to establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct

statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). We determine that the full instructions requested by Mason were not warranted by the evidence and that Mason was not prejudiced by the court's refusal to give the full instructions.

Mason points to the testimonies given by Wagy and Prentice to the effect that Mason, Wagy, and Prentice all went together to get drugs from King. Both Wagy and Prentice testified that immediately prior to shooting King in the hand, Mason said to King, "Break yourself," and Prentice testified that this statement meant that Mason was telling King to "Give me everything." Mason argues that the jury could have inferred from this that Mason was robbing King of the drugs in his possession and that the three had conspired and planned to rob King. Mason further argues that the two witnesses' status as accomplices is supported by evidence of their behavior after the shooting — both witnesses initially lied to the police regarding their involvement; Prentice threw away his clothes, which had been stained by King's blood; Wagy was attempting to hide from police when they contacted her the day after the shooting; and Wagy had burned her car, which was also stained with King's blood.

With respect to the definition of an "accomplice," this court has stated:

> " 'To constitute one an accomplice he must take some part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice . . . .' "

*State v. Sutton*, 231 Neb. 30, 45, 434 N.W.2d 689, 699 (1989) (quoting *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960). See, also, *State v. Salas*, 231 Neb. 471, 436 N.W.2d 547 (1989); *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985). Based on this definition, although there might have been evidence

that Wagy and Prentice were accomplices to an attempted drug transaction, there is no evidence that they were accomplices to an attempted robbery or to the shooting. Neither Wagy nor Prentice testified that there was a plan to rob or to kill King. Instead, they testified only that they were meeting King to purchase drugs, and they testified that they did not know Mason was going to attempt to rob or shoot King. Mason testified in his defense that he had no part in the events leading to King's death, and therefore, there was nothing in Mason's testimony which would indicate a plan between himself, Wagy, and Prentice to rob or kill King. Because there was no evidence that Wagy and Prentice were accomplices to the crimes charged in this case, the court did not err in refusing to give the entire accomplice instructions requested by Mason.

To the extent there was evidence that Wagy and Prentice tried to cover up the crime, such evidence points to their possibly being "accessories after the fact." In *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), the defendant requested an accomplice instruction based on NJI2d Crim. 5.6. Instead, the court gave a jury instruction stating that there was evidence that the witnesses at issue were " 'accessories after the fact' " and stating that " '[y]ou should closely examine their testimony for any possible motive they might have to testify falsely.' " 261 Neb. at 45, 621 N.W.2d at 130. We acknowledged that at least one of the witnesses was arguably an accomplice rather than an accessory after the fact, and we stated, "It is the rule in this state that a defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an accomplice, and the failure to give such an instruction is reversible error." *Id.* at 61, 621 N.W.2d at 139. However, in *Quintana*, we held that considering the instructions taken as a whole, the substance of the refused instruction was presented to the jury. We found it important in *Quintana* that the jury was instructed to closely examine the witnesses' testimony for any possible motive to testify falsely and that the State was required to prove each and every element of the offense charged beyond a reasonable doubt and that otherwise, the jury was to find the defendant not guilty.

In the present case, as in *Quintana*, Mason was not prejudiced by the court's refusal to give his requested instructions

because the parts of the instructions that were relevant, namely that the jury should be instructed to closely examine the witnesses' testimony for motive to testify falsely and to convict only if there is evidence beyond a reasonable doubt, were given. Instructions identifying Wagy and Prentice as "accomplices" were not necessary, nor were such instructions supported by the evidence. Therefore, the court in this case did not err in refusing to give the entire instructions requested by Mason, and we reject this assignment of error.

*Lesser-Included Offense Instruction.*

Mason asserts that the court erred in refusing to give an instruction regarding robbery and attempted robbery as lesser-included offenses of felony murder. We conclude that the evidence in this case did not produce a rational basis for acquitting Mason of felony murder and convicting him of robbery or attempted robbery and that therefore, the court did not err in refusing the instruction.

[9] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). With respect to whether robbery and attempted robbery are lesser-included offenses of felony murder in this case, we note that in *State v. Bjorklund*, 258 Neb. 432, 472, 604 N.W.2d 169, 207 (2000), we said:

> We have stated that a predicate felony is a lesser-included offense of felony murder for sentencing purposes, such that a defendant cannot be convicted and sentenced for both felony murder and the underlying felony without violating the Double Jeopardy Clause. See, *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). However, we have not directly confronted the question of whether a defendant in a felony murder case may be entitled to a lesser-included offense instruction on the underlying felony.

In *Bjorklund*, we determined that we did not need to decide the issue because even if the predicate felony were a lesser-included offense, the evidence in that case did not produce a rational basis for acquitting the defendant of felony murder and convicting him of the predicate felonies and, therefore, the second prong of *Williams* was not met.

Similar to *Bjorklund*, in the present case, we need not decide whether robbery and attempted robbery are lesser-included offenses of felony murder because the evidence in this case does not produce a rational basis for acquitting Mason of felony murder and convicting him of robbery or attempted robbery. The evidence presented by the State supported a finding of felony murder. Wagy's testimony was that Mason shot King in the hand, although she was not clear on whether he fired a second shot, and Prentice's testimony was that Mason shot King in the hand and shot at him again when King left the vehicle. Although he could not identify Mason as the shooter, Mitchell testified that King was shot by a bullet fired from the car that Wagy and Prentice testified was occupied by Mason, Wagy, and Prentice. Mason's testimony in his own defense was that he was elsewhere at the time the murder was committed and that he was not involved in any of the events. Therefore, either the jury could have believed Mason's story, in which case, he would not have been found guilty of either felony murder or the predicate felony, or the jury could have believed, in whole or in part, the versions told by Wagy, Prentice, and Mitchell, in which case, Mason would be found guilty of felony murder. There was no rational basis on which the jury could have viewed the evidence presented to acquit Mason of felony murder but find him guilty of robbery or attempted robbery. Although Mason argues that the jury could have found that he attempted to rob King but that someone else, such as Mitchell, could have shot King, Mason's theories are based on speculation, there was no evidence presented to support such a finding, and, on the contrary, there was evidence that Mason shot King and that King died of gunshot wounds.

Because the evidence does not produce a rational basis for acquitting Mason of felony murder and convicting him of robbery or attempted robbery, the court did not err in refusing the

lesser-included offense instruction. We therefore reject this assignment of error.

*Challenge to Firearms Expert Testimony.*

Mason asserts that the court erred in overruling his motion in limine and allowing the testimony of the State's firearms expert, Bohaty. Mason argues that the court specifically erred by (1) putting the burden on Mason to prove the unreliability of the expert's testimony rather than putting the burden on the State to prove reliability and (2) failing in its order to give adequate analysis of its reasons for admitting the evidence. We find no merit to Mason's claims, and we conclude that the court did not abuse its discretion by admitting the testimony.

[10] An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, 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. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005). 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) (*Daubert/Schafersman*). 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. This gatekeeping function 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, supra*.

A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004). 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 court 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 was properly 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). *Tolliver, supra*.

Mason's arguments on appeal with regard to admission of the firearms expert testimony appear to focus mainly on the second step of this process, in which the court conducts a *Daubert* analysis to determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. To the extent Mason challenges the court's rulings on the other steps of the process, we conclude that the foundation established by the State supported the court's conclusions that Bohaty was qualified to testify as a firearms expert, that the methodologies used by Bohaty could be applied to the evidence in this case, and that Bohaty's testimony was more probative than prejudicial.

Regarding Mason's challenges to the trial court's *Daubert* analysis, we note that the substance of Bohaty's testimony involved opinions he developed based on his examination of the casings and bullets related to the King shooting and, in particular, his examination of the markings on the bullets. From this examination, Bohaty was able to testify to his opinions regarding the type of gun or guns from which the bullets were likely fired. The *Daubert* analysis therefore was focused on the reasoning and methodologies Bohaty used to form these opinions.

[11,12] Mason first argues that the court improperly conducted the *Daubert* analysis by putting the burden on him to prove that Bohaty's methodology was unreliable rather than putting the burden on the State to prove that it was reliable.

With regard to the respective burdens of the parties to a *Daubert* challenge, we have stated that "[o]nce 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.' " *Zimmerman v. Powell*, 268 Neb. 422, 429, 684 N.W.2d 1, 8 (2004) (quoting *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001)). It is thus apparent that the initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony. After the factual basis, data, principles, or methods, or their application has been sufficiently called into question, then the proponent of the expert testimony has the burden of showing that the testimony is reliable. See *U.S. v. Hicks*, 389 F.3d 514 (5th Cir. 2004).

In the present case, Mason filed an initial motion in limine challenging Bohaty's testimony. The motion in limine was a general challenge which failed to specify the aspects of Bohaty's testimony that Mason asserted to be unreliable. In reaction to the initial motion in limine, the court ordered Bohaty to submit himself for deposition and ordered Mason to specify the inadequacies of the expert's testimony. The court thus aided Mason in sufficiently calling into question aspects of Bohaty's testimony.

After the deposition, Mason filed a second motion in limine, in which he asserted, inter alia, that the reliability of Bohaty's theory and methodology had not been established, because he only provided his opinion as to such reliability and did not provide any documentation of testing of such reliability. Although in his original motion in limine, Mason had made general assertions regarding reliability, in his second motion in limine, Mason specified his objections to the reliability of Bohaty's testimony to the extent that he sufficiently called reliability into question.

Contrary to Mason's argument on appeal, the court did not place the burden on him to prove that the expert testimony was unreliable. Instead, by giving Mason the opportunity to depose Bohaty and by directing him to specify his objections to Bohaty's testimony, the court was guiding Mason in meeting his initial burden to sufficiently call some aspect of the expert testimony into

question. After Mason had done so in the second motion in limine, the State then had the burden of showing that the testimony was reliable. The State undertook to meet this burden by entering into evidence, in addition to Bohaty's deposition taken by Mason, the laboratory report of Bohaty's testing in this case and the bill of exceptions from the trial of Mason's cousin, at which trial, Bohaty testified to the same matters to which he was going to testify in Mason's trial. Bohaty's testimony at the cousin's trial included testimony which provided foundation with regard to Bohaty's qualifications as well as the reliability of the methodology he used to form his opinions. The burden was on the State to establish reliability, and in its order overruling Mason's motion in limine, the court determined that the State had met its burden.

With respect to the court's order, Mason argues that the court failed to give adequate analysis of its reasons for admitting the expert testimony of Bohaty. Mason relies on *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004), in which this court concluded in a jury trial that because the trial court failed to explain its reasoning, the court had abdicated its gatekeeping duty under *Daubert/Schafersman*. Compare *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004) (extensive findings in nonjury case demonstrated gatekeeping duty performed). We stated in *Zimmerman* that a 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.

268 Neb. at 430-31, 684 N.W.2d at 9. We concluded in *Zimmerman* that the record included the court's conclusions, but lacked analysis. We elaborated, stating:

> The court should have explained why [the expert's] trial testimony was sufficient to show that [the scientific method he used] and the manner in which he used it were reliable. For example, if the court believed that [the method] was reliable because [the expert] suggested that it was widely accepted as quality software within the engineering community, it should have said so.

268 Neb. at 435, 684 N.W.2d at 12.

In the present case, the court in its order gave reasons why it found that Bohaty's testimony was reliable. Although the court's analysis was not as extensive as might have been appropriate in a more complicated case, given the subject matter at issue, the court's analysis was adequate. In *Zimmerman*, we acknowledged that the *Daubert* model recognizes that "a range of reasonable methods exists for distinguishing reliable expert testimony from false expertise." 268 Neb. at 429, 684 N.W.2d at 8. We further noted that "the trial court has considerable discretion in deciding what procedures to use in determining if an expert's testimony satisfies *Daubert*/*Schafersman*" and that "[t]he trial court's discretion further extends to deciding what factors are reasonable measures of reliability in each case." *Id.*

The type of ballistics and firearms testimony that Bohaty presented in this case was not novel and is fairly routine in cases involving the use of firearms. Therefore, the *Daubert* analysis did not need to be as extensive as it might have been if the testimony involved more complicated, less routine methods of testing. In *State v. Leibhart*, 266 Neb. 133, 144, 662 N.W.2d 618, 628 (2003), with respect to a *Daubert* challenge to expert testimony regarding shaken baby syndrome, we stated:

> We note that the evidence presented at the *Daubert* hearing in this case was not extensive and consisted mainly of [the expert's] testimony and his reference to the relevant literature. However, the level of inquiry in a *Daubert* hearing may vary depending on the nature of the expert testimony challenged, and the inquiry in the present case was appropriate and sufficient. As we stated in *Schafersman* [*v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001)], *Daubert* "does not require that courts reinvent the wheel each time that evidence is adduced." 262 Neb. at 228, 631 N.W.2d at 874.

We noted in *Leibhart* that expert testimony regarding shaken baby syndrome had been previously admitted by courts in this state and that courts in other states had found such testimony reliable. We further stated:

> General acceptance is one of several factors that may be considered to determine the reliability of expert testimony.

> In this regard, we note that a reexamination under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), is most appropriate "where recent developments raise doubts about the validity of previously relied-upon theories or techniques." *Schafersman*, 262 Neb. at 228, 631 N.W.2d at 874.

*Leibhart*, 266 Neb. at 144, 662 N.W.2d at 628.

Similar to the expert testimony in *Leibhart*, the type of ballistics and firearms testimony to which Bohaty testified in this trial has commonly been admitted in this state. See, *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997); *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994); *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988). Expert testimony similar to that given in this case has been found reliable under a *Daubert* analysis in other jurisdictions. See *U.S. v. Hicks*, 389 F.3d 514, 526 (5th Cir. 2004) (stating that "[w]e have not been pointed to a single case in this or any other circuit suggesting that the methodology employed by [the government's ballistics expert] is unreliable"). See, also, *U.S. v. Foster*, 300 F. Supp. 2d 375 (D. Md. 2004), and cases cited therein.

In a case involving a more novel methodology or a methodology which had been more significantly called into question, a more extensive inquiry and more extensive analysis and reasoning would have been indicated. Considering the nature of the expert testimony involved in this case, we conclude that the court's inquiry, analysis, and ruling with respect to Mason's challenge were adequate and that the court did not abuse its discretion in admitting Bohaty's expert testimony. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005) (admissibility of expert testimony reviewed for abuse of discretion). We therefore reject Mason's assignments of error with respect to the admission of Bohaty's testimony.

*Testimony of Forensic Pathologist.*

Mason asserts that the court erred in overruling his objection to the testimony of the forensic pathologist, Dr. Okoye. Mason objected on the basis that Dr. Okoye was "just reading from his

[final anatomic] report. He's not testifying from any independent recollection or anything like that at this time." We conclude that the record indicates that Dr. Okoye was not merely reading from his report and that therefore, the court did not err in overruling Mason's objection.

In support of his assertion that it was error for the court to allow Dr. Okoye to testify by reference to his prepared notes under the guise of refreshing his recollection, Mason cites *Hall v. American Bakeries Co.*, 873 F.2d 1133 (8th Cir. 1989). Although the Court of Appeals for the Eighth Circuit in *Hall* found the use of notes to be error, the court noted that "[n]o foundation was laid regarding [the witness'] need to refresh his memory or whether the notes would be of assistance." 873 F.2d at 1136. Likewise, in *Baker v. Boren*, 129 Idaho 885, 893, 934 P.2d 951, 959 (Idaho App. 1997), also cited by Mason, the court concluded that "the proper foundation for use of [a witness'] notes was not laid." In the present case, Mason makes no argument with regard to foundation and it appears from the record that proper foundation was made that Dr. Okoye needed to refresh his memory and that the report would help him do so. Although the cases indicate that it was error for the court to allow a witness with no independent recollection to simply read from notes, the record in this case does not indicate that Dr. Okoye simply read from his report. We further note that Mason did not move to strike Dr. Okoye's testimony, nor does he direct us on appeal to portions of the testimony which should have been excluded as prejudicial.

When overruling Mason's objection, the court in this case stated that "Dr. Okoye's not just reading out loud what his report is." For support of his contention that Dr. Okoye was simply reading from the report, Mason points to testimony in which Dr. Okoye states that a small projectile was recovered in relation to a "gunshot wound of the left anterior thigh area" and then immediately thereafter amends the statement saying, "Actually, it's a typographical error. It should be right. . . . It was the right thigh. So this is, you know, [a] typographical error. . . . And then on page six, you know, instead of — instead of left it should be right, actually. On the heading should be right." The portion of the record highlighted by Mason does not indicate that Dr.

Okoye was simply reading his report into the record; to the contrary, the witness' correction of the report indicates that he was testifying from present recollection rather than merely from reading the report.

The trial court observed Dr. Okoye's testimony and stated that Dr. Okoye was not merely reading from his report, and our review of the record does not contradict this statement but instead indicates that Dr. Okoye was testifying from his independent recollection as evidenced by his correcting portions of the report. We therefore conclude that the court did not err in overruling Mason's objection, and we reject this assignment of error.

*Motions for Mistrial.*

Mason asserts that the court erred in denying both motions for mistrial that he made during the course of the trial. We conclude that the court did not abuse its discretion in denying either motion.

[13] 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. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). 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. *Id.*

The first motion for mistrial occurred during jury selection when a potential juror stated that he knew a person in the courtroom and that the person was "[y]our transport jailer." Mason moved for mistrial on the basis that the potential juror's comment could prejudice the other jurors. Mason argued that the comment violated the spirit of rulings that had been issued prior to trial allowing Mason to wear civilian clothing and to remove all restraints except a leg restraint while in court. Mason argued that the object in granting such motions was to shield the jury from the knowledge that Mason was in jail during trial, because such knowledge would be prejudicial to his defense. The court overruled the motion for mistrial.

We conclude that the court did not abuse its discretion in denying the first motion for mistrial. The prospective juror's statement

that he recognized a person in the courtroom as a transport jailer was not a statement that Mason was known to be incarcerated, and in any event, we cannot say that the comment would have prejudiced the jury with respect to its task of fairly weighing the evidence. The State did not further question the prospective juror, and he did not further elaborate. The challenged comment was fleeting and did not violate the specific pretrial rulings.

The second motion for mistrial occurred during Prentice's testimony when Prentice stated that he had originally lied to the police because "if — well, where I grew up, if you sit there and tell somebody it can probably mean your life." Mason argued that the comment violated an order granting a motion in limine preventing witnesses from testifying about their own or others' participation in gangs. The court denied Mason's motion for mistrial.

We conclude that the court did not abuse its discretion in denying Mason's second motion for mistrial. Prentice's comment, "where I grew up," did not violate the motion in limine against testimony regarding gang affiliation. Fear of reprisal for testifying could be a concern whether or not in reference to gang activity, and Prentice's expression of such fear would not necessarily be understood as testimony regarding gang activity.

We note that with regard to the prospective juror's comment in this case, Mason declined the court's offer to give an instruction at the time. Furthermore, with respect to both incidents in this case, neither incident required an instruction or admonition because neither comment was so prejudicial that it could have prevented a fair trial. In *State v. McLemore*, 261 Neb. 452, 466, 623 N.W.2d 315, 327 (2001), we concluded that the court did not abuse its discretion in not granting a motion for mistrial based on a "vague statement [that] did not inform the jury" of potentially prejudicial information. There was no mention in *McLemore* that any admonition or instruction was made with respect to the statement. Similarly, in the present case, the statements upon which Mason moved for mistrial did not, as Mason argues, inform the jury of potentially prejudicial information and therefore, there was no need for an admonition or instruction. Furthermore, if the court had instructed on either incident in this case, it would merely have served to draw the jury's

attention to the comments and raised questions in the jurors' minds regarding the meaning and importance of the comments.

We conclude that the court did not abuse its discretion in overruling the motions for mistrial, and we reject this assignment of error.

*Sufficiency of Evidence.*

Finally, Mason asserts that the evidence was not sufficient to support his convictions for first degree murder and use of a deadly weapon to commit a felony. We conclude that the evidence in this case was sufficient to support Mason's convictions.

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. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

Mason asserts that the only direct evidence of his guilt were the testimonies of Wagy and Prentice. He argues that because their testimonies were "unbelievable," they lacked sufficient probative force for the jury to find him guilty beyond a reasonable doubt. Mason posits that it is possible that Wagy or Prentice committed the murder or that they conspired together and blamed Mason for the killing in order to lessen their punishment. Mason contends that because of Wagy's and Prentice's inconsistent statements and their potential motives to lie, this court should conclude that their testimonies lacked sufficient probative force as a matter of law and that therefore, there was not sufficient evidence to convict Mason.

The issue of the witnesses' credibility was to be decided by the jury, and if the jury believed their testimonies, there was sufficient evidence to support Mason's conviction. As noted above, in reviewing a conviction, this court does not pass on the

credibility of witnesses because such matters are for the finder of fact. *Sanders, supra*. Mason's argument hinges on his proposal that this court should conclude as a matter of law that Wagy's and Prentice's testimonies were unreliable; under the standard of review recited above, we will not do so. The jury was presented with evidence from which it could assess the witnesses' credibility. Despite their inconsistent prior statements and their potential motives, about which the jury was made aware, the jury was properly permitted to believe Wagy's and Prentice's testimonies to the effect that Mason shot King, and such testimonies, along with the other evidence presented, including evidence that King died from gunshot wounds, provided sufficient evidence on which to convict Mason. We therefore reject this assignment of error.

## CONCLUSION

Having rejected each of Mason's assignments of error, we affirm his convictions and sentences.

AFFIRMED.

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BECKY A. WHITE, APPELLANT, V.
VERLYN J. WHITE, APPELLEE.

709 N.W.2d 325

Filed February 3, 2006. No. S-05-135.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Child Custody: Jurisdiction: Appeal and Error.** The question as to whether jurisdiction existing under the Nebraska Child Custody Jurisdiction Act should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal.
3. **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 conclusions reached by the trial court.

4. **Actions: Child Custody: Time.** Pursuant to Neb. Rev. Stat. § 43-1266 (Reissue 2004), a motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made.
5. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning.
6. **Child Custody: Jurisdiction.** A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination if this state is the home state of the child at the time of commencement of the proceeding.
7. **Child Custody: States: Time: Words and Phrases.** "Home state" is defined as the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as a parent, for at least 6 consecutive months.
8. **Child Custody: Jurisdiction: States.** A court of this state shall not exercise its jurisdiction under the Nebraska Child Custody Jurisdiction Act if, at the time of filing the petition, a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with the Nebraska Child Custody Jurisdiction Act.
9. **Child Custody: Modification of Decree: Jurisdiction: States.** A court which has jurisdiction under the Nebraska Child Custody Jurisdiction Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.
10. **Child Custody: Jurisdiction: States.** The end goal of the Nebraska Child Custody Jurisdiction Act is that litigation concerning the custody of a child takes place in the state which can best decide the case.
11. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

John J. Kohl, of Raynor, Rensch & Pfeiffer, for appellant.

Stan A. Emerson, of Sipple, Hansen, Emerson & Schumacher, for appellee.

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

HENDRY, C.J.

## INTRODUCTION

Becky A. White, now Becky A. Bedore, appeals the order of the Platte County District Court granting Becky's ex-husband, Verlyn J. White, permanent custody of the parties' children. We

granted Becky's petition to bypass the Nebraska Court of Appeals.

## FACTUAL BACKGROUND

Becky and Verlyn were divorced in Kansas in April 1999. At the time of the divorce, the parties had three minor children: Andrea, born July 29, 1992; Cameron, born August 30, 1994; and Blaize, born July 9, 1997. The Kansas district court awarded the parties joint custody of the children, with the "primary place of residence" of the children to be with Becky.

Prior the entry of the divorce decree, Verlyn moved from Kansas to Nebraska. In September 1999, Becky and the children also moved from Kansas to Nebraska, where they lived until August 12, 2000. On August 12, Becky and the children moved to Colorado.

On August 10, 2000, Verlyn petitioned the Kansas district court for a change in the permanent residency of the children. Becky responded by filing a motion to dismiss, challenging the district court's subject matter jurisdiction. On April 6, 2001, the Kansas district court denied Becky's motion to dismiss, concluding that it did have jurisdiction but finding that no material change in circumstance justified a change in permanent residence.

In December 2002, Verlyn again petitioned the Kansas district court for a change in the permanent residency of the children. That petition was granted on February 28, 2003, and the children's residence was transferred to Verlyn in Platte County, Nebraska, where they have lived since the granting of that petition.

Becky appealed from the order of the Kansas district court. In her appeal, Becky challenged the jurisdiction of the court. In a memorandum opinion dated December 5, 2003, the Kansas Court of Appeals concluded that the Kansas district court lacked jurisdiction to grant residential custody to Verlyn. See *In re Marriage of White*, No. 90,429, 2003 WL 22902791 (Kan. App. Dec. 5, 2003) (unpublished disposition listed in table at 79 P.3d 1093). In doing so, it reasoned that as of August 10, 2000, the date Verlyn commenced his initial action in the Kansas district court, "all parties had lived in Nebraska for 11 months prior to the filing of the first motion in August 2000" and that

as a result, "Nebraska was the children's home state in August 2000." *Id.* at *2. It then held that "[w]e vacate the February 28, 2003, order wherein residential custody was changed to Verlyn. Residential custody is in Becky A. White, n/k/a Becky Bedore and the previous orders of the trial court are controlling of custody, support, and visitation." *Id.* at *3.

On December 11, 2003, 6 days following the Kansas Court of Appeals' decision, Verlyn filed a petition to modify and an ex parte application for temporary custody in the district court for Platte County. Verlyn's ex parte application was granted that same day. Shortly thereafter, on or about December 24, Verlyn filed with the Kansas Supreme Court a "Petition for Review" of the Kansas Court of Appeals' decision. That request was ultimately denied by the Kansas Supreme Court on February 10, 2004.

In response to Verlyn's action commenced in the Platte County District Court, Becky filed a motion to dismiss, contending, inter alia, that the Kansas proceedings prevented Nebraska from assuming jurisdiction of Verlyn's action. Becky also filed an application for a writ of assistance, requesting that the sheriff aid her in taking custody of the children pursuant to the Kansas Court of Appeals' decision.

Following a hearing on Verlyn's request for temporary custody, the district court granted Verlyn temporary custody and denied Becky's motion to dismiss and application for a writ of assistance. In denying Becky's motion to dismiss, the district court determined it had subject matter jurisdiction as either the "home state" or the state having the most "significant connection" with the children pursuant to Nebraska's version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Neb. Rev. Stat. §§ 43-1226 through 43-1266 (Reissue 2004). On December 14, 2003, a trial was held on Verlyn's amended petition to modify, and he was granted permanent custody. Becky appeals.

## ASSIGNMENTS OF ERROR

On appeal, Becky assigns, renumbered and rephrased, that the Platte County District Court erred in (1) applying Nebraska's version of the UCCJEA rather than the Nebraska Child Custody Jurisdiction Act (NCCJA), Neb. Rev. Stat. §§ 43-1201 through

43-1225 (Reissue 1998); (2) finding that it had subject matter jurisdiction; (3) failing to find that Verlyn's pending appeal in Kansas precluded its exercise of jurisdiction; (4) exercising jurisdiction; (5) considering the children's best interests in determining that it had jurisdiction; and (6) "failing to hold that [its] jurisdiction must be determined as of the date the Petition to Modify is filed."

Becky does not assign as error the district court's finding that "there exists a material change in circumstances such that it would now be in the best interests of the . . . children . . . that their physical custody and primary residence be changed and awarded to . . . Verlyn."

## STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999).

[2] The question as to whether jurisdiction existing under the NCCJA should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal. *In re Interest of Kelley D. & Heather D., supra.*

## ANALYSIS

[3] In her first assignment of error, Becky argues that the district court erred in analyzing whether it had jurisdiction under the UCCJEA rather than under the NCCJA. The resolution of Becky's first assignment of error involves a question of statutory interpretation. 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 conclusions reached by the trial court. *Farber v. Lok-N-Logs, Inc.*, 270 Neb. 356, 701 N.W.2d 368 (2005).

[4,5] The petition to modify in this action was filed by Verlyn on December 11, 2003. Pursuant to the UCCJEA, and specifically § 43-1266, "[a] motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made." Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). The plain language of § 43-1266 states that any motion or request for relief filed prior to January 1, 2004, is to be governed by the "law in effect at the time the motion or other request was made." On December 11, 2003, the date Verlyn filed his petition to modify, the law in effect was the NCCJA. Thus, we determine that the district court erred as a matter of law in applying the UCCJEA rather than the NCCJA. That, however, does not end our analysis.

Having concluded that the trial court erred in applying the UCCJEA, we must next decide whether it is necessary to remand the cause to the district court for further proceedings. In answering this question, we are guided by the principle that when a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *In re Interest of Kelley D. & Heather D., supra.*

Initially, we note that neither party argues that remand is required upon a determination that the applicable law is the NCCJA. Furthermore, in their briefs, both parties base their substantive jurisdictional analyses upon the NCCJA. Also, as to any factual findings made by the district court relevant to our analysis, we conclude that such findings are not clearly incorrect. Accordingly, we will proceed to review the jurisdictional issue applying the NCCJA.

### Did District Court Have Jurisdiction Under NCCJA?

[6,7] In her second assignment of error, Becky argues that the district court did not have jurisdiction over this custody dispute. We will analyze this issue by looking to the NCCJA, which provides in relevant part:

> A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination . . . if:
>
> (a) This state (i) is the home state of the child at the time of commencement of the proceeding [or]
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; [or]
>
> . . . .
>
> (d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (a), (b), or (c) of this section, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction . . . .

§ 43-1203(1). "Home state" is defined as "the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as a parent, for at least six consecutive months." § 43-1202(5).

The petition for modification was filed in the Platte County District Court on December 11, 2003. The record establishes that the children have lived with Verlyn in Nebraska since approximately February 28, 2003. Given that the children had lived in Nebraska for more than 6 months when Verlyn filed his petition for modification, it would appear, pursuant to §§ 43-1202(5) and 43-1203(1)(a)(i), that Nebraska was the children's home state.

Despite these statutory provisions, Becky contends that even though the children had lived in Nebraska for more than 9 months as of the date Verlyn filed his motion on December 11, 2003, such residence was the result of an "invalid" order issued by the Kansas district court. Consequently, Becky argues this 9-month time period is not properly includable in the calculation of whether Nebraska has home state jurisdiction.

In support of her argument, Becky cites to *Luna v. Luna*, 592 N.W.2d 557 (N.D. 1997), and *Weller v. Weller*, 960 P.2d 493 (Wyo. 1998). Neither case, however, addresses the precise issue presented. Rather, both cases stand, in relevant part, for the proposition that a court's jurisdiction must exist at the time an action is filed and cannot be attained after such date regardless of the amount of time spent by the children in the state subsequent to the filing of a custody action. Given that no one contends that the 9-month time period during which the children lived with Verlyn in Nebraska and over which home state jurisdiction was based was subsequent to Verlyn's filing, we conclude that both cases are inapplicable.

Becky also directs this court to *In re Marriage of Hamilton*, 120 Wash. App. 147, 84 P.3d 259 (2004), a case decided under Washington's version of the UCCJEA. Becky contends that *In re Marriage of Hamilton* holds that " 'significant contacts' generated without a valid court order may not be used to establish jurisdiction." Brief for appellant at 19. However, a review of *In re Marriage of Hamilton* does not support Becky's contention. To the contrary, the Washington Court of Appeals did consider the child's contacts with Washington in concluding that Washington had jurisdiction, notwithstanding the fact that the mother had moved from Texas to Washington without the father's knowledge. Despite those circumstances, the Washington court held that where a child had no home state, as was true in the situation presented, that child's significant contacts with a state could be considered in determining jurisdiction. We conclude that *In re Marriage of Hamilton* is not supportive of Becky's argument.

We note that we are not faced with a situation like the one presented in *Marriage of Ieronimakis*, 66 Wash. App. 83, 831 P.2d 172 (1992), which was cited and distinguished in *In re Marriage of Hamilton*. In *Marriage of Ieronimakis*, a mother brought her children from Greece, where they had lived with the children's father, to Washington without the father's permission or knowledge. In concluding that it lacked jurisdiction over the children, the court explained:

> To allow Washington courts to assert jurisdiction because [the mother] generated significant contacts with the state is in effect telling any abducting parent that if you

> can stay away from the home state long enough to generate new considerations and new evidence, that is a sufficient reason for the new state to assert a right to adjudicate the issue. Such a holding circumvents the intent of the jurisdiction laws.

*Marriage of Ieronimakis*, 66 Wash. App. at 92, 831 P.2d at 177. See, also, *Ortman v. Ortman*, 670 N.E.2d 1317 (Ind. App. 1996) (where mother unilaterally removed children from prior state of residence, allowing change in children's home state would contravene purposes of Indiana's version of NCCJA). See, generally, § 43-1208 (where one party without consent improperly removes child from party with right to custody, court should decline to exercise jurisdiction).

On the record before us, it is undisputed that Verlyn did not abduct the children or otherwise improperly remove them from Becky's custody. On the contrary, Verlyn filed a petition for modification of custody in the Kansas district court. Following a trial, the Kansas court found a material change in circumstances and granted Verlyn custody of the children. It was only after that order was issued that Verlyn obtained custody of the children and moved them to Nebraska. Although the Kansas Court of Appeals later determined that the Kansas court was without jurisdiction to grant custody to Verlyn, that does not change the fact that Verlyn took custody of the children in accordance with what was believed to be a valid court order.

Furthermore, the conclusion that the 9-month period from February to December 11, 2003, is properly considered in determining the children's home state does not, given this record, contravene the general purposes of the NCCJA. Section 43-1201 sets forth the general purposes of the NCCJA. Subsection (e) provides that one such purpose is to "[d]eter abductions and other unilateral removals of children undertaken to obtain custody awards," while subsection (g) provides that the NCCJA should "[f]acilitate the enforcement of custody decrees of other states." Neither of these purposes is inconsistent with the view that Verlyn should be permitted to rely upon the Kansas order in establishing home state jurisdiction. The NCCJA is not concerned with the conduct of a custodial parent acting pursuant to what is believed to be a valid court order, but, rather, with

the unilateral removal of a child from another jurisdiction. Nor would it facilitate the enforcement of custody decrees from other jurisdictions to hold that a party's good faith reliance upon such a decree is of no consequence if it is ultimately determined to have been erroneous.

We conclude that upon this record, the time the children spent in Nebraska pursuant to the Kansas order is properly includable in calculating whether Nebraska had home state jurisdiction. Accordingly, the Platte County District Court had home state jurisdiction over the children.

For the sake of completeness, we note that the district court concluded it possessed subject matter jurisdiction pursuant to the UCCJEA as either the home state or the state having the most "significant connection" with the children. Having determined that the district court acquired home state jurisdiction under the NCCJA, we need not further address its alternative basis of jurisdiction. Becky's second assignment of error is without merit.

### Is Nebraska Precluded From Exercising Jurisdiction?

In her third assignment of error, Becky assigns that pursuant to § 43-1206(1), Verlyn's pending appeal in the Kansas Supreme Court "precluded" Nebraska courts from exercising jurisdiction over this custody matter.

The record indicates that on December 5, 2003, the Kansas Court of Appeals issued its opinion finding that the Kansas district court lacked jurisdiction. On December 11, Verlyn filed his petition for modification in Platte County District Court. Thereafter, on or about December 24, Verlyn filed a petition for review of the Kansas Court of Appeals' decision with the Kansas Supreme Court. That petition was denied by the Kansas Supreme Court on February 10, 2004.

Becky argues that given these undisputed filing dates, at the time Verlyn filed his petition for modification in Nebraska, the time period for filing an appeal from the Kansas Court of Appeals' decision had not expired, as evidenced by Verlyn's December 24, 2003, filing in the Kansas Supreme Court. From this, Becky contends that § 43-1206(1) precluded the Platte County District Court from exercising its jurisdiction because the custody issue had not reached a final determination in Kansas.

The matter was therefore "pending" in Kansas when Verlyn filed his petition for modification in Nebraska. We do not believe § 43-1206(1) supports Becky's argument.

[8] The plain language of § 43-1206(1) provides that "[a] court of this state shall not exercise its jurisdiction under [the NCCJA] if, at the time of filing the petition, a proceeding concerning the custody of the child was pending in a court of another state *exercising jurisdiction substantially in conformity with* [*the NCCJA*]." (Emphasis supplied.) The undisputed record demonstrates that Kansas was not "exercising jurisdiction" substantially in conformity with the NCCJA at the time Verlyn filed his petition in the Platte County District Court. To the contrary, the decision of the Kansas Court of Appeals, specifically determining that Kansas did not have jurisdiction over this custody proceeding, had been rendered 6 days prior to Verlyn's filing in Nebraska. Assuming without deciding that a "proceeding . . . was pending" in Kansas on the date Verlyn filed his petition for modification in Nebraska, it is undisputed that Kansas had no jurisdiction to exercise under the NCCJA. As such, § 43-1206(1) does not preclude the Platte County District Court's exercise of jurisdiction. See, also, *Swire v. Swire*, 202 N.J. Super. 289, 494 A.2d 1035 (1985) (New Jersey courts could exercise jurisdiction despite mother's pending New York appeal, as New York lacked jurisdiction at time it entered its order). Becky's third assignment of error is without merit.

### Should Nebraska Exercise Jurisdiction?

[9] In her fourth assignment of error, Becky assigns that even if the district court had jurisdiction under the NCCJA, it should have declined to exercise that jurisdiction. In support of her position, Becky argues that Colorado, rather than Nebraska, was the most convenient forum to hear this dispute and, further, that the district court's exercise of jurisdiction contravened the purposes of the NCCJA as stated in § 43-1201. Because Becky's arguments rely upon specific provisions of §§ 43-1201 and 43-1207 of the NCCJA, we initially set forth the relevant provisions of those sections. Section 43-1207 provides:

> (1) A court which has jurisdiction under [the NCCJA] to make an initial or modification decree may decline to

> exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.
>
> . . . .
>
> (3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:
>
> (a) If another state is or recently was the child's home state;
>
> (b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;
>
> (c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
>
> (d) If the parties have agreed on another forum which is no less appropriate; and
>
> (e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 43-1201.

Section 43-1201 sets forth the purposes behind the NCCJA and provides, in relevant part, that the court should strive to:

> (c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
>
> (d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
>
> . . . .
>
> (f) Avoid relitigation of custody decisions of other states in this state when feasible.

Becky and the children moved from Kansas to Nebraska following the entry of the initial divorce decree in April 1999, and then to Colorado in August 2000. As the district court noted, while in Colorado, the children attended several different schools and had several different babysitters. No evidence exists in the record to suggest any ongoing relationships between the children and persons associated with any of these schools or care providers. In fact, with the exception of friendships the children developed in Colorado over their summer visitation, there is no evidence in the record regarding existing relationships between the children and anyone in Colorado, save Becky and her new husband.

Following the decision of the Kansas district court on February 28, 2003, the children moved from Colorado to Nebraska and have resided with Verlyn in Nebraska since that time. As the district court found, the children attend school and church in Nebraska, have friends in Nebraska, and are involved in extracurricular activities in Nebraska. The record also indicates the children receive medical care in Nebraska.

As noted above, in determining whether it should exercise jurisdiction under the NCCJA, a court should consider the factors set forth in § 43-1207(3), as well as the purposes behind the NCCJA as enunciated in § 43-1201. In doing so, we first note that although Colorado was formerly the children's home state, they have not resided in Colorado since February 2003. Moreover, a review of the record shows that the children have closer ties with Nebraska than Colorado and that the bulk of the evidence regarding their "present or future care, protection, training, and personal relationships is more readily available" in Nebraska. See § 43-1207(3).

[10] Furthermore, Nebraska's exercise of jurisdiction would facilitate rather than contravene the purposes behind the NCCJA. In particular, given the children's contacts in Nebraska, Nebraska's exercise of jurisdiction would ensure that litigation takes place in the state with the closest connection to the children and where the most evidence can be found. Nebraska's exercise of jurisdiction would also discourage continuing controversies, promote stability in the lives of these children, and avoid relitigation of a matter which, at a minimum, has been

twice previously heard on its merits. This court has held that the end goal of the NCCJA is that litigation concerning the custody of a child takes place in the state which can best decide the case. *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000). We believe Nebraska's exercise of jurisdiction best meets this goal.

Contrary to Becky's assertions, we conclude that upon this record, Nebraska, not Colorado, was the more convenient forum to hear this custody matter and, further, that Nebraska's exercise of jurisdiction did not contravene the purposes of the NCCJA. Accordingly, we determine that the Platte County District Court did not abuse its discretion in exercising jurisdiction. Becky's fourth assignment of error is without merit.

### Remaining Assignments of Error

In her fifth assignment of error, Becky assigns that the district court "erred in considering the best interests of the children as part of the analysis to determine jurisdiction." In particular, Becky contends that "[t]he district court's order also suggests that the court determined Nebraska had jurisdiction because it believed that the children should remain with their father." Brief for appellant at 23.

An examination of the district court's order does not support Becky's contention. At issue is the district court's order entered on March 17, 2004, following a hearing with respect to both Becky's motion to dismiss and application for a writ of assistance and Verlyn's motion for temporary custody. In response to Becky's motion to dismiss, the district court specifically noted that it had home state jurisdiction over the proceeding, because the children had been present in Nebraska more than 6 months prior to the filing of the petition to modify. As a result, the district court denied Becky's motion and application.

The district court then addressed the issue of Verlyn's motion for temporary custody. In its analysis of that issue, the court concluded that "it would be in the children's best interests that their temporary custody be, and is, awarded to their father, Verlyn." While the court clearly considered the best interests of the children in awarding temporary custody to Verlyn, the court did not consider the children's best interests until after it concluded that it had jurisdiction. Becky's fifth assignment of error is without merit.

In her sixth assignment of error, Becky has assigned the district court's failure "to hold that the court's jurisdiction must be determined as of the date the Petition to Modify is filed." As we understand Becky's argument, she is contending that the district court did not determine its jurisdiction as of December 11, 2003, the date of the filing of Verlyn's petition to modify. In her brief, however, Becky fails to specify the date she believes was improperly utilized by the district court. In any event, it is apparent from the record that the date utilized by the district court when it initially determined that it had jurisdiction was, in fact, December 11. Becky's sixth assignment of error is without merit.

[11] Finally, Becky argues that the Platte County District Court did not, pursuant to § 43-1206, consult with other states before deciding to exercise jurisdiction. However, this argument is not assigned as error in Becky's brief. 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 Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). As a result, we need not consider this argument.

## CONCLUSION

We conclude that the district court properly exercised jurisdiction over this custody dispute.

AFFIRMED.

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## DAVID H. PTAK, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILMA L. PRITCHARD, DECEASED, APPELLANT, V. LEOTA SWANSON, APPELLEE.

709 N.W.2d 337

Filed February 10, 2006. No. S-04-1009.

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. **Jurisdiction.** Subject matter jurisdiction is a question of law for the court.
3. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision.

4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.
5. **Rules of the Supreme Court: Constitutional Law: Statutes: Notice.** Neb. Ct. R. Prac. 9E (rev. 2001) requires that a party presenting a case involving the constitutionality of a statute must file and serve notice with the Supreme Court Clerk at the time of filing the party's brief.
6. **Constitutional Law: Courts: Jurisdiction.** Because a district court's general jurisdiction emanates from the Nebraska Constitution, it cannot be legislatively limited or controlled.
7. **Decedents' Estates: Actions: Equity: Courts: Jurisdiction.** In common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
8. **Actions: Pleadings.** The allegations of a petition establish the character of a cause of action and the remedy or relief it seeks.

Appeal from the District Court for Madison County: DARVID D. QUIST, Judge. Affirmed.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellant.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

David H. Ptak brought the present action in the district court for Madison County to recover amounts improperly distributed to Leota Swanson from the estate of Wilma L. Pritchard. The district court dismissed the action for lack of subject matter jurisdiction. Ptak appealed, and we granted Ptak's motion to bypass the Nebraska Court of Appeals.

## BACKGROUND

The following facts are taken from our opinion in *Swanson v. Ptak*, 268 Neb. 265, 266-67, 682 N.W.2d 225, 228-29 (2004):

> 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.

Ptak's claim against Swanson, which was filed in the district court, was dismissed by the district court for lack of subject matter jurisdiction. In dismissing the case, the district court found that the recovery of a distribution erroneously made by Ptak was related to the decedent's estate and was therefore within the exclusive jurisdiction of the county court pursuant to Neb. Rev. Stat. §§ 24-517(1) (Cum. Supp. 2002) and 30-2211 (Reissue 1995). The district court also found that Neb. Const. art. V, § 9, grants both chancery and common-law jurisdiction to the district court, but does not grant the district court probate jurisdiction. Ptak appealed the dismissal of his claim, and we granted his motion to bypass the Court of Appeals.

## ASSIGNMENTS OF ERROR

Ptak generally asserts that the district court erred in dismissing his claim for lack of subject matter jurisdiction. Ptak specifically asserts that the district court has concurrent jurisdiction with the county court. Ptak also asserts that §§ 24-517(1) and 30-2211 are unconstitutional insofar as they purport to limit the chancery or common-law jurisdiction of the district court under

Neb. Const. art. V, § 9, and to the extent that the application of these statutes would eliminate a litigant's right to a 12-person jury under Neb. Const. art. I, § 6.

## 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. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005).

[2,3] Subject matter jurisdiction is a question of law for the court. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

[4] Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine. *Schweitzer v. American Nat. Red Cross, supra.*

## ANALYSIS

### CONSTITUTIONAL QUESTION

We first address Ptak's claims that §§ 24-517(1) and 30-2211 are unconstitutional. Before doing so, however, we must determine whether Ptak has satisfied the procedural prerequisites for appellate review of his constitutional claims.

[5] Neb. Ct. R. Prac. 9E (rev. 2001) requires that a party presenting a case involving the constitutionality of a statute must file and serve notice with the Supreme Court Clerk at the time of filing the party's brief. *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005). Rule 9E also provides that if the Attorney General is not already a party to the action, a copy of the brief assigning unconstitutionality must be served on the Attorney General within 5 days of the filing of the brief with the Supreme Court Clerk. A review of the record in this case reveals that Ptak

failed to file a notice of a constitutional question and failed to serve upon the Attorney General, who is not a party to this action, a copy of his brief.

This court has repeatedly held that strict compliance with rule 9E is required for the court to address a constitutional claim. See *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998) (refusing to consider constitutional question where record contained no separate written notice as required by rule 9E); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994) (holding this court will not consider constitutional challenge where appellant failed to strictly comply with rule 9E). See, also, *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003); *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000); *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000); *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995); *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992); *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990).

Because Ptak has failed to comply with the requirements of rule 9E, we decline to address Ptak's constitutional claims on appeal.

### District Court Concurrent Jurisdiction

Ptak also asserts that his petition should not have been dismissed because the district court has concurrent jurisdiction with the county court over cases involving the recovery of money, including those cases arising within the context of a probate proceeding.

Exclusive original jurisdiction over probate matters has been given to the county court by the Nebraska Legislature. Section 24-517 provides in pertinent part: "Each county court shall have the following jurisdiction: (1) Exclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof . . . ." Section 30-2211(a) provides in part: "To the full extent permitted by the Constitution of Nebraska, the [county] court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction

of wills and determination of heirs and successors of decedents, and estates of protected persons." We have stated, however, that the Legislature's grant of exclusive jurisdiction to the county court in matters relating to decedents' estates "is of suspect constitutionality insofar as it relates to matters that would involve either the chancery or common-law jurisdiction of the district courts." *In re Estate of Steppuhn*, 221 Neb. 329, 332, 377 N.W.2d 83, 85 (1985).

[6,7] Neb. Const. art. V, § 9 states: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ." Because a district court's general jurisdiction emanates from the Nebraska Constitution, it cannot be legislatively limited or controlled. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999); *In re Estate of Steppuhn, supra*. Thus, in common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991). See *In re Estate of Steppuhn, supra*.

[8] The allegations of a petition establish the character of a cause of action and the remedy or relief it seeks. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). As we read Ptak's petition, it states a claim for statutory recovery under Neb. Rev. Stat. §§ 30-24,106 and 30-24,107 (Reissue 1995) of the Nebraska Probate Code.

Section 30-24,106 provides that the personal representative may recover assets or their value if their distribution was improper. Section 30-24,107 provides that a distributee of property improperly received is liable to return the property and its income since distribution, or the value of the property as of the date of distribution and its income and gain received by distributee if the distributee does not have the property. These statutes create a duty to return estate assets improperly received and create in the personal representative a right to recover such assets.

Ptak's recovery of estate assets is inextricably tied to the probate of the estate. See § 24-517(1). Therefore, Ptak's right of recovery in the instant case arises within the exclusive original

jurisdiction over probate matters in the county court. We therefore conclude that the district court properly dismissed Ptak's petition for lack of subject matter jurisdiction.

## CONCLUSION

Because Ptak has failed to comply with the requirements of rule 9E, we decline to address his constitutional claims on appeal. With regard to Ptak's assertion that the district court has concurrent jurisdiction with the county court over the instant case, we conclude that jurisdiction over the recovery of the estate assets improperly distributed in this matter lies exclusively with the county court. We therefore affirm the district court's dismissal of Ptak's petition.

AFFIRMED.

GERRARD, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
CHRIS VOICHAHOSKE, APPELLANT.

709 N.W.2d 659

Filed February 10, 2006. No. S-05-132.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** As part of a lawful traffic stop, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
5. ____: ____: ____. A traffic stop investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. The officer may engage in similar routine questioning of passengers in the vehicle to verify information provided by the driver.

6. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference.
7. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
8. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.
9. **Investigative Stops: Motor Vehicles: Probable Cause.** When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively.
10. **Investigative Stops: Motor Vehicles: Probable Cause: Appeal and Error.** An appellate court must consider both the length of the continued detention and the investigative methods employed when determining whether a detention was reasonable in the context of an investigative stop.
11. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.
12. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
13. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
14. **Probable Cause: Words and Phrases.** Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.
15. **Probable Cause.** Probable cause is determined by an objective standard of reasonableness: whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime will be found.
16. **Probable Cause: Motor Vehicles.** A drug detection dog's identification of drugs in luggage or in a car provides probable cause that drugs are present.
17. **Search and Seizure: Probable Cause.** A person's mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.
18. **Search and Seizure: Motor Vehicles: Probable Cause.** Probable cause to search a car does not necessarily justify searching the body of a passenger.
19. **Miranda Rights: Words and Phrases.** Under the *Miranda* rule, a custodial interrogation takes place when questioning is initiated by law enforcement officers after one

has been taken into custody or is otherwise deprived of one's freedom of action in any significant way.

20. **Police Officers and Sheriffs: Arrests.** Neb. Rev. Stat. § 29-215(2)(c)(ii)(C) (Cum. Supp. 2004) does not require that an officer requesting assistance tell the responding officer that he or she fears evidence will be lost; it asks (1) whether the suspect may destroy or conceal evidence of the commission of a crime and (2) whether an officer needs assistance in making an arrest.
21. **Police Officers and Sheriffs: Jurisdiction: Arrests.** Under Neb. Rev. Stat. § 29-215(2)(c) (Cum. Supp. 2004), officers responding to requests for assistance outside their jurisdiction have the same authority as they would in their primary jurisdiction.

Appeal from the District Court for Boone County: MICHAEL OWENS, Judge. Affirmed.

Bradley J. Montag, of Moyer, Moyer, Egley, Fullner & Montag, for appellant.

Jon Bruning, Attorney General, Matthew M. Enenbach, and Michael W. Jensen for appellee.

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

CONNOLLY, J.

Following a routine traffic stop, Trooper James D. Reilly of the Nebraska State Patrol detained the appellant, Chris Voichahoske. After a drug detection dog alerted to the car in which Voichahoske was a passenger, Voichahoske was taken to jail and strip searched by a deputy from a neighboring county. The deputy found a bag of methamphetamine protruding from Voichahoske's rectum. In a bench trial, the Boone County District Court convicted Voichahoske of possessing methamphetamine. Voichahoske appeals his conviction, claiming that the methamphetamine should have been suppressed because his detention and search were illegal and because the searching officer was outside his jurisdiction.

We affirm because (1) Reilly had reasonable suspicion to detain the car and its occupants for further investigation, (2) the detention was reasonable, (3) Reilly had probable cause particularized to Voichahoske that he was concealing drugs on his

person, and (4) the searching officer had jurisdiction under Neb. Rev. Stat. § 29-215(2)(c)(ii)(C) (Cum. Supp. 2004).

## I. BACKGROUND

Around 6:15 p.m. on February 17, 2004, Amy Roan was driving in Boone County, Nebraska, with passengers Voichahoske, Erin Young, and Michael Hall. Suspecting Roan was speeding, Reilly followed her. Before Reilly could turn on his patrol car lights, Roan pulled over into a farmyard. Having clocked her car traveling at 72 m.p.h. in a 60-m.p.h. zone, Reilly decided to conduct a traffic stop and followed them into the farmyard.

Reilly asked Roan for her driver's license, registration, and proof of insurance, and when she said she could not produce them, he asked her to follow him to his patrol car. Roan told Reilly that her name was "Christina Hohn" and that the car belonged to "her cousin, Amy Roan," who was in Iowa. Reilly was familiar with the Roan name, because several weeks earlier, a warrant had been issued for her arrest, and because law enforcement officers "suspected [Roan] of using illegal narcotics." He also asked her about her passengers and travel plans. She said that she did not know the two back seat passengers, but identified the front seat passenger as Voichahoske, who Reilly knew was also suspected of "using illegal narcotics."

According to Roan, she drove from Lindsay, Nebraska, to Albion, Nebraska, to pick up her cousin's child near a hospital; she planned to drop off the back seat passengers by some apartments near the hospital. When Reilly noted that she was not taking a direct route to Albion, she said that the back seat passengers had been looking at a vehicle near Saint Edward, Nebraska, when their ride left them. She also told Reilly that she pulled into the farmyard because it belonged to Voichahoske's relatives and that she needed to get gas money. Later, however, Voichahoske denied that he knew the owners of the farmyard, but he said the driver did.

Reilly then questioned the passengers, while Roan waited in his patrol car. Young was in the back seat on the passenger side, and Hall was in the back seat on the driver's side. Voichahoske told Reilly that they were going to Columbus to get gas money and then were heading back to Albion to drop off Young and

Hall. Hall said they planned to stay with a friend of his there, but could not say whose house he was staying at. Young said the friend lived in Columbus, and Hall corrected her, saying, " 'That's why we're staying in Albion.' "

Reilly also observed what he described as suspicious behavior. He said that while interviewing Roan in his patrol car, he noted that her passengers "continuously moved around" and that at one point, he saw Young lean forward, appearing to shove something under the passenger seat. When questioning the passengers, he noticed that Young appeared "unable to hold still." Young also complained that she had just started her menstrual cycle and "continuously rubbed her vaginal area," which made Reilly suspect that "she might be hiding something there." He suspected that she was on a narcotic.

Reilly then returned to his patrol car, gave Roan a speeding ticket, and asked permission to search Roan, her car, and its contents. When she refused, Reilly called for the Nebraska State Patrol canine unit. But when he learned that its drug dog was not available, he summoned the Nance County, Nebraska, canine unit instead. He told the dispatcher he believed that the Nance County canine unit was working that night and that he knew the Nebraska State Patrol trained the dog. He then told Roan she was being detained. While waiting for the canine unit, Roan explained to Reilly that "she was picking up her cousin's child at the hospital because it had bronchitis, and they were holding the child because they did not want it to get pneumonia." She also told Reilly she would consent to the search if that meant she would not have to wait for the drug dog; Reilly replied that he would wait for the dog to avoid the appearance of coercion.

About 12 minutes after detaining Roan, Sgt. Jeff D. Horn of the Nance County Sheriff's Department arrived. Reilly told Horn about the group's inconsistent stories, said that the stories did not make sense, and asked Horn to run his dog around the car to check for illegal narcotics. Horn asked Reilly to remove the passengers from the car first, but Reilly refused "in case they had narcotics on their person." Horn did as Reilly asked, and the dog alerted to both the passenger-side door and the driver's-side door. The passengers were then removed from the car and handcuffed.

After handcuffing them, Reilly asked Young and Hall for the driver's name. They said that they had just met the driver and that she had told them to say her name was Chrissy or Christina. Suspicious, Reilly questioned Voichahoske again about the driver's name. Voichahoske said that he had just met her that day and that her name was "Chrissy or something like that." Reilly then told Voichahoske that Roan reported earlier that she had known Voichahoske for almost a year. Voichahoske then admitted that Roan's driver's license was in his wallet. Reilly retrieved the license and confirmed that Roan had given him a false name.

Reilly then conducted a "very preliminary search of the vehicle" and asked the Norfolk, Nebraska, dispatcher to have Boone County send additional officers and a tow truck. Deputy Jaromey L. Radford and a Deputy Swanson responded to the dispatch. On arriving, Reilly and Horn informed them that the suspects' stories were "not making sense" and that the drug dog had alerted twice on the car. Reilly and Horn agreed that the occupants of the car needed to be searched, although this exchange was not evident on the videotape. They specifically asked Radford and Swanson to transport and search "the two remaining occupants . . . Hall and . . . Young." The videotape revealed no explicit reference to searching all the occupants, although Reilly did ask the dispatcher to explain "the situation" to the Boone County sheriff's office, to avoid surprise when the suspects arrived.

Before transporting Voichahoske, Horn patted him down and searched his pockets. During the pat-down search, Horn noticed a bulge in Voichahoske's left shoe; he and Reilly agreed that the bulge should be investigated. After the tow truck arrived, Horn and Reilly drove Voichahoske and Roan to the Boone County sheriff's office, dropping them off before taking Roan's car to a garage for processing. Reilly said he could not recall if he specifically gave the Boone County officers instructions to search Voichahoske and Roan, but "[i]t was known that they were to be searched."

Radford drove Hall to the Boone County sheriff's office. At the office, he and a Deputy Maple of Boone County strip searched Voichahoske. During the search, Voichahoske handed over a marijuana pipe hidden in his sock, and when Voichahoske was asked to bend over, the officers noted that a bag of white

powder was protruding from his rectum. The white powder was later identified as methamphetamine. In response to Radford's questioning, Voichahoske admitted that the bag was his and that he believed it contained methamphetamine.

After Reilly and Horn arrived at the garage, they searched Roan's car. Reilly found a clear plastic baggie containing methamphetamine lodged under the back of the front passenger seat between the foam and the springs; he also found a marijuana pipe and a small, blue container containing marijuana under the driver's seat. Horn found a small, brown bottle on the rear driver's side between the seat and the side paneling and a syringe on the floor of the car's hatchback. Horn testified that because of where Voichahoske was seated, Voichahoske did not have access to these items.

After searching the car, Reilly returned to the Boone County sheriff's office; he advised Voichahoske of his *Miranda* rights, and after Voichahoske waived his rights, Voichahoske told him he had picked up his methamphetamine in an old pickup near Fullerton, Nebraska, and that they were heading back to Albion to drop off Young and Hall when stopped. Voichahoske stated that he concealed his methamphetamine while Reilly questioned Roan in the patrol car and that he believed Young and Hall did the same.

The State charged Voichahoske with possessing a controlled substance, methamphetamine. After the Boone County District Court denied Voichahoske's motion to suppress, the court held a bench trial on stipulated facts, preserving Voichahoske's objections to the evidence. The court found Voichahoske guilty, sentencing him to 15 to 36 months' imprisonment.

## II. ASSIGNMENT OF ERROR

Voichahoske assigns, consolidated and rephrased, that the trial court erred by overruling his motion to suppress evidence stemming from his strip search, because his continued detention, arrest, and search were illegal and because the officer conducting the search was outside his primary jurisdiction.

## III. STANDARD OF REVIEW

[1] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable

cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court. See *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005).

[2] When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Caspers Constr. Co. v. Nebraska State Patrol*, 270 Neb. 205, 700 N.W.2d 587 (2005).

## IV. ANALYSIS

First, we address whether Reilly had reasonable suspicion to detain Roan while awaiting the drug dog; second, whether Reilly had probable cause to search and arrest Voichahoske; and third, whether Radford had authority to search Voichahoske in Boone County.

### 1. Continued Detention

Voichahoske argues that Reilly improperly detained Roan and her passengers. Resolving this issue hinges on whether Reilly had reasonable suspicion to believe that criminal activity was occurring.

[3,4] Reilly stopped Roan because she was speeding; a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Verling, supra*; *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). Once stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. See *id.*

[5] The investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. See *id.* Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. *Id.* The officer may engage in similar routine questioning of passengers in the vehicle to verify information provided by the driver. *State v. Verling, supra.*

[6-9] Here, the original purpose of the traffic stop was completed when Reilly issued the warning citation to Roan. See, *State v. Verling, supra*; *State v. Lee, supra*. In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. *Id*. Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. See *State v. Verling, supra*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. See *id*. Reasonable suspicion must be determined on a case-by-case basis. *Id*. When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *Id*.

Before issuing the citation, Reilly had a reasonable, articulable suspicion that criminal activity was occurring. Several factors contribute to that suspicion; some might be insufficient standing alone, but collectively establish reasonable suspicion. First, Roan pulled into the farmyard after Reilly began following her, but before he turned on his lights; this made Reilly suspect that she sought to evade the stop. Also, when Reilly investigated the stop, Roan provided no proof of identification. See *U.S. v. Green*, 52 F.3d 194 (8th Cir. 1995) (determining that lack of identification does not automatically create reasonable suspicion of criminal activity, but that it can contribute).

Roan and her passengers also gave inconsistent explanations for pulling into the farmyard and inconsistent descriptions of their travel plans. See *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003) (determining that individual's inconsistent explanation of reason for being at particular location can contribute to reasonable suspicion). See, also, *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995) (determining that inconsistencies between driver's and passenger's explanations of trip's purpose can contribute to reasonable suspicion). Reilly also testified that he was

suspicious because they were not taking the most direct route to their stated destination.

In addition, Reilly testified that Roan's passengers constantly moved around while he spoke with Roan in his patrol car; at one point, he saw Young lean forward and put something under the seat. See *State v. Gutierrez*, 9 Neb. App. 325, 611 N.W.2d 853 (2000) (determining that observing stopped passenger bend over and hide something can contribute to reasonable suspicion). He also noted that Young continuously rubbed her vaginal area while he questioned her and that she said she needed to use a restroom because she had just started her menstrual cycle. He opined that based on his experience and training, he believed her behavior indicated that she was on a narcotic and that she might be hiding contraband.

Reilly also stated that the Nebraska State Patrol's intelligence officer informed him Roan and Voichahoske were suspected of "using illegal narcotics." But Reilly provided vague information and could not explain what facts premised the suspicion. Moreover, Reilly did not realize Roan had given him a false name until after he detained her. Nonetheless, the totality of the circumstances demonstrates that Reilly had reasonable suspicion Roan was involved in illegal activity beyond that which justified the initial stop, and thus, he could detain her and the passengers while awaiting the drug dog.

[10] Having determined that reasonable suspicion exists supporting continued detention, we consider whether the detention was reasonable in the context of an investigative stop. See *State v. Lee, supra*. We consider both the length of the continued detention and the investigative methods employed. See, *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005); *State v. Lee, supra*. Reilly testified that the drug dog arrived about 15 minutes after ticketing Roan. Reilly called for the Nebraska State Patrol canine unit, but when it was not available, he had to wait for the Nance County canine unit, which he believed was both reliable and available. The record fails to show a lack of diligence on Reilly's part, or any unreasonable delay. And because a canine sniff is not a search under the Fourth Amendment, using the drug dog during the lawful detention did not violate any constitutionally protected right. See, *State v. Verling, supra*;

*State v. Lee, supra*. Thus, the length and method of detention were reasonable.

### 2. Search and Arrest

Voichahoske argues that the "trial court erred in overruling [his] Motion to Suppress Evidence . . . in that the arrest, detention and strip search of the appellant were without probable cause and therefore illegal." Brief for appellant at 15. We liberally interpret his assignment to raise two distinct issues: (1) whether strip searching Voichahoske was reasonable under the Fourth Amendment and (2) whether handcuffing Voichahoske triggered his *Miranda* rights.

#### (a) Probable Cause to Search Voichahoske

[11] The Fourth Amendment provides that the people are "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005).

[12,13] The warrantless search exceptions recognized by this court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001). In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *State v. Roberts, supra*.

The State argues that the drug dog's alert while the passengers were inside the car provides probable cause to search both the car and its passengers. However, as explained later, this statement sweeps too broadly.

[14-16] Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. *Maryland v.*

*Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003). See, also, *State v. Oltjenbruns*, 187 Neb. 694, 193 N.W.2d 744 (1972). Moreover, we determine probable cause by an objective standard of reasonableness: whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime will be found. See *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997). Here, Reilly had probable cause to search the *car* because of the dog's alert. A dog's identification of drugs in luggage or in a car provides probable cause that drugs are present. *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994).

[17,18] But a person's mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. See *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 238 (1979) (holding that search warrant for tavern and its bartender did not permit body searches of all bar's patrons). Specifically, probable cause to search a car does not necessarily justify searching the body of a passenger. *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948).

"Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry v. Ohio*, 392 U.S. 1, 24 25, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Thus,

> [w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

*Ybarra v. Illinois*, 444 U.S. at 91.

We have echoed this standard, saying: "Probable cause to arrest is not some vapor permeating a place, engulfing anyone who happens to be at a site where unlawful conduct may be occurring or may have occurred. Rather, probable cause to arrest is particularized and exists in reference to a specific individual." *State v. Evans*, 223 Neb. 383, 388, 389 N.W.2d 777, 781 (1986).

So we focus on whether Reilly had probable cause sufficiently particularized to Voichahoske.

In *Maryland v. Pringle*, the U.S. Supreme Court considered whether there was probable cause particularized to the defendant, the front seat passenger, when (1) $763 of rolled-up cash was found in the glove box directly in front of him, (2) five plastic baggies of cocaine were hidden within his reach, and (3) all of the car's occupants refused to claim ownership of the money and cocaine. The Court reasoned:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe [the defendant] committed the crime of possession of cocaine, either solely or jointly.

*Maryland v. Pringle*, 540 U.S. 366, 372, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003). The Court also brushed aside the defendant's attempt to characterize the case as one of "guilt-by-association." *Id*. It distinguished *Ybarra* and *Di Re*, pointing out that in *Pringle*, the evidence showed a " 'common enterprise' " among the car's occupants, producing " 'the same interest in concealing the fruits or the evidence of their wrongdoing.' " *Maryland v. Pringle*, 540 U.S. at 373 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999)). The Court stated that the evidence indicated that someone in the car was dealing drugs. This was significant because the Court reasoned that drug dealing is an enterprise not likely to be conducted in front of innocent persons who could testify against those involved. *Maryland v. Pringle, supra*.

Voichahoske, however, argues that the State failed to establish probable cause for his arrest, detention, and strip search because no contraband was linked to him until after the strip search. Voichahoske's argument fails. Like the baggies in *Pringle*, the dog's alert provided probable cause to believe that someone in the car possessed drugs. Also like *Pringle*, Voichahoske is not guilty by association. He actively helped Roan conceal her identity by hiding her driver's license in his wallet and lying to Reilly about her identity. This complicity suggests a common enterprise with the same interest in concealing the evidence of wrongdoing.

Moreover, the officers found no drugs during their preliminary search of the car, despite the drug dog's alert, and the passengers had ample time to conceal evidence. We determine Reilly had probable cause to believe that drugs would be found on Voichahoske.

(b) *Miranda*

Voichahoske argues that he was not informed of his *Miranda* rights until after the strip search. The State responds by arguing that Voichahoske was merely detained for investigation during the strip search and was not formally arrested until after Reilly searched the car. We disagree with the State's contention that Voichahoske was not in custody.

[19] Under the *Miranda* rule, a "custodial interrogation" takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way. See *State v. Veiman*, 249 Neb. 875, 881, 546 N.W.2d 785, 790 (1996). Here, Voichahoske was handcuffed for almost 1½ hours before arriving at the station. And during the strip search, Radford asked Voichahoske if the baggie of white powder was his and if he knew what it was. In response, Voichahoske claimed ownership and admitted it was methamphetamine. Laboratory testing later confirmed that it was methamphetamine. But any error is harmless because the information obtained was cumulative to that legitimately obtained by the search. See *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

3. Radford's Jurisdiction to Search Voichahoske

Voichahoske argues that Radford illegally searched him because Radford was outside his primary jurisdiction when conducting the search and thus had no authority to act. Section 29-215 defines the jurisdiction and powers of law enforcement officers. The pertinent portions of § 29-215 provide:

> (1) A law enforcement officer has the power and authority to enforce the laws of this state and of the political subdivision which employs the law enforcement officer or otherwise perform the functions of that office anywhere within his or her primary jurisdiction.

> (2) *Any law enforcement officer who is within this state, but beyond his or her primary jurisdiction, has the power and authority to enforce the laws of this state . . . or otherwise perform the functions of his or her office, including the authority to arrest and detain suspects, as if enforcing the laws or performing the functions within his or her primary jurisdiction in the following cases:*
>
> . . . .
>
> (c) *Any such law enforcement officer shall have such enforcement and arrest and detention authority when responding to a call in which a local, state, or federal law enforcement officer is in need of assistance. A law enforcement officer in need of assistance shall mean (i) a law enforcement officer whose life is in danger or (ii) a law enforcement officer who needs assistance in making an arrest and the suspect* (A) will not be apprehended unless immediately arrested, (B) may cause injury to himself or herself or others or damage to property unless immediately arrested, or *(C) may destroy or conceal evidence of the commission of a crime*; and
>
> . . . .
>
> (4) For purposes of this section:
>
> . . . .
>
> (b) Primary jurisdiction means the geographic area within the territorial limits of the state or political subdivision which employs the law enforcement officer.

(Emphasis supplied.)

Voichahoske argues first that Radford lacked jurisdiction under § 29-215(2) because "Reilly never told . . . Radford that Voichahoske needed to be searched or they would lose evidence." Brief for appellant at 13. The trial court found that "[a]s contended by the defendant, it does not appear that any of these factors [under § 29-215(2)(c)] are applicable to the facts at hand." Voichahoske's argument initially appears to have traction, but bogs down under further scrutiny.

[20] Voichahoske argues that "Radford testified that . . . Reilly never advised that he was concerned about losing evidence[;] Reilly never told . . . Radford that Voichahoske needed to be searched or they would lose evidence." Brief for appellant

at 13. Voichahoske essentially argues that Reilly never explicitly told Radford that he was concerned that evidence would be lost. But § 29-215(2)(c)(ii)(C) does not call for such specificity. Subsection (2)(c)(ii)(C) does not require that an officer requesting assistance tell the responding officer that he or she fears evidence will be lost. It asks (1) whether the suspect "may destroy *or conceal* evidence of the commission of a crime," § 29-215(2)(c)(ii)(C), and (2) whether an officer "needs assistance in making an arrest," § 29-215(2)(c)(ii). The statute fails to specify whether these questions are answered subjectively—what the requesting officer believed, or objectively—what a reasonable person under the circumstances could believe. But we need not decide this because both standards are met.

(a) Possibility of Destroying or Concealing Evidence

Although Reilly never explicitly told Radford he was concerned about "losing evidence," he did testify that he believed that "anybody in the vehicle could possibly have had narcotics on them." He also asked Horn to pat down Voichahoske at the scene, and in his police report, he described it as a search "for narcotics." Moreover, Reilly testified that he agreed with Horn that the occupants needed to be searched and the videotape reveals that Reilly agreed that the bulge in Voichahoske's shoe needed to be investigated.

Why would Reilly want the occupants searched if not to find concealed evidence? Reilly testified that when he called the dispatcher for assistance, the occupants had already been handcuffed. And the record provides no indication that the occupants threatened his safety. Moreover, if Reilly had not been concerned that the occupants would discard evidence, he and Horn could have driven the four, two to a car. Instead, he opted to wait for separate transportation, so the suspects could not leave contraband in the patrol car and possibly blame their fellow passengers.

Reilly also had an objective reason to believe that Voichahoske was concealing evidence and that given the opportunity, he might destroy it. Reilly already had probable cause to believe Voichahoske was concealing drugs on his person, which, in turn, justified his arrest. See *State v. Dussault*, 193

Neb. 122, 225 N.W.2d 558 (1975) (holding that under Fourth Amendment, standards for determining probable cause for arrest and probable cause for search and seizure are same). Because a search of his person was inevitable, Reilly could reasonably believe Voichahoske would seize the opportunity to destroy or discard the drugs. Thus, the record shows both subjectively and objectively that Voichahoske might conceal or destroy evidence.

(b) Assistance Making Arrest

When probable cause materialized, Reilly was the only officer at the scene with primary jurisdiction. Although the occupants were handcuffed, he had to drive all four of them to the Boone County jail for further processing, search them incident to arrest, and search the car. The occupants outnumbered Reilly, and he could not accomplish all four arrests by himself. Recognizing this, he called his dispatcher to request help. Nance County deputies Radford and Swanson responded to the call. Each of the four officers drove one of the occupants. Swanson drove Voichahoske to the station. Then Radford and Maple, a Boone County deputy, searched Voichahoske, while Reilly and Horn searched the car. To require Reilly to drive each occupant to the station while the Nance County deputies detained the others would be senseless. Although Reilly could have refused assistance from the Nance County deputies and waited for Boone County deputies to arrive, this could pose an unreasonable delay. Moreover, because he requested assistance from Boone County officers but was told that Nance County officers were responding, Reilly could reasonably believe that the Boone County officers could not respond in time. A reasonable person could believe that help was needed to carry out the arrests.

[21] Because Voichahoske might conceal or destroy evidence, and because Reilly needed assistance in making the arrest, we determine that Reilly was "in need of assistance" within the meaning of § 29-215(2)(c). Although Voichahoske argues that Reilly did not explicitly ask for assistance in searching Voichahoske, as before, we do not read the statute as requiring such specificity. Under § 29-215(2)(c), officers responding to requests for assistance outside their jurisdiction have the same authority as they would in their primary jurisdiction. Compare

§ 29-215(1) and (2). It is undisputed that Reilly requested assistance and that Radford responded to that call. Thus, Radford has the same authority in Boone County as he would in Nance County. Because he could have searched Voichahoske incident to arrest in Nance County, it follows that he could also search him incident to arrest in Boone County. Therefore, Radford had authority to administer the strip search under § 29-215.

Voichahoske, however, argues that Maple, as a Boone County deputy, could have conducted the search instead of Radford. The record reflects that both Maple and Radford were in the booking room with Voichahoske during the search, but that Radford told Voichahoske to disrobe. Although Maple could have conducted the search, he had not been at the scene and did not have the details of the stop and arrest. While ideally, Reilly should have conducted the search incident to arrest, it was permissible for Radford to conduct the search under these circumstances.

## V. CONCLUSION

Reilly had reasonable suspicion that a crime was occurring. He was thus justified in detaining Roan and her passengers for further, limited investigation. Moreover, the manner and duration of the detention was reasonable. The drug dog's alert, in combination with Voichahoske's complicity hiding Roan's identity, provided probable cause particularized to Voichahoske that he was concealing drugs on his person. Thus, his arrest, detention, and subsequent search were reasonable under the Fourth Amendment. Finally, because of the risk that he was concealing evidence and might destroy it, and because of Reilly's request for assistance making the arrest, Radford was authorized to search Voichahoske incident to his arrest. Voichahoske's conviction is affirmed.

AFFIRMED.

# STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. THOMAS A. GLEASON, RESPONDENT.

709 N.W.2d 675

Filed February 24, 2006. No. S-05-1330.

Original action. Judgment of disbarment.

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

PER CURIAM.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Thomas A. Gleason. As indicated below, the court accepts respondent's surrender of his license and enters an order of disbarment.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 24, 1975. At all times relevant hereto, respondent was engaged in the private practice of law in Nebraska.

On November 1, 2005, an application for the temporary suspension of respondent from the practice of law was filed by the vice chairperson of the Committee on Inquiry of the Second Disciplinary District. The application stated that two grievances had been filed against respondent and were under investigation by the Counsel for Discipline. The application stated that according to the grievances, respondent had, in effect, misappropriated client funds, in the total amount of approximately $57,000. The application further stated that "[i]t appear[ed] that the respondent was engaging in conduct that, if allowed to continue until final disposition of disciplinary proceedings, will cause serious damage to the public and to the legal profession . . . ."

On November 16, 2005, this court entered an order directing respondent to show cause why his license should not be temporarily suspended. A copy of the show cause order was served on respondent, and respondent filed an affidavit in response to the show cause order. On December 14, this court determined

that respondent had failed to show cause why his license should not be temporarily suspended and ordered respondent's license to practice law in the State of Nebraska temporarily suspended until further order of the court.

On February 3, 2006, 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 contest the truth of the allegations in the grievances. 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; stated in writing that he knowingly does not contest the truth of the allegations in the grievances, which, in summary, allege that he misappropriated approximately $57,000 of his clients' funds; and waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent has stated that he does not contest the truth of the allegations in the grievances to the effect that he misappropriated client funds and that his statement 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. 2004), 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. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

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BORLEY STORAGE AND TRANSFER CO., INC., APPELLANT,
V. WARREN R. WHITTED, JR., APPELLEE.

710 N.W.2d 71

Filed March 3, 2006. No. S-04-708.

1. **Rules of Evidence: Appeal and Error.** A trial court's decision to admit habit evidence based on opinion under Neb. Rev. Stat. § 27-406 (Reissue 1995) is reviewed for an abuse of discretion.
2. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
3. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.
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. **Damages.** Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury.
6. ____. A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts.

7. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
8. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
9. **Rules of Evidence: Words and Phrases.** Relevant evidence, as defined by Neb. Rev. Stat. § 27-401 (Reissue 1995), is that which tends to make the existence of any fact of consequence more or less probable than it would be without the evidence.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

STEPHAN, J.

This legal malpractice action is before this court for the second time. In the first appearance, we determined that the district court erred in entering partial summary judgment in favor of the plaintiff and therefore reversed and vacated the judgment and remanded the cause for further proceedings. *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 657 N.W.2d 911 (2003). Following remand, the cause was tried to a jury and a verdict was returned in favor of the defendant attorney, Warren R. Whitted, Jr. Borley Storage and Transfer Co., Inc. (Borley Storage), the plaintiff below, appeals from the judgment entered on the verdict. We affirm.

## I. BACKGROUND

Borley Storage was a family business operated by Harry Borley and Maxine Borley. On December 10, 1982, Borley Storage entered into an agreement to sell its business to Borley Moving and Storage, Inc. (Borley Moving). Borley Moving was a new entity formed by the longtime manager of Borley Storage, Dennis Bauder, and his wife, Wanda Bauder, who were the sole shareholders of the new corporation. Borley Moving had no assets prior to the sale.

Whitted represented Borley Storage in the seller-financed transaction and prepared all of the documents related to the sale of the business. Pursuant to the terms of the purchase agreement dated December 10, 1982, Borley Moving agreed to pay a purchase price of $250,000, payable in monthly installments and bearing interest at the rate of 12 percent per annum. Payments were to begin on February 1, 1983, and continue through January 1, 1993. The purchase agreement also provided that the Bauders would execute a promissory note for the purchase price. A promissory note dated January 3, 1983, in the amount of $250,000 payable to Borley Storage was executed by Dennis Bauder, by Wanda Bauder, and by Dennis Bauder in his capacity as president of Borley Moving. The note provided that the said parties "jointly and severally" promised to pay the principal amount with interest at 12 percent in 119 monthly installments commencing on February 1, 1983. It further provided that "[i]f the makers' [sic] fail to pay any installment when due, then the entire unpaid principal balance, together with accrued interest, shall at the option of the holder, immediately become due and payable without notice."

Pursuant to the purchase agreement and to provide security for the transaction, Borley Moving granted Borley Storage a security interest in the personal property, rolling stock, and accounts receivable associated with the business. Borley Moving also granted Borley Storage a first deed of trust in certain real property. Whitted prepared and filed a mortgage and a financing statement to perfect the security interests in the personal property and accounts receivable. The financing statement was filed on July 12, 1983. By operation of law, this security interest lapsed on July 12, 1988, 5 years after its filing, because no continuation statement was timely filed.

Borley Moving defaulted on the purchase agreement in 1991, and Borley Storage thereafter attempted to recover by foreclosing on the real estate and recovering the collateral. Borley Moving filed bankruptcy in 1993. The bankruptcy court approved a reorganization plan in 1995, and Borley Storage's claim was valued at $308,000. Approximately $140,000 was secured by the real estate and rolling stock. However, because a

second creditor had filed a financing statement with respect to the personal property and Borley Storage failed to file a continuation statement prior to the expiration of the 5-year period, Borley Storage lost its priority with respect to the personal property and accounts receivable. Instead, the second creditor received approximately $64,000 based on its secured interest. Borley Storage never sought recovery from the Bauders on the promissory note.

In this malpractice action, Borley Storage alleged that Whitted negligently failed to file or advise its officers of the need to file the continuation statement necessary to preserve the priority of its security interest in the personal property and accounts receivable associated with the business, thus depriving Borley Storage of security valued at $106,000. Whitted denied that he was negligent, and he alleged as an affirmative defense that Borley Storage failed to mitigate its claimed damages. After trial, a jury entered a verdict in favor of Whitted. Following entry of judgment on the jury verdict and denial of its motion seeking alternative forms of postjudgment relief, Borley Storage perfected this timely appeal. We moved the appeal to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

Additional facts relevant to the analysis are included therein.

## II. ASSIGNMENTS OF ERROR

Borley Storage assigns, restated, that the district court erred in (1) instructing the jury that any failure to mitigate damages was a complete bar to its recovery; (2) failing to give certain tendered jury instructions; (3) failing to direct a verdict on the issue of mitigation of damages; (4) instructing the jury that the Bauders were, as a matter of law, personally liable on the promissory note; (5) instructing the jury that the failure to file a continuation statement did not relieve the Bauders of their obligation on the promissory note; (6) overruling its foundational objection to Whitted's testimony regarding his habit or routine with respect to representing sellers of businesses; (7) receiving Dennis Bauder's personal financial statements over objection, and (8) overruling its motion to set aside the verdict

or judgment, motion for new trial, and motion for judgment notwithstanding the verdict.

## III. STANDARD OF REVIEW

[1] A trial court's decision to admit habit evidence based on opinion under Neb. Rev. Stat. § 27-406 (Reissue 1995) is reviewed for an abuse of discretion. See *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d 397 (2000).

[2] In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003); *Nauenburg v. Lewis*, 265 Neb. 89, 655 N.W.2d 19 (2003).

## IV. ANALYSIS

### 1. Comakers' Liability on Promissory Note

Several of the issues presented in this appeal relate to the undisputed fact that Borley Storage did not make a claim against the Bauders on the promissory note which the Bauders executed personally in connection with their purchase of the business. Borley Storage argues that any such claim would have been defeated by an impairment of collateral defense and that, in any event, the Bauders' potential liability on the note was not relevant to Borley Storage's claim against Whitted. Borley Storage thus argues that the district court erred in receiving evidence on and instructing the jury about the promissory note and its relationship to Whitted's mitigation of damages defense.

#### (a) Impairment of Collateral

Over the objection of Borley Storage, the district court instructed the jury as follows:

> The Court has determined that as a matter of law, Dennis Bauder and Wanda Bauder are co-makers of a promissory note and as such they are jointly and serverly [sic] liable to satisfy the indebtedness created by the promissory note.
>
> The Court has futher [sic] determined as a matter of law, that the failure to file the continuation statement, did not

> relieve Dennis Bauder and Wanda Bauder of this obligation to pay the indebtedness created by the promissory note.

Borley Storage argues that the failure to file a continuation statement preserving its security interest relieved the Bauders of their personal liability on the note. This argument is based upon Neb. U.C.C. § 3-606(1) (Reissue 1980), in effect in Nebraska at the time of the sale, which provided: "The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse."

Generally, this provision of the Uniform Commercial Code has been interpreted to discharge only the obligations of those parties who sign a negotiable instrument in the capacity of a surety. See, generally, Annot., 61 A.L.R. 5th 525 (1998); 21 Shepard's Causes of Action 145, § 23 (1990). This is because § 3-606 is generally regarded as a protection for a surety's right of subrogation. See 61 A.L.R. 5th, *supra*. However, a minority of jurisdictions take the position that all parties to a negotiable instrument, including nonaccommodating makers and comakers, can avail themselves of the defense of discharge. See, *Crimmins v. Lowry*, 691 S.W.2d 582 (Tex. 1985); *Bishop v. United Missouri Bank of Carthage*, 647 S.W.2d 625 (Mo. App. 1983); *Southwest Florida Production v. Schirow*, 388 So. 2d 338 (Fla. App. 1980); *Rushton v. U.M.&M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968).

Although this court has not specifically addressed this split in authority, we have implicitly followed the majority view that the impairment of collateral defense is not available to the maker or comaker of a promissory note. In *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 419, 520 N.W.2d 189, 194 (1994), we rejected a claim that a party was entitled to assert "the special suretyship defenses set forth in Neb. U.C.C. § 3-606" based in part upon our prior determination that the party "was a principal obligor on the note and not an accommodation party." See, also, *First State Bank v. Peterson*, 205 Neb. 814, 816-17, 290 N.W.2d 634, 635 (1980) (holding that under § 3-606, "a guarantor who is a party to the instrument is discharged by an unjustifiable impairment of collateral" and that under "a general rule of

suretyship," a surety is "discharged only pro tanto by any wrongful loss or release of security"). Moreover, the official comment to former § 3-606 specifically stated that the "suretyship defenses here provided" are available "to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so."

Borley Storage argues that the Bauders were accommodation parties and therefore would have been entitled to assert an impairment of collateral defense in any action to enforce their liability on the promissory note. We note that when the Bauders executed the note in 1983, Neb. U.C.C. § 3-415 (Reissue 1980) was in effect and defined the contract of an accommodation party with respect to a negotiable instrument. Although provisions relating to accommodation parties are now codified at Neb. U.C.C. § 3-419 (Reissue 2001), we apply the law in effect at the time of execution of the promissory note in determining whether or not the Bauders were accommodation parties.

The question of whether a party is an accommodation maker or a principal obligor on an instrument is a question of intent. *Ashland State Bank v. Elkhorn Racquetball, Inc., supra*; *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989). Section 3-415 defined an accommodation party as "one who signs the instrument in any capacity for the purpose of lending his name to another party to it." We have held that under this definition, an accommodation party is a surety who by lending its name to the maker of the note, in a sense, guarantees that in the event of default by the principal obligor, the accommodation party will be liable. *Marvin E. Jewell & Co., supra*. In examining this issue, we stated:

> The critical question in determining whether someone intended to lend his name to another is whether the alleged accommodation party was required to sign the instrument to enable the alleged principal obligor to obtain credit. Several courts have stated that a major consideration in determining accommodation party status is the fact that the lender refused to make the loan unless the accommodation party was a party to the instrument.

*Id.* at 6, 434 N.W.2d at 535. Evidence of the effect of the transaction is also relevant to the issue of intent, as "[t]he best, if not controlling, evidence of the intent of the parties to an agreement is the parties' interpretation of the agreement as evidenced by their actions in performance of the agreement." *Id.*

Borley Storage relies on *Farmers Loan & Trust Co. v. Letsinger*, 652 N.E.2d 63 (Ind. 1995), in support of its argument that the Bauders were accommodation parties entitled to assert an impairment of collateral defense. In that case, two individuals executed a promissory note reflecting a bank loan in their capacities as officers of a corporation and also in their individual capacities. They also executed separate guaranty agreements. After the corporation declared bankruptcy, the bank initiated an action against the individuals, and the individuals sought to assert an impairment of collateral defense based on allegations that the bank had allowed a security interest to lapse. The trial court and an intermediate court of appeals determined that the individuals were accommodation parties entitled to assert the defense with respect to the promissory note, and this determination was not challenged in the appeal to the Indiana Supreme Court. Rather, the opinion of that court focused solely on the issue of whether, under Indiana common law, a party executing a guaranty agreement may assert an impairment of collateral defense. Thus, the opinion provides no reasoning or detailed factual basis for the determination that the individuals signed the note as accommodation parties, and we do not find it persuasive on that issue in this case.

Instead, we look to the record in this case, beginning with documents drawn in connection with the sale of the business. The purchase agreement recites: "The purchase price shall be represented by a promissory note executed by Buyers, Dennis Bauder and Wanda Bauder, husband and wife." The promissory note was signed first by Dennis Bauder, then by Wanda Bauder, and finally by Dennis Bauder in his capacity as president of Borley Moving. These parties are referred to collectively in the note as "makers." In his deposition testimony received at trial, Harry Borley agreed that the Bauders signed as makers of the note. Whitted testified that the parties' agreement was for the Bauders to be personally liable on the note, that the Bauders

signed as comakers, and that the purpose of the note was to make the Bauders jointly and severally liable for Borley Moving's obligations. There is no evidence that the Bauders would have had any right of recourse against Borley Moving if they had paid the note personally. As a result of the sale, all of the assets of Borley Storage were transferred to Borley Moving. The Bauders were the sole shareholders of Borley Moving, which had no assets prior to the sale. Neither the language of the promissory note nor any extrinsic evidence suggests that the Bauders signed as sureties, guarantors, or in any other form of accommodation status. The only reasonable inference which can be drawn from the record is that the Bauders were principal obligors of the promissory note, not accommodation parties, and thus could not have asserted an impairment of collateral defense to a claim on the note. Accordingly, the district court did not err in determining as a matter of law that the Bauders were personally liable on the note notwithstanding the failure to file a continuation statement, and in so instructing the jury.

(b) Mitigation of Damages

Borley Storage contends that the district court erred in receiving certain evidence on, and instructing the jury with respect to, the affirmative defense of mitigation of damages. Borley Storage argues that as a secured creditor, it had a right to choose whether to sue on the promissory note or proceed against the collateral. See *Ceres Fertilizer, Inc. v. Beekman*, 209 Neb. 447, 308 N.W.2d 347 (1981). Borley Storage contends that it "clearly elected to recover its collateral, and did not then, nor has it since, ever sought a dollar judgment against any maker of the note." Brief for appellant at 15. It characterizes the instant action for attorney malpractice as "merely an extension" of its efforts to recover the value of its collateral and argues that Whitted, who is alleged to have caused the loss of collateral, should not be permitted "to dictate the manner in which the secured creditor seeks to recover its losses upon default." Brief for appellant at 16.

[3] However, this is not a proceeding to enforce a creditor's remedy under the Uniform Commercial Code. Rather, it is a legal malpractice action governed by principles of tort law. In civil legal malpractice actions, a plaintiff alleging attorney negligence

must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

We examined these elements in the context of a claim that an attorney negligently failed to obtain security for a debt owed to his client in *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987). In that case, the client sued the attorney for the unpaid balance of a loan, alleging that the attorney negligently failed to obtain personal guaranties from shareholders of the debtor corporation. The client recovered a judgment against the attorney, but appealed on the ground that the judgment did not include accrued interest. The attorney cross-appealed, assigning error in the refusal of the trial court to instruct on contributory negligence and failure to mitigate damages. This court did not reach the mitigation of damages issue because it concluded under the plain error doctrine that there was a failure of proof with respect to proximate cause. We reasoned that even if a jury could have concluded that the attorney negligently failed to obtain the guaranties, the client was not automatically entitled to the unpaid principal and interest on the loan, but, rather, was required to present evidence that the failure to obtain the guaranties proximately caused the loss. We concluded that there was a failure of proof necessitating reversal with directions to dismiss because there was no evidence that obtaining the shareholders' guaranties would have prevented the loss.

Applying these principles to the instant case, it is clear that the lapse of the security interest in 1988 did not automatically result in any damage to Borley Storage. Had the Bauders, as comakers, made timely payments on the note, the lapse of the security interest would have been of no consequence. See *Widemshek v. Fale*, 17 Wis. 2d 337, 117 N.W.2d 275 (1962) (holding no actual damage resulted from attorney's failure to obtain first mortgage to secure indebtedness where client recovered full amount of indebtedness). The loss of the security interest deprived Borley Storage of one of its remedies in the event of default by Borley Moving, but it did not extinguish the alternative remedy of enforcing the Bauders' personal liability on the

note. With this background, we turn to the specific assignments of error pertaining to mitigation of damages.

*(i) Jury Instructions*

Borley Storage assigns error with respect to two jury instructions given by the court over Borley Storage's objection. Instruction No. 2 provided in relevant part:

> In the affirmative defense that the Plaintiff failed to mitigate its damages, the burden is upon the Defendant to prove, by the greater weight of the evidence, each and all of the following:
>
> a) That the Plaintiff failed to take reasonable steps to minimize its damages;
>
> b) That the Plaintiff's damage occurred as a result of its failure to take reasonable steps to minimize its damages.

The same instruction then stated, "If the Defendant has met his burden of proof that the Plaintiff failed to take reasonable steps to minimize its damages, then your verdict must be for the Defendant. If the Defendant has not met its burden of proof, you must disregard the affirmative defenses."

Instruction No. 15 further provided:

> If you assess damages, then you must consider the Defendant's claim that the Plaintiff failed to take reasonable steps to minimize its damages by pursuing Dennis Bauder and/or Wanda Bauder co-makers of the promissory note. The Defendant is not liable for any damages that could have been prevented if the Plaintiff had done so. The Defendant has the burden of proving that the Plaintiff failed to take reasonable steps to minimize its damages.

Borley Storage advances two reasons why the trial court erred in giving these instructions. First, it contends that the instructions should not have been given because it had no obligation to pursue its remedy against the Bauders in order to mitigate the damages sought from Whitted. Second, Borley Storage argues that instruction No. 2 conveyed the incorrect notion that failure to mitigate was an absolute defense.

[4] As noted above, whether and to what extent Borley Storage could have recovered the indebtedness by proceeding against the Bauders on the promissory note was relevant to the determination of what loss, if any, Borley Storage sustained as a result of the

lapsed security interest attributed to the alleged malpractice. While this could be viewed as a question of causation, it is clear from the record that the parties and the trial court considered this issue as being within the affirmative defense of mitigation of damages. As a general rule, an appellate court disposes of a case on the theory presented in the district court. *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004); *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002). We do so here.

[5,6] Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury. See, *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988); *Welsh v. Anderson*, 228 Neb. 79, 421 N.W.2d 426 (1988). A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts. *Gottsch Feeding Corp v. Red Cloud Cattle Co., supra*. A plaintiff's duty to mitigate damages arises only after a defendant's negligence. *Welsh v. Anderson, supra*.

[7] The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004); *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). Instruction No. 15 given by the district court is taken nearly verbatim from NJI2d Civ. 4.70 and is a correct statement of the law. Borley Storage alleged that Whitted negligently failed to take steps to prevent the security interest from lapsing in 1988 and that it discovered the facts on which its claim is based in October 1991, several months after Borley Moving had defaulted. Thereafter, Borley Storage made no attempt to enforce the Bauders' obligation on the promissory note. These facts were sufficient to warrant the giving of instruction No. 15.

Instruction No. 2, which consisted of the statement of the case, outlined the claims and defenses asserted by the parties and instructed the jury that if Whitted met his burden of proof with respect to his mitigation of damages defense, "then your

verdict must be for the Defendant." Read in isolation, there is tension between this statement and the rule that a plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts. See *Gottsch Feeding Corp. v. Red Cloud Cattle Co., supra*. However, in reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003); *Nauenburg v. Lewis*, 265 Neb. 89, 655 N.W.2d 19 (2003). Read together, instructions Nos. 2 and 15 clearly inform the jury that it could find Whitted liable only for those damages which could not have been avoided by reasonable steps to mitigate. We conclude that the district court did not err in giving these instructions.

[8] Although Borley Storage assigns that the district court erred in refusing to give certain of its tendered jury instructions, its brief includes no argument of this issue. Errors that are assigned but not argued will not be addressed by an appellate court. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005); *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005).

*(ii) Financial Statements*

Borley Storage next assigns error with respect to the receipt into evidence of two financial statements signed by Dennis Bauder reflecting his assets and liabilities in 1990 and 1991. Borley Storage objected to the exhibits on grounds of hearsay, foundation, relevance, and probative value outweighed by unfair prejudice. Foundational requirements with respect to authenticity are satisfied because Dennis Bauder identified both documents and testified that by signing them in connection with a loan transaction, he certified the accuracy of the information which they contained.

[9] Relevant evidence, as defined by Neb. Rev. Stat. § 27-401 (Reissue 1995), is that which tends to make the existence of any fact of consequence more or less probable than it would be

without the evidence. *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999). Here, the Bauders' financial ability to satisfy a judgment on the promissory note was relevant to the issue of whether it would have been reasonable for Borley Storage to pursue such a claim in mitigation of its damages. Borley Storage contends that any probative value of the financial statements was outweighed by the danger of unfair prejudice in that there was no showing of the methodology used for valuing Dennis Bauder's assets and liabilities, and thus the exhibits should have been excluded under Neb. Rev. Stat. § 27-403 (Reissue 1995). We conclude that this argument goes to the weight of the evidence and that the district court did not abuse its discretion in declining to exclude the financial statements under § 27-403.

Finally, Borley Storage argues that the financial statements should have been excluded as hearsay, in that they constituted out-of-court statements by Dennis Bauder to prove his net worth. Prior to receipt of the financial statements, Dennis Bauder testified at length concerning his financial condition at various times, including those periods covered by the financial statements. Thus, even if the financial statements constituted inadmissible hearsay, their admission would be harmless error because their content was established by other relevant evidence properly admitted. See *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

*(iii) Motion for Directed Verdict*

Borley Storage contends that the district court erred in overruling its motion for directed verdict on the issue of mitigation of damages made at the close of the evidence. In denying the motion, the district court determined that "the defense has presented sufficient evidence to have that issue go to the jury." For the reasons discussed above, we find no error in that determination.

2. Evidence of Habit and Custom

Whitted testified that he did not have a specific recollection of informing either Harry Borley or Maxine Borley of the need to file a continuation statement within 5 years of filing the original

financing statement. Over an objection that he lacked personal knowledge, Whitted was permitted to testify as to his habit and custom in advising parties in seller-financed transactions. Borley Storage contends that the district court erred in receiving this testimony over its objection.

The issue presented by this assignment of error is governed by § 27-406, which provides:

> (1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
>
> (2) Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Although this court has not interpreted or applied this rule, the Nebraska Court of Appeals did so in *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d 397 (2000). In that case, the Court of Appeals examined whether a medical doctor offered sufficient foundation to support his testimony in a malpractice action as to his regular practice and routine. At the outset, the court noted that its analysis was "limited to situations where a party attempts to prove habit by way of opinion rather than by specific instances of conduct," because there was no record made of the doctor's habit based on specific conduct in specific similar situations. *Id.* at 167, 609 N.W.2d at 403. The court further noted the "precise contours of how frequently and consistently a behavior must occur to rise to the level of habit cannot be easily defined or formulated," and thus concluded that admissibility depends on the trial judge's evaluation of the particular facts of the case. *Id.* Thus, the trial court's decision to admit habit evidence based on opinion will be reviewed for an abuse of discretion. *Id.*

In *Hoffart*, the doctor testified that he regularly saw 140 patients per week for 15 years. He stated that during the relevant time period, he had a policy of advising his patients of mammogram failure rates and he generally told them a mammogram would be "'10 to 15 percent not accurate.'" *Id.* at 169, 609

N.W.2d at 404. Although the doctor could not specifically remember advising the patient at issue of the mammogram failure rates, it was his opinion that he would have informed her because it was his regular practice to do so. The Court of Appeals concluded that although the foundation for this opinion "was not thoroughly or artfully presented," the trial court did not abuse its discretion in finding it to be admissible. *Id.* at 170, 609 N.W.2d at 405. The court noted that "[t]he lack of detail concerning regularity (which involves frequency and consistency), specificity, and involuntary response, which are the hallmarks of proof of habit by specific instances rather than by opinion, does not render the opinion evidence inadmissible." *Id.* Rather, the court found that the absence of detail went to the weight which the fact finder would place on such evidence.

In the instant case, Whitted testified that he drafted all of the documents for the sale of Borley Storage. He stated that he had a procedure or checklist he followed in seller-financed transactions like that in which he represented Borley Storage. He stated that the documents involved in such transactions are generally the same. In addition, Whitted testified:

> Generally in a seller-financed transaction I would go through the documents with the client. And in going through the documents with the client, I would tell them of the effect of the document. For example, I would tell them that the stock pledge entitled to [sic] them to basically enforce the stock pledge and irrevocable stock power and take back the stock. I would have told them what — that the security interest in the personal property entitled them to repossess the personal property or to sell the personal property for satisfaction of the debt. I would tell them that it was perfected by virtue of filing with the Secretary of State, and I would tell them that the financing statement was good for a period of time and subject to later continuation.

Whitted stated that with respect to the Borley Storage sale, he "would have advised" that the financing statement needed to be continued after 5 years because that was his "standard operating procedure."

We agree with the analytical principles applied by the Court of Appeals in *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d

397 (2000), and conclude that the district court did not abuse its discretion in permitting this testimony. As in *Hoffart*, this case focuses on a professional service rendered years prior to testimony in a malpractice action. In *Hoffart*, the court recognized the practical reality that "a doctor cannot be expected to specifically recall the advice or explanation he or she gives to each and every patient he or she sees or treats" and that thus, "evidence of habit may be the only vehicle available for a doctor to prove that he or she acted in a particular way on a particular occasion" and is therefore "highly relevant." 9 Neb. App. at 168, 609 N.W.2d at 404. The same reality exists with respect to advice which is routinely given by a lawyer to a client in particular circumstances. Whitted testified that he has practiced law in Nebraska since 1974, focusing his practice on real estate and corporate transactional law, including the sale of businesses of all sizes. Although Borley Storage argues that Whitted did not provide a specific number of transactions in which he had been professionally involved or the details of any specific transaction, we conclude that this goes to the weight to be given to his testimony and not to its admissibility.

## V. DENIAL OF POSTTRIAL MOTIONS

Borley Storage assigns error with respect to the district court's denial of its posttrial motions seeking, in the alternative, the setting aside of the verdict and entry of judgment notwithstanding the verdict or for a new trial. Its argument with respect to this assignment is based upon claimed error in the submission of the mitigation of damages defense and the admission of Whitted's testimony regarding habit and custom. For the reasons discussed above, we conclude that the district court did not err in denying the posttrial motions.

## VI. CONCLUSION

For the reasons discussed, we conclude that there was no reversible error, and the judgment of the district court entered upon the jury verdict in favor of Whitted should therefore be affirmed.

AFFIRMED.

CONNOLLY, J., not participating.

# Sam Kaplan and Gerald Pankonin, appellants, v. Lori McClurg, director of the Department of Administrative Services of the State of Nebraska, and the Department of Administrative Services of the State of Nebraska, appellees.

710 N.W.2d 96

Filed March 3, 2006. No. S-04-1097.

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. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
3. **Administrative Law: Words and Phrases.** For purposes of the Administrative Procedure Act, a "contested case" is defined as a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.
4. ____: ____. A proceeding becomes a contested case when a hearing is required.
5. **Administrative Law: Due Process: Notice.** When an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings.

Appeal from the District Court for Lancaster County: Paul D. Merritt, Jr., Judge. Appeal dismissed.

Sam Kaplan and Gerald Pankonin, pro se.

Jon Bruning, Attorney General, and Charles E. Lowe for appellees.

Hendry, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Wright, J.

## NATURE OF CASE

Sam Kaplan and Gerald Pankonin petitioned the Department of Administrative Services of the State of Nebraska (DAS) for a declaratory order related to their requests for reclassification of their positions with the state. The petition concerned the definition of certain words and the use and application of certain

agency documents. DAS declined to issue such an order, and the petitioners sought judicial review of that decision. The Lancaster County District Court concluded it lacked subject matter jurisdiction because DAS' refusal was not "a final decision in a contested case." See Neb. Rev. Stat. § 84-917(1) (Reissue 1999). The court dismissed the petition for judicial review, and the petitioners appealed.

## SCOPE OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

[2] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

## FACTS

The petitioners were employed as attorneys by the Department of Health and Human Services Finance and Support. They were part of the state's classified personnel system, which is administered by the director of DAS' state personnel division.

In June 2003, the petitioners submitted requests seeking to be reclassified from attorney III to agency legal counsel I. During the time the reclassification requests were pending, the petitioners filed a petition with DAS seeking a declaratory order under Neb. Rev. Stat. § 84-912.01 (Reissue 1999). The petitioners asked that DAS restrict the criteria that could be used in considering their reclassification requests. They sought a determination that internal guidelines, referred to as "guidance documents," could not be considered in their reclassification review. They also sought a definition of the word "unit" as used in the formal class specification for agency legal counsel I.

On January 29, 2004, the DAS director declined to issue a declaratory order, stating: "[Section] 84-912.01 is generally inapplicable to your inquiry, and . . . your inquiry is beyond the scope

of the subject matter related to that section." However, the director addressed two queries made by the petitioners.

First, the DAS director found that the use of the "guidance document" was appropriate as a supplement to published position criteria. She stated that the document's purpose was to clarify and supplement the requirements for positions and that it did not contradict or supplant the published criteria. In response to the petitioners' claim that the "guidance document" was arbitrary and capricious, the DAS director stated that the document

> provide[d] a greater depth of understanding of the tasks and responsibilities outlined in the criteria; viewing positions in the vacuum of only published criteria would lead to more arbitrary and capricious decisions given the skeletal nature of the criteria. Guidance documents are a vital part of viewing all facts of a position and examining the position in a relative fashion.

Second, the DAS director stated that the definition of a "unit" in the context of the legal services division of the Department of Health and Human Services Finance and Support was correct. The petitioners had argued that the word "unit" as used in the formal class specification for agency legal counsel I should be interpreted to mean the separate "teams" of the legal services division.

In their petition for judicial review, the petitioners claimed that a ruling by DAS on the petition for declaratory order was a necessary and preliminary step that DAS failed to take prior to denying their requests for reclassification. They asserted that DAS' action denied their due process rights and other rights under the Administrative Procedure Act (APA), Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003). They alleged that DAS' decision was arbitrary, capricious, and contrary to the law. They asked that the refusal to issue a declaratory order be set aside and that the matter be remanded to DAS for further consideration of their requests for reclassification.

In their answer, the DAS director and DAS denied that the district court had subject matter jurisdiction to hear the petition for judicial review because DAS' declination did not constitute "a final decision in a 'contested case'" appealable to the court under § 84-917(1).

The district court concluded that it did not have jurisdiction over the matter and dismissed the petition for judicial review. It noted that the petitioners had sought review of DAS' determination that it would not issue a declaratory order pursuant to § 84-912.01 and that this petition for judicial review did not relate to the denial of the petitioners' requests for reclassification. The court opined that the existence of a contested case depended upon whether the petitioners were entitled to a hearing on their petition seeking a declaratory order and whether DAS acted in a quasi-judicial manner. If the petitioners had no right to a hearing, there was no contested case. If DAS did not act in a quasi-judicial manner, there was no right to a hearing and, thus, no contested case. The court found that DAS was not exercising a quasi-judicial function in acting on the petition for a declaratory order, which sought (1) to limit the criteria that could be used in considering the petitioners' reclassification requests and (2) to define the term "unit."

The district court found that DAS had declined to issue a declaratory order because the petition did not seek a declaratory ruling with respect to the applicability of any rule or statute subject to the authority or jurisdiction of DAS. The "guidance document" and class specifications did not fall within the category of "statute, rule, regulation, or order." See § 84-912.01(1). The court dismissed the matter, and the petitioners appealed.

## ASSIGNMENTS OF ERROR

The petitioners' assignments of error can be summarized to allege that the district court erred in failing to find that it had jurisdiction of the matter and in dismissing the petition for judicial review.

## ANALYSIS

Our review is limited to the issue of whether the district court properly concluded that it lacked jurisdiction because the matter was not a contested case under the APA. DAS' declination to reclassify the petitioners' position is not before this court. 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. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

Section 84-912.01 provides in relevant part:

> (1) Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, regulation, or order within the primary jurisdiction of the agency. . . .
>
> . . . .
>
> (4) Within thirty days after receipt of a petition for a declaratory order, an agency shall, in writing:
>
> (a) Issue an order . . . declaring the applicability of the statute, rule, regulation, or order in question to the specified circumstances;
>
> . . . or
>
> (c) Decline to issue a declaratory order, stating the reasons for its action.
>
> . . . .
>
> (6) A declaratory order shall have the same status and binding effect as any other order issued in a contested case. . . .
>
> (7) If an agency has not issued a declaratory order within sixty days after receipt of a petition therefor, the petition shall be deemed to have been denied.

In addition, 10 Neb. Admin. Code, ch. 20, § 008 (1984), states:

> 008.01 Petition – Any interested person may petition for request of the Department to issue a declaratory ruling with respect to the applicability to [a] person, property, or state of facts of any rule or statute subject to the authority or jurisdiction of the Department. . . .
>
> 008.02 Consideration of Petition – The Director shall give consideration to all petitions submitted . . . and shall make the following determinations:
>
> . . . .
>
> 008.02B Whether the ruling, if issued, would terminate the uncertainty or controversy giving rise to the petition; and
>
> . . . .
>
> If the Director finds that the Department does have authority and jurisdiction, and that a ruling could terminate

> the controversy . . . the Director shall, within ninety (90) days of the filing of the petition, set the matter for hearing. If the Director finds that any of the conditions aforementioned do not exist, the matter will not be set for hearing. The Director shall notify petitioner, within thirty (30) days of the filing of the petition, as to whether or not a hearing will be conducted on the req[u]ested ruling, giving reasons in support of [such] decision.

In the present case, the petitioners sought a declaratory order holding (1) that the state personnel division could not use the "guidance document" in evaluating the petitioners' reclassification requests and (2) that the word "unit" as used in the class specifications be given its plain meaning and not be defined as the entire legal services division of the Department of Health and Human Services Finance and Support. DAS declined to issue such an order.

[3,4] The district court concluded it lacked jurisdiction because DAS' decision declining to issue a declaratory order was not a final decision in a contested case. For purposes of the APA, a "[c]ontested case" is defined as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." § 84-901(3). Accord *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998). A proceeding becomes a contested case when a hearing is required. *Id.*

[5] "[W]hen an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings." *Id.* at 484, 577 N.W.2d at 277. Accord *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996). If an agency acts in a quasi-judicial manner, a case may be deemed contested. *Stoneman v. United Neb. Bank, supra*. Generally, the exercise of discretion to grant or deny a license, permit, or other type of application is a quasi-judicial function. *Id.*

In the case at bar, DAS was not asked to determine the legal rights, duties, or privileges of specific parties. Rather, DAS was asked (1) to limit the criteria that could be used in considering the petitioners' reclassification requests and (2) to define the

word "unit" as used in the class specifications. The declaratory order requested from DAS would not grant or deny a license, permit, or other application.

The parties did not petition DAS for a declaratory order "as to the applicability to specified circumstances of a statute, rule, regulation, or order within the primary jurisdiction of the agency." See § 84-912.01(1) and 10 Neb. Admin. Code, ch. 20, § 008.01. Thus, § 84-912.01 did not require a hearing before DAS to decide the issues raised by the petitioners, the petition for a declaratory order did not require DAS to act in a quasi-judicial manner, and the proceeding was not a contested case under the APA.

The district court correctly determined that it lacked jurisdiction. DAS was not exercising a quasi-judicial function, and the declination to issue a declaratory order did not create a contested case under the APA.

## CONCLUSION

The record demonstrates that DAS' decision not to issue a declaratory order did not create a contested case over which the district court had jurisdiction, and the court correctly determined that it lacked jurisdiction over this matter. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003). The district court did not have jurisdiction, and this court also lacks jurisdiction. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

GERRARD, J., not participating.

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DEANN C. STOVER, APPELLANT, V.
COUNTY OF LANCASTER, APPELLEE.

710 N.W.2d 84

Filed March 3, 2006. No. S-04-1108.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing 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. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Attorney Fees: Attorneys' Liens: Notice.** The purpose of the notice requirement of Neb. Rev. Stat. § 7-108 (Reissue 1997) is to protect innocent persons who have no notice or knowledge that an attorney claims a lien on the judgment.
5. ____: ____: ____. When an attorney has given appropriate notice of an attorney's lien under Neb. Rev. Stat. § 7-108 (Reissue 1997), the lien is perfected and attaches to funds in the hands of the adverse party and belonging to the attorney's client.
6. **Attorney Fees: Attorneys' Liens: Liability.** Despite the attachment of an attorney's lien, the adverse party may be relieved from liability on such lien by payment of the judgment into the clerk of the court.
7. **Attorney Fees: Attorneys' Liens: Notice.** When an adverse party pays into the clerk of the district court such sums as will satisfy a judgment awarded against that party, and prior to the payment of such sums into the court, notice is given and an attorney's lien has attached, the district court clerk who has notice of the lien by virtue of its filing has a duty to retain that portion of the deposited funds to which an attorney's lien has attached until the rightful owner of the sums retained can be determined. When the funds cannot be fully paid out, as part of the clerk's duty to manage such funds, the clerk of the district court should notify those entities of whom the clerk is on notice who have claimed an interest in the funds, of the retention of the funds, to effectuate the determination of the rightful owner.

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 reversed, and cause remanded with directions.

Victor E. Covalt III and Mary C. Gaines, of Ballew, Schneider, Covalt, Gaines & Engdahl, P.C., L.L.O., for appellant.

Gary E. Lacey, Lancaster County Attorney, Douglas D. Cyr, and Nathan Evershed, Senior Certified Law Student, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

DeAnn C. Stover, an attorney, appeals from the district court's decision affirming the order of the county court, which had denied her claim brought against Lancaster County, under the

Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2002) (Tort Claims Act). At issue in this appeal is the determination of the duties of the clerk of the district court to preserve funds in a case in which an attorney's lien has been filed. We have not previously commented on the duties of the clerk under the circumstances of this case.

In this case, Stover filed a claim against Lancaster County asserting that the clerk of the district court erred when the clerk paid the entirety of the funds deposited by the judgment debtor to the judgment creditor in disregard of an attorney's lien filed by Stover. The Lancaster County Board of Commissioners denied Stover's claim. In subsequent litigation, the county court ruled in favor of Lancaster County and dismissed Stover's complaint. The district court for Lancaster County concluded the clerk did not owe a duty to Stover and affirmed the county court's decision. Because we conclude that under the facts the district court clerk owed a duty to Stover to preserve the funds, pending resolution of Stover's claimed attorney's lien, we reverse the decision of the district court and remand the cause to the district court with directions to remand to the county court for further proceedings consistent with this opinion.

## STATEMENT OF FACTS

The facts essential to our consideration of the issue raised in this appeal are not in dispute. Arnold Denison hired Stover to represent him as the petitioner in a divorce action against Lori Denison, filed in the district court for Lancaster County and entitled "Denison v. Denison," case No. CI 01-222. On September 25, 2001, judgment in the amount of $5,000 was entered in the Denison case in favor of Arnold and against Lori.

On November 7, 2001, Stover filed a document entitled "Lien" in the Denison case. In the document, Stover claimed a $2,500 "lien for professional services rendered" during her representation of Arnold in the Denison case. A copy of the lien was mailed to all parties, and thus, the clerk and the parties had notice of Stover's attorney's lien.

On April 19, 2002, Lori paid the sum of $5,153.57 into the district court clerk's office in apparent satisfaction of the judgment rendered against her. The parties in the instant case have

stipulated that the clerk paid Arnold the "entire" amount on or about April 23. The clerk did not advise Stover that Lori had paid the judgment into the clerk's office and did not retain any funds relative to Stover's lien. In May 2002, Stover became aware of Lori's payment of the judgment and the subsequent disbursement of the judgment funds by the clerk to Arnold.

On June 17, 2002, Stover submitted a claim to the Lancaster County Board of Commissioners pursuant to the Tort Claims Act. The board held a hearing on Stover's claim on August 13 and denied the claim on August 14.

On January 23, 2003, Stover filed a complaint under the Tort Claims Act in the county court for Lancaster County. In her complaint, Stover alleged, in summary, that the clerk erred when she disbursed the sum paid by Lori to Arnold, in derogation of Stover's claimed attorney's lien. On March 5, Lancaster County filed an answer to Stover's complaint, in summary denying that it was liable to Stover. On January 8, 2004, the case was submitted to the county court on stipulated facts and exhibits. On February 9, the county court ruled in favor of Lancaster County and dismissed Stover's complaint. In its journal entry, the county court stated as follows:

> While I think [Stover] is certainly getting the bad end of this from the government, I feel the statutes in effect do not allow me to award [Stover] the damages requested. There were certain procedures [Stover] could have taken to assure a valid lien. These steps were not taken.

Stover appealed the county court's decision to the district court for Lancaster County. The case came before the district court on June 10, 2004. In an order dated August 26, 2004, the district court affirmed the county court's ruling. In its order, the district court stated the following:

> Stover chose to give notice of her claim to an attorney's lien by filing the document she captioned "Lien" and sending it to her client and opposing counsel. However, filing a notice of the attorney's lien alone is not sufficient to create a right to the money held by the clerk and, thus, a duty to Stover under [Neb. Rev. Stat.] §25-2214.01 [(Reissue 1995)]. To do that the attorney must proceed by way of intervention to obtain a judgement [sic] for her fee. Stover

took no steps to do that at the time she filed her notice of lien or in the five months thereafter.

I agree with Stover that *Myers v. Miller*[, 134 Neb. 824, 279 N.W. 778 (1938),] contains language that suggests the outcome should be otherwise. (In fact, until I read the law for purposes of deciding this case, I thought the outcome would be otherwise. And if I were allowed to make the law rather than follow what I have concluded the law is, I might rule otherwise.)

Stover appeals from the district court's order.

## ASSIGNMENT OF ERROR

On appeal, Stover assigns several errors that we restate as claiming that the district court erred in failing to conclude that the clerk of the district court owed a duty to preserve the judgment funds on deposit so as to be available to satisfy Stover's attorney's lien.

## STANDARDS OF REVIEW

[1-3] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record. See *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). 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. *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002). However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004).

## ANALYSIS

In this appeal, the controlling facts are not in dispute, and we are asked to determine the duty of the district court clerk as it pertained to Stover's claimed attorney's lien. Relevant to our analysis are the attorney's lien statute, Neb. Rev. Stat. § 7-108 (Reissue 1997), and the district court clerk's money and property management statute, Neb. Rev. Stat. § 25-2214.01 (Reissue 1995).

In Nebraska, the statutory provision establishing a lien for an attorney fee is found at § 7-108, and reads as follows:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

The list of responsibilities of the clerk of the district court to manage property and money that come into the clerk's possession is found at § 25-2214.01 and provides in relevant part as follows:

> (1) Whenever any money or other property is received by the clerk of the district court, he or she shall carefully manage it and may, when the money cannot immediately be paid out to its rightful owner, deposit the money in interest-bearing accounts in insured banking or savings institutions.

We note that this case presents this court with its first opportunity to harmonize § 7-108 and its jurisprudence with § 25-2214.01.

As set forth above, on September 25, 2001, a judgment was awarded against Lori in Denison v. Denison, Lancaster County District Court, case No. CI 01-222, in favor of Arnold, Stover's client, in the amount of $5,000. On November 7, Stover filed her attorney's lien in Denison v. Denison in the amount of $2,500, with notice to both parties. Subsequent thereto, on April 19, 2002, Lori apparently satisfied the judgment, by paying into the clerk of the district court the amount of $5,153.57, and the clerk thereafter paid Arnold the "entire" amount.

On appeal, Stover challenges the district court's conclusion that the clerk of the district court owed no duty to Stover under § 25-2214.01. Specifically, Stover asserts that after she filed her attorney's lien under § 7-108, she had asserted an interest to at least a portion of the funds subsequently paid by Lori into the clerk's office, and that pursuant to § 25-2214.01, the district court clerk had a duty to retain possession of funds sufficient to satisfy Stover's lien until such time as the rightful ownership of those

funds could be determined. We agree with Stover that under the facts, the clerk owed a duty to Stover.

[4] Under § 7-108, an attorney has a lien upon "money . . . in the hands of the adverse party" belonging to the attorney's client from the time the attorney gives notice of the lien. We have previously recognized that § 7-108 creates a charging lien and that it " 'is not perfected until notice has been given to the party in possession of the fund.' " *Barber v. Barber*, 207 Neb. 101, 112, 296 N.W.2d 463, 471 (1980) (quoting *Cones v. Brooks*, 60 Neb. 698, 84 N.W. 85 (1900)). We have stated that the purpose of the statute's notice requirement is to "protect innocent [persons] who have no notice or knowledge that an attorney claims a lien on the judgment." *Tuttle v. Wyman*, 149 Neb. 769, 779, 32 N.W.2d 742, 748 (1948). We have further acknowledged that the statute does not mandate any particular form of notice. See, *Barber v. Barber, supra*; *Tuttle v. Wyman, supra*. In the instant case, Stover prepared and served upon the parties in Denison v. Denison a written notice of her claimed attorney's lien, and she filed a copy of her lien in the district court file in Denison v. Denison. Her notice was sufficient.

[5] Because Stover filed her attorney's lien prior to Lori's payment of the funds to the district court clerk, at the time Lori paid the judgment into the court, the lien had been perfected by Stover's notice and had attached to the funds. See, generally, *Kleager v. Schaneman*, 212 Neb. 333, 339, 322 N.W.2d 659, 663 (1982) (discussing attorney's lien "attach[ing]" upon money in hands of adverse party); *Barber v. Barber*, 207 Neb. at 112, 296 N.W.2d at 471 (quoting *Cones v. Brooks, supra*, and noting that lien " 'is not perfected until notice has been given to the party in possession of the fund' "). Notwithstanding perfection of Stover's attorney's lien, under the rulings of this court noted below, Lori, as the adverse party and judgment debtor, was nevertheless permitted to pay the judgment against her into the district court clerk's office to satisfy the judgment and at the same time be relieved from her obligations under Stover's lien.

[6] It is fundamental that "the proper place to pay a judgment by a judgment debtor is to the clerk of the court in which the judgment is obtained." *Myers v. Miller*, 134 Neb. 824, 830, 279

N.W. 778, 781 (1938). In a case involving both an outstanding judgment and an attorney's lien, we have stated:

> We believe, in the absence of fraud or conniving on the part of the judgment debtor against an attorney to defeat his attorney's lien, that such judgment debtor has a right to pay the amount of the judgment to the clerk of the court in which the judgment was rendered, when notice of an attorney's lien has been given to the . . . clerk thereof. To hold otherwise would unnecessarily cause difficulty in the payment of judgments by judgment debtors, especially so in a controversy between the attorney, his client and the court, and unnecessarily work a hardship on a judgment debtor.

*Id.* at 831, 279 N.W. at 781-82. Based on our decision in *Myers*, despite the attachment of an attorney's lien, the adverse party may be relieved from liability on such lien by payment of the judgment into the clerk of the court's office. Therefore, Lori's payment of the judgment against her into the office of the clerk of the district court relieved Lori from her responsibilities with regard to Stover's attorney's lien.

In view of the foregoing, the issue thus arises as to whether, under § 25-2214.01, the district court clerk had a duty to Stover to preserve funds sufficient to satisfy her claimed attorney's lien at the time the clerk transmitted the entire sum Lori had paid into the clerk's office to Arnold. We conclude that the clerk had such a duty, and the district court erred when it concluded to the contrary.

The substance of Stover's complaint was the allegation that the clerk mistakenly paid out funds to which Stover was entitled in some measure pursuant to her attorney's lien. Whether a legal duty in negligence exists is a question of law. *Moglia v. McNeil Co.*, 270 Neb. 241, 700 N.W.2d 608 (2005). By its terms, § 25-2214.01 obligates the clerk of the district court to "carefully manage" money received and to pay out moneys to the "rightful owner." Moreover, the statute anticipates uncertainty as to ownership by requiring the clerk to retain possession of the money and deposit it into an interest-bearing account "when the money cannot immediately be paid out to its rightful owner."

[7] Given our decisions regarding attorneys' liens, and harmonizing §§ 7-108 and 25-2214.01, we conclude that when an

adverse party pays into the clerk of the district court such sums as will satisfy a judgment awarded against that party, and prior to the payment of such sums into the court, notice is given and an attorney's lien has attached, the district court clerk who has notice of the lien by virtue of its filing has a duty to retain that portion of the deposited funds to which an attorney's lien has attached until the "rightful owner" of the sums retained can be determined. Under such circumstances, when the funds cannot be fully paid out, as part of the clerk's duty to "manage" such funds, the clerk of the district court should notify those entities of whom the clerk is on notice who have claimed an interest in the funds, of the retention of the funds, to effectuate the determination of the "rightful owner." § 25-2214.01.

In the instant case, we note that both the county and district courts concluded that the district court clerk had no duty to Stover in the absence of her intervention in Denison v. Denison and reached such conclusion by reliance on decisions of this court discussing equitable intervention by attorneys seeking to enforce attorneys' liens. See, *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980); *Tuttle v. Wyman*, 149 Neb. 769, 32 N.W.2d 742 (1948). See, generally, *Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N.W. 1 (1903); *Reynolds v. Reynolds*, 10 Neb. 574, 7 N.W. 322 (1880). However, given the posture of the instant case, the lower courts misperceived the relevance of those decisions to the resolution of the threshold issue of whether the clerk owed Stover a duty. We have concluded that the clerk had a duty to Stover to retain funds and that the clerk should have notified the parties or individuals claiming an interest in the retained funds. Had that occurred, intervention by Stover at that point to prove entitlement and the amount of her attorney's lien would have been appropriate. See *id*. The lower courts' reliance on the intervention cases was misplaced. See, generally, *Myers v. Miller*, 134 Neb. 824, 830, 279 N.W. 778, 781 (1938) (discussing attorney's lien and noting that in Nebraska, "there are no special statutory provisions relating to procedure to enforce an attorney's lien").

Stover brought this action under the Tort Claims Act, and a negligence action brought under the Tort Claims Act has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages. See *Cerny v.*

*Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001). Stover has alleged that the clerk erred when she distributed funds in which Stover had an interest and that Stover was damaged thereby. The sole issue raised in this appeal concerned the duty of the district court clerk to retain funds until the "rightful owner" was established, and we have concluded that the clerk owed such duty to Stover. Because the county court erroneously determined that the district court clerk did not have a duty, it dismissed Stover's complaint against Lancaster County without consideration of the remaining elements raised by the allegations in the complaint, and the county court's decision was affirmed on appeal by the district court. In view of the foregoing, we reverse the decision of the district court and remand the cause to the district court with directions to remand to the county court to consider the remaining elements of Stover's claim against Lancaster County under the Tort Claims Act. See *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006) (appellate court will not consider issue on appeal that was not passed upon by trial court).

## CONCLUSION

This is a case of first impression. In this case brought under the Tort Claims Act, we conclude that under the language of § 25-2214.01, when an adverse party pays sums into the office of the clerk of the district court to satisfy a judgment, and prior to the payment of such sums, an attorney's lien has attached to such sums, the district court clerk has a duty without regard to whether the attorney has intervened to retain that portion of the funds to which an attorney's lien has attached until the "rightful owner" of the sums can be determined. In such circumstance, the clerk of the district court should notify those entities of whom the clerk is on notice who have claimed an interest in the funds, of the retention of the funds by the clerk, to effectuate the determination of the "rightful owner."

The district court's order concluding that the clerk owed no duty to Stover and affirming dismissal of Stover's complaint was in error. Because the lower courts erroneously ruled that the district court did not have a duty, no determination was made concerning the remaining elements raised by Stover's complaint. Accordingly, we reverse the decision of the district court

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.

WRIGHT, J., participating on briefs.

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NELSON MERZ, APPELLEE, AND DOUGLAS E. MERZ, APPELLANT, V. JOHN SEEBA, APPELLEE.

710 N.W.2d 91

Filed March 3, 2006. No. S-04-1129.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is 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. **Interventions: Time.** A party seeking to intervene must be diligent and not guilty of unreasonable delay after knowledge of the suit.
4. **Interventions: Equity: Laches.** Under equity principles, laches, or unreasonable delay, is a proper reason to deny intervention.
5. **Courts: Equity: Time.** Under equitable principles, courts of equity have inherent power to refuse relief after an inexcusable delay when not to do so would work an injustice.
6. **Laches.** What constitutes laches depends on the circumstances of the case.
7. **Laches: Equity.** Laches does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.

Appeal from the District Court for Richardson County: DANIEL BRYAN, JR., Judge. Affirmed.

J.L. Spray and Reginald S. Kuhn, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

John M. Guthery and Shawn P. Dontigney, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee John Seeba.

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

CONNOLLY, J.

Douglas E. Merz (Douglas) appeals the district court's order denying his motion to intervene and motion for a new trial. In

2004, Douglas sought to intervene in an action filed in 1990. The district court dismissed the intervention action for two reasons: (1) It was not properly revived and (2) equitable principles prevented intervention. Because the 10-year delay in seeking intervention was unreasonable, we affirm.

## BACKGROUND

Nelson Merz (Nelson) filed this action in 1990 against John Seeba seeking an accounting and divestment of stock. Merz held shares in Salem Grain Company, Inc. (Salem), and Seeba was an officer and director of the corporation. According to Nelson's fourth amended petition, Seeba diverted shares and corporate opportunities to himself, harming the other stockholders. The crux of the allegations focused on Seeba's alleged purchase of shares of Salem stock from a bank when the bank had initially offered to sell the stock to Salem. The action remained on the docket for several years, with the court allowing amendments to the petition. The record includes multiple occasions where the court ordered Nelson to show cause why the action should not be dismissed. In 1994, the court ordered that the action be dismissed unless Nelson showed cause within 45 days. The record shows that Nelson did not respond. A docket notation shows that the action was dismissed in 1995, but there is no formal order of dismissal.

Nelson died in 1996, and his estate was closed in 1997. In 2004, Douglas filed a petition in intervention alleging that he was a shareholder in Salem, seeking the same remedies that Nelson sought. The district court denied the intervention. The court first determined that a formal dismissal had never been filed. The court then determined that the case had become dormant and had not been revived within the allowable statutory time, terminating the action. In the alternative, the court denied intervention on equitable principles. The court overruled Douglas' motion for a new trial, and he appeals.

## ASSIGNMENT OF ERROR

Douglas assigns, rephrased and consolidated, that the district court erred by applying the revivor statutes and equity powers to deny his request to intervene.

## STANDARD OF REVIEW

[1,2] Whether a party has the right to intervene in a proceeding is a question of law. *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005). 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.*

## ANALYSIS

Douglas contends that he can intervene as a matter of right because the action was never dismissed and the motion was filed before trial. Because the intervention statute presents intervention as one of "right," he argues that equitable doctrines such as laches cannot apply to prevent intervention. See Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004).

Section 25-328 provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

Nebraska procedure requires that a complaint be filed to intervene. Intervention is governed by the same rules as other pleadings. Neb. Rev. Stat. § 25-330 (Cum. Supp. 2004).

[3] We have previously applied equitable principles to § 25-328 under different circumstances. For example, we have long recognized that when it would be in the interests of justice for a party to intervene after trial has commenced, rules of equity will allow intervention. See *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 115 N.W.2d 796 (1962). In cases involving intervention after trial has commenced, we have stated that a right to intervene should be asserted within a reasonable time. *Lincoln Bonding & Ins. Co. v. Barrett*, 179 Neb. 367, 138

N.W.2d 462 (1965). A party seeking to intervene must be diligent and not guilty of unreasonable delay after knowledge of the suit. *Id.* As a result, parties who would otherwise be granted leave to intervene are denied consideration where they sit by and allow litigation to proceed without seasonably requesting leave to enter the case. *Id.*

Although we recognize that equity may allow intervention after trial has commenced, we have not addressed whether it can deny intervention when trial has not begun but an unreasonable delay occurs. Courts in other jurisdictions, however, have allowed use of equitable principles to deny intervention when a statutory provision would otherwise apply. *In re Yokohama Specie Bank*, 86 Cal. App. 2d 545, 195 P.2d 555 (1948); *Amer States Ins Co v Albin*, 118 Mich. App. 201, 324 N.W.2d 574 (1982).

In *In re Yokohama Specie Bank*, the California Court of Appeal affirmed an order denying intervention. The court discussed the effect of equitable principles on a statutory "right" of intervention. The court noted that the California statute stated that a person "may" intervene with leave of the court. The court held that the statute gave the trial court power to deny intervention. Therefore, there was not an absolute statutory right to intervention. The court then addressed delay as one reason why the intervention was properly denied. The court stated that the evidence showed that the intervenors were guilty of an "unreasonable delay and laches in asserting their claims." *Id.* at 555, 195 P.2d at 561. The court then stated: "'Aside from the statutory limitation upon the time of intervention, it is the general rule that a right to intervene should be asserted within a reasonable time and that the interven[o]r must not be guilty of an unreasonable delay after knowledge of the suit.' . . ." *Id.* 555-56, 195 P.2d at 561. See, also, *Amer States Ins Co, supra* (holding that laches or unreasonable delay is proper reason to deny intervention).

Douglas argues that an unreasonable delay rule does not apply because we have previously stated that when intervention is sought before trial, the intervenor is not required to set forth reasons why he or she did not intervene at an earlier time. See *Pribil v. French*, 179 Neb. 602, 139 N.W.2d 356 (1966). We disagree. In *Pribil*, the court was not presented with the issue whether laches could apply because of an unreasonable delay.

Instead, it was an action brought before trial with no delay involved. Accordingly, *Pribil* is not applicable.

[4] We agree with the California and Michigan courts which have held that under equity principles, laches, or unreasonable delay, is a proper reason to deny intervention. Like the California statute at issue in *In re Yokohama Specie Bank*, § 25-328 provides that a person "may" intervene. To intervene, a party must file a complaint, and the court can deny intervention. § 25-330. Therefore, although the statute uses the title of intervention of "right," it does not provide for an "absolute right" to intervene.

[5-7] Under equitable principles, courts of equity have inherent power to refuse relief after an inexcusable delay when not to do so would work an injustice. *Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). What constitutes laches depends on the circumstances of the case. *Id*. Laches, however, does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another. *Id*.

In the petition to intervene, Douglas, a shareholder in Salem, alleged that he had been a shareholder during all relevant times and was appointed by the corporation in 1986 to act as its agent to negotiate the purchase of stock from the bank. During that time is when Seeba allegedly breached a duty to the corporation by purchasing the stock. So, from the beginning, Douglas was aware of Salem's claim against Seeba. He did not, however, seek to intervene while Nelson was alive, nor did he seek to revive the action after Nelson's death. Instead, he waited 10 years to revive the dormant action by filing a intervention complaint.

Moreover, because the action was treated as dismissed and was not revived after Nelson's death, Seeba could justifiably believe that the action was final; the statute of limitations for a new action for divestiture and an accounting had also run. Therefore, allowing the claim to be revived through intervention would prejudice Seeba. We affirm.

AFFIRMED.

# PAMELA JOANN GRESS, APPELLEE AND CROSS-APPELLANT, V. PATRICK RAYMOND GRESS, APPELLANT AND CROSS-APPELLEE.

710 N.W.2d 318

Filed March 3, 2006. No. S-05-007.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **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.
3. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
4. **Child Custody.** When both parents are found to be fit, the inquiry for the court is the best interests of the children.
5. ____. 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.
6. **Child Support.** Before determining a parent's child support obligation, there must be a determination regarding the monthly incomes of the custodial and noncustodial parents.
7. **Taxation.** As a general rule, the income of a self-employed person can be determined from his or her income tax return.
8. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
9. **Child Support: Taxation.** Income, for the purpose of child support, is not necessarily synonymous with taxable income.
10. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure.
11. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2004), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the

net marital estate between the parties in accordance with the principles contained in § 42-365.

12. ____. Property which one party brings into the marriage is generally excluded from the marital estate.
13. **Divorce: Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding.
14. **Property Division.** Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
15. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
16. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Otoe County: DANIEL BRYAN, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Louie M. Ligouri, of Ligouri Law Office, for appellant.

Stefanie S. Flodman and Steven J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellee.

Gerald M. Stilmock, of Brandt, Horan, Hallstrom, Sedlacek & Stilmock, guardian ad litem.

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

STEPHAN, J.

Patrick Raymond Gress appeals from an order of the district court for Otoe County dissolving his marriage to Pamela Joann Gress. He contests the court's order regarding custody, child and spousal support, property division, and attorney fees. Pamela cross-appeals, arguing that the duration of spousal support was inadequate. We affirm in part, and in part reverse and remand for further proceedings.

## FACTS

The parties were married on July 29, 1988. They had four children during the marriage. The couple's youngest son has Down

syndrome and requires special assistance and therapy. At all times during the marriage, Patrick was a self-employed farmer.

Pamela petitioned for dissolution in September 2003, after which Patrick left the marital home and began to reside with his parents on their adjoining family farm. In November, a temporary order was entered, placing custody of the children with Pamela and appointing counsel to represent the children's interests. Patrick exercised regular visitation at all times. Proceedings on the petition were held September 1 and 10, October 1, November 3, 5, and 19, and December 3, 2004. The parties' 14-year-old daughter testified that she wished to live with Pamela, and the children's counsel urged the court to keep the children together with Pamela. Each party called witnesses who testified to his or her fitness as a parent, and each introduced expert testimony regarding the other's mental health.

On December 15, 2004, the district court entered a decree of dissolution. The court awarded sole custody of the children to Pamela, with rights of visitation to Patrick. Pamela was awarded the marital home subject to its mortgage, and Patrick was awarded the farm property, machinery, and equipment. The marital debts were divided, and Patrick was ordered to pay $1,285 per month for child support, $1,000 per month for spousal support, and attorney fees. Other facts will be discussed in the relevant context.

## ASSIGNMENTS OF ERROR

Patrick assigns, restated, regrouped, and renumbered, that the court erred in (1) awarding sole custody of the minor children to Pamela and in determining Patrick's visitation, (2) its treatment of depreciated farm assets for purposes of calculating income and child support, (3) ordering spousal support for Pamela, (4) determining the property division, (5) ordering Patrick to pay attorney fees, and (6) admitting certain expert testimony. In her cross-appeal, Pamela assigns that the district court erred in ordering that alimony payments be terminated after 5 years.

## STANDARD OF REVIEW

[1] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. See, *Robb v.*

*Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004); *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. See, *Gangwish v. Gangwish, supra*; *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004); *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003).

## ANALYSIS

### Child Custody

[2,3] Patrick first contends that the court erred in awarding custody of the parties' four minor children to Pamela. Alternatively, Patrick contends that the court erred in not ordering that his visitation schedule include Sundays on the weekends the children are not with him. 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. *Robb v. Robb, supra*; *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Id.*

In particular, Patrick argues that there are evidentiary issues surrounding the testimony of Pamela's expert regarding Patrick's mental health and the testimony of Patrick's expert regarding the validity of personality tests taken by Pamela. We need not address the evidentiary issues Patrick raises, however, because there is no indication that the court gave any particular weight to the testimony of either expert. Patrick never alleged that Pamela is an unfit parent, and the trial court expressly found that both Patrick and Pamela are fit parents to have custody of the children.

Our de novo review of the record reveals that there was evidence sufficient to support the court's finding that both parents are fit. Both parents had loving, caring relationships with the children prior to the dissolution action, as witnessed by friends and family. During the 15-month pendency of the action, the record shows that Pamela encouraged relationships between the

children and Patrick and that Patrick did not miss any of his opportunities for visitation.

[4,5] When both parents are found to be fit, the inquiry for the court is the best interests of the children. See, *Robb v. Robb, supra*; *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). 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. Neb. Rev. Stat. § 42-364(2) (Reissue 2004); *Robb v. Robb, supra*; *Marcovitz v. Rogers, supra*.

As noted above, both parents have loving relationships with the children. However, the record reveals that Pamela was the primary caregiver. She was responsible for the children's care from the time they were infants, including bathing the children, purchasing their clothes, doing laundry, cooking the family meals, and taking the children to and from school, activities, and doctor's appointments. Further, the youngest son has Down syndrome and requires special care. Although Patrick is able and willing to care for him, Pamela works only part time outside the home and considers her "vocation in life" to be caring for her children. Thus, Pamela has more flexibility in her schedule than Patrick has when farming. The parties' 14-year-old daughter testified that she wished to live with Pamela because Pamela is the parent that usually helps her with problems and with homework and that her relationship with Patrick is not as good. While in Pamela's sole custody during the pendency of the action, the older children continued to do well in school. Regarding Patrick's contention that he should have Sunday visits on the weekends that he does not have the children, both the daughter and Pamela testified that such an arrangement would not allow the children to spend a complete weekend with Pamela. We conclude that the district court did not abuse its discretion in its custody and visitation order.

## Child Support

[6] Patrick next challenges how the trial court calculated his child support obligation under paragraph D of the Nebraska Child Support Guidelines. Before determining a parent's child support obligation, there must be a determination regarding the monthly incomes of the custodial and noncustodial parents. See, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003). Patrick was a self-employed farmer prior to and during the parties' marriage.

[7] As a general rule, the income of a self-employed person can be determined from his or her income tax return. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000). However, prior to September 1, 2002, paragraph D provided that if a party was self-employed, depreciation claimed on tax returns should be added back to income or loss from the business or farm to arrive at an annualized total monthly income. *Gase v. Gase, supra.*

Effective September 1, 2002, paragraph D was amended to read in relevant part:

> Depreciation calculated on the cost of ordinary and necessary assets may be allowed as a deduction from income of the business or farm to arrive at an annualized total monthly income. After an asset is shown to be ordinary and necessary, depreciation, if allowed by the trial court, shall be calculated by using the "straight-line" method, which allocates cost of an asset equally over its useful duration or life. An asset's life should be determined with reference to the Class-lives and Recovery Periods Table created pursuant to 26 CFR § 1.167(a)-11. A party claiming depreciation shall have the burden of establishing entitlement to its allowance as a deduction.
>
> . . . Any party claiming an allowance of depreciation as a deduction from income shall furnish to the court and the other party copies of a minimum of 5 years' tax returns . . . .

The amended guidelines were in effect when Pamela filed for dissolution in September 2003. In accordance with the requirement of paragraph D, Patrick produced tax returns for the years 1998 through 2003.

Patrick's tax returns showed that his taxable income during those years was determined after deducting for depreciation of

farm machinery and equipment. Patrick's tax preparer testified that the deductions were for ordinary and necessary assets in farm operations. The district court concluded that Patrick met his burden and established that he was entitled to a depreciation deduction under paragraph D. Neither party contests this portion of the court's findings.

After determining that Patrick was entitled to a depreciation deduction, the court expressed some uncertainty about the appropriate application of paragraph D and opined that allowing Patrick to reduce his income by the full amount of his depreciation deductions would "work against the best interests of [the] children." The court adopted Pamela's proposed calculations of Patrick's monthly income, which averaged the income of the years 2000 through 2003 after adding one-half of the depreciation deductions for each year back to the corresponding year's taxable income. Patrick contends that once the district court determined that he was entitled to a depreciation deduction, the court erred in using the income calculation proposed by Pamela. We agree.

[8] This is our first opportunity to review a case involving the proper treatment of depreciation deductions under the September 2002 amendment to paragraph D. Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004); *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

Depreciation as set out in paragraph D is a matter of proving the ordinary and necessary expenses of doing business. Part of that burden is showing the court that the deduction does not represent artificial treatment of assets for the purpose of avoiding child support obligations. Once the burden is met, the appropriate procedure is for a court to use the straight-line depreciation method in calculating the parent's monthly income. Because a monthly income calculation under paragraph D is mathematical in nature, the effect of a depreciation deduction on child support is not a proper question under paragraph D.

The district court in this case determined that Patrick met his burden and established that he was entitled to a depreciation

deduction. The court was then required to calculate Patrick's income using the straight-line method of depreciation without any manipulation of the figures. Patrick's tax preparer testified that Patrick's 1996 through 2003 tax returns were prepared using the declining-balance method of depreciation, but provided the court with straight-line method depreciation figures for the same years. The district court did not compute Patrick's income using the straight-line figures provided by Patrick's tax preparer. Instead, the court adopted Pamela's calculations, which used the 2000 through 2003 declining-balance depreciation figures and which improperly manipulated Patrick's monthly income by adding back one-half of the depreciated amounts. We conclude that the district court erred in its calculation of Patrick's monthly income under paragraph D.

[9,10] Pamela suggests that the court's calculation demonstrates a desire to make a warranted deviation from the guidelines, pointing to Patrick's own evidence that he is able to pay expenses that well exceed his depreciated income. Income, for the purpose of child support, is not necessarily synonymous with taxable income. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000). The Nebraska Child Support Guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure. *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001).

Although what effect depreciation has on child support is not a proper question under paragraph D, once a potential child support obligation has been determined based upon the calculations under paragraph D, paragraph C permits a deviation from the guidelines "whenever the application of the guidelines in an individual case would be unjust or inappropriate." See, *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999). The trial court in this case indicated that it would be contrary to the children's best interests to calculate child support based upon Patrick's depreciated monthly income. We are unable to reach this issue, however, because there is no record of what amount of child support Patrick would be required to pay based upon proper calculation of his depreciated income under paragraph D or why it would not be in the best interests

of the children to order Patrick to pay that amount. Deviations from the guidelines must take into consideration the best interests of the child, and in the event of a deviation, the trial court must state the amount of support that would have been required under the guidelines absent the deviation and include the reason for the deviation in the findings portion of the decree or order, or complete and file worksheet 5 in the court file. *Moore v. Bauer*, 11 Neb. App. 572, 657 N.W.2d 25 (2003).

Accordingly, we reverse the district court's decision ordering Patrick to pay $1,285 per month for child support and remand the matter for further proceedings in conformity with this opinion.

### Spousal Support

Patrick next assigns that the trial court erred in ordering him to pay Pamela $1,000 per month in spousal support; an amount that Patrick argues exceeds his earning capacity. In her cross-appeal, Pamela argues that the district court erred in ordering that the support payments terminate after 5 years.

The Nebraska Child Support Guidelines provide at paragraph M that the guidelines "intend that spousal support be determined from income available to the parties after child support has been established." The guidelines require that Patrick's child support obligations be calculated prior to the calculation of any alimony. See *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). Because we are remanding the matter of child support, we reverse the alimony order and remand the matter for determination after Patrick's child support obligations have been calculated. Accordingly, we need not address Pamela's cross-appeal.

### Property Division

Patrick next assigns that the trial court erred in its property distribution by (1) failing to first separate out nonmarital assets that Patrick brought into the marriage or that belong to Patrick's parents in whole or part and (2) failing to show how it valued the farm machinery. Patrick contends that at the time of the marriage, he owned certain farm machinery and held cash assets in three bank accounts and two investment accounts.

[11,12] Under Neb. Rev. Stat. § 42-365 (Reissue 2004), the equitable division of property is a three-step process. The first

step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). Property which one party brings into the marriage is generally excluded from the marital estate. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

[13] The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding. *Shearer v. Shearer*, 270 Neb. 178, 700 N.W.2d 580 (2005). The record shows that Patrick depleted the cash assets he brought into the marriage for various family expenses during the marriage. As to the farm machinery, Patrick offered evidence that his parents owned all or part of items valued at about $57,000. He also established that at the time of the dissolution proceeding, he had nonmarital personal property worth approximately $19,000, some of which he purchased before the marriage and still owned, and other items claimed as nonmarital by virtue of the traceable trade-in of property purchased before the marriage. Pamela confirmed that Patrick owned farm equipment and other property prior to the marriage, though she did not know its value.

The court's division of property awarded Pamela the marital home valued at approximately $250,000, and a car, personal property, and cash accounts valued at $14,631. She was given responsibility for $26,130 in marital debt, making her portion of the net marital estate $238,501. Under the decree, Patrick's portion of the net marital estate was $241,475.16. The court awarded Patrick marital assets valued at $533,771.46 and $292,296.30 in marital debt. Patrick was awarded all income-producing property, including farmland valued at $97,000 and farm machinery valued at $260,000.

[14] The court did not discuss premarital property or individually list or value each piece of farm machinery in its decree. Even if the court overlooked the value of the nonmarital machinery, as Patrick suggests, the court did not abuse its discretion in distributing the marital property. Although the division of property

is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

Even adjusting the award by deducting the value of the disputed machinery, Patrick's net award would still result in his receipt of at least one-third of the marital property. Further, the court's division was fair and reasonable. Pamela was given custody of the minor children. The parties agreed it would be in the best interests of the children to be able to remain in the marital home with whichever parent was given custody. As a practical matter, the district court awarded the marital home to Pamela and the farm property, machinery, and equipment to Patrick. The marital home is the only significant property awarded to Pamela and is not an income-producing asset. Pamela earns approximately $731 per month. It would be unreasonable to require Pamela to offset any perceived difference in the property distribution by taking out a loan that she can ill afford to service. Accordingly, we find no error in the property distribution.

## Attorney Fees

[15] Finally, Patrick contends that the trial court erred in ordering him to pay $10,000 of Pamela's attorney fees and all fees and costs for representation of the minor children. In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[16] The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005). This action involved a 7-day court trial over a 3-month period. The custody of the four children was a primary issue, and the

court appointed an attorney to represent their interests. Neither party contests the reasonableness of the fees. The court awarded Patrick the only income-producing marital property that existed and opined that Patrick's income capacity will be substantial compared to Pamela's "for a number of years, if not for [the] duration of her lifetime." See *Gangwish v. Gangwish, supra* (ordering husband to pay wife's attorney fees because he was awarded marital property which enabled him to continue to reap substantial income stream). Even so, Patrick was ordered to pay only about one-third of Pamela's attorney fees in addition to the fees for the children's court-appointed counsel. We conclude that the district court did not abuse its discretion in ordering Patrick to pay attorney fees.

## CONCLUSION

We affirm the district court's order awarding sole custody of the minor children to Pamela. We also affirm the court's property division and award of attorney fees. We conclude that the court erred in its calculation of Patrick's monthly income for purposes of child support under paragraph D of the Nebraska Child Support Guidelines. We therefore reverse the court's determination and remand the matter for an appropriate calculation and reasoned child support order. We also remand the matter of alimony for determination following the child support determination.

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

WRIGHT, J., participating on briefs.

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# IN RE GUARDIANSHIP OF SOPHIA M., A MINOR.
# JULIUS M. AND MIRIAM M., APPELLEES, V. NAOMI M., APPELLANT.

710 N.W.2d 312

Filed March 3, 2006. No. S-05-154.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision.

2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Actions: Statutes: Words and Phrases.** Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action. An action is any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.
6. **Actions: Guardians and Conservators.** Proceedings initiated pursuant to Neb. Rev. Stat. § 30-2610 (Reissue 1995), to appoint a guardian, are special proceedings.
7. **Pretrial Procedure: Final Orders: Appeal and Error.** Discovery orders are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is not considered final. However, if the discovery order affects a substantial right and was made in a special proceeding, it is appealable.
8. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
9. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
10. **Juvenile Courts: Parental Rights: Final Orders.** The question whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.
11. **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.

Appeal from the County Court for Lancaster County: JACK B. LINDNER, Judge. Appeal dismissed.

Robert Wm. Chapin, Jr., of Chapin Law Offices, P.C., L.L.O., for appellant.

Kent E. Endacott, of Woods & Aitken, L.L.P., for appellees.

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

GERRARD, J.

## NATURE OF CASE

Julius M. and Miriam M. (the grandparents) filed a petition on June 22, 2004, to be appointed coguardians of their granddaughter, Sophia M., alleging that Naomi M., the grandparents' daughter and Sophia's mother, was in protective custody at a mental health crisis center. The grandparents were appointed temporary coguardians of Sophia on June 22. A final guardianship hearing was scheduled for late January 2005. Prior to the final hearing, the county court, on January 7, 2005, granted the grandparents' request for a mental examination of Naomi and, on the same date, denied Naomi's request for immediate visitation. Naomi appeals from both orders.

## FACTUAL AND PROCEDURAL BACKGROUND

The grandparents filed a petition to be appointed coguardians of Sophia, for the reason that Naomi was in protective custody at a mental health crisis center. The court entered an order appointing the grandparents as temporary coguardians of Sophia, and on June 22, 2004, the grandparents signed an acceptance of the appointment.

Subsequently, the grandparents, as temporary guardians, filed a motion on December 27, 2004, pursuant to Neb. Ct. R. of Discovery 35 (rev. 2001), requesting that the court order Naomi to submit to a mental examination. Naomi filed a motion on December 30, 2004, for immediate visitation. After a hearing on both motions, the court entered an order sustaining the grandparents' motion regarding a mental examination of Naomi. The court also entered an order denying Naomi's request for immediate visitation. The court reasoned:

> The matter relating to visitation has been before the Court on several occasions during the past few months, and at one time during the later part of October significant efforts were made to accomplish weekend visitation by using a qualified professional to monitor the same. Those efforts proved to be unsuccessful and we are now about three

> weeks from the final hearing in the case. Having gone this far without visitation the court finds there is very little to be gained by starting the search for another professionally monitored visitation arrangement as we can have this issue and others resolved in three or four weeks.

Naomi filed the present appeal, challenging the court's disposition of both motions.

## ASSIGNMENTS OF ERROR

Naomi assigns, summarized and restated, that the county court erred in (1) ordering a rule 35 mental examination and instructing that the scope of the examination include any recommendation for treatment by the examining physician, (2) denying Naomi's request for visitation, (3) receiving into evidence an initial assessment for abuse or neglect worksheet at the hearing on the rule 35 and visitation motions, and (4) continuing to exercise jurisdiction over the case during the pending appeal.

## STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

## ANALYSIS

*Orders Compelling Mental Examination and Denying Visitation Were Not Final, Appealable Orders.*

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). 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. *Id.* The orders on appeal in this case did not determine the action and prevent a judgment, nor were they made on summary application in an action after judgment was rendered. Thus, we consider whether the orders were made during a special proceeding and affected a substantial right. See *In re Trust of Rosenberg, supra.*

[5,6] Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action. *In re Guardianship & Conservatorship of Larson, supra.* We have described an action as any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment. *Id.* Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding. *Id.* Proceedings initiated pursuant to Neb. Rev. Stat. § 30-2610 (Reissue 1995), to appoint a guardian, are special proceedings. See *In re Guardianship & Conservatorship of Larson, supra.* In this case, the proceeding during which the court heard the rule 35 and visitation motions was initiated pursuant to the grandparents' request to be appointed coguardians of Sophia and, thus, constitutes a special proceeding.

Having determined that this was a special proceeding, we next consider whether a substantial right was affected. Naomi asserts that "[t]he [m]otions in question clearly affect a substantial right as they require [Naomi] to take an examination, an infringement upon her First Amendment right to liberty, and deny her visitation with her child, an infringement upon her First Amendment right to liberty." Brief for appellant at 9. We note that Naomi offers neither authority nor analysis identifying the "First Amendment right to liberty" she believes to have been affected. The grandparents assert that the rule 35 order concerns discovery matters and, thus, is not appealable. In addition, the grandparents argue that the denial of visitation order was not a final, appealable order because it was merely a temporary order designed to maintain the status quo until the final guardianship hearing was scheduled to occur in late January 2005.

[7] Discovery orders, such as the rule 35 order in this case, are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is not considered final. See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000). However, pursuant to our final order jurisprudence, if the discovery order affects a substantial right and was made in a special proceeding, it is appealable.

[8,9] A substantial right is an essential legal right, not a mere technical right. *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000). A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

In this case, the rule 35 order did not affect a substantial right and, therefore, is not a final, appealable order. The court's order requiring Naomi to submit to a mental examination does not diminish her power to contest any unfavorable results of the examination or defend her capacity to have custody of Sophia in the guardianship proceeding. In fact, at the hearing, Naomi presented her own report of a psychological evaluation completed by a clinical psychologist at the request of Naomi's attorney. The rule 35 order giving the grandparents the opportunity to produce a separate mental evaluation does not prevent Naomi from offering her report in support of her case for custody of Sophia.

In addition, an appeal of the rule 35 order after final judgment provides an adequate remedy to Naomi. Although a mental examination, once ordered and performed, cannot be undone, we are not convinced that any harm caused by waiting to appeal the order until after final judgment is sufficient to warrant an interlocutory appeal. In contrast, allowing an interlocutory appeal in this case promotes significant delay in the guardianship proceedings and the ultimate resolution of Sophia's custody.

Rule 35 offers protection in the form of standards that must be met before an order for a mental examination may be issued. To obtain an order for mental examination, rule 35 requires that the mental condition of a party be in controversy and that the moving party show good cause for ordering the examination. Finally, if warranted, an egregious error made by the court in ordering a

mental examination could be challenged by the aggrieved party in a mandamus action. See *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999). Thus, we conclude that a rule 35 order does not affect a substantial right and, therefore, is not a final, appealable order.

[10] The visitation order is also not a final, appealable order. In the context of juvenile matters, this court has stated:

> "[T]he question . . . whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed."

*In re Interest of Borius H. et al.*, 251 Neb. 397, 401, 558 N.W.2d 31, 34 (1997), quoting *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). Accord, *In re Interest of Daniel W.,* 3 Neb. App. 630, 636, 529 N.W.2d 548, 553-54 (1995), *reversed on other grounds* 249 Neb. 133, 542 N.W.2d 407 (1996); *In re Interest of Zachary W. & Alyssa W.*, 3 Neb. App. 274, 526 N.W.2d 233 (1994). Although this case is a guardianship proceeding, the visitation order concerned the relationship between Naomi and her daughter; thus, we look to juvenile cases for guidance in determining if the denial of visitation in this case affects a substantial right.

Here, the visitation order denied visitation pending the final guardianship hearing, which was scheduled to occur approximately 3 weeks later. The court explained that prior efforts to provide visitation had been unsuccessful and that, with only 3 weeks until the final guardianship hearing and a final resolution of the issue, very little would be gained by attempting to construct another visitation arrangement. Further, since the order effectively denied visitation only until the final guardianship hearing, the length of time that Naomi's relationship with Sophia was to be disturbed was brief, and the order was not a permanent disposition. The fact that Naomi's appeal of the visitation order has delayed the final disposition of the guardianship proceeding is unfortunate but irrelevant in our determination whether the order, when issued, affected a substantial right. The visitation order did not affect a substantial right and is not a final, appealable order.

*Actions Taken by County Court During Pendency of Appeal Are Not Void.*

[11] Naomi argues that any further action on behalf of the county court in this case pending the outcome of this appeal is in error and that any such proceedings are void. The record fails to show that any further action has been taken by the county court. However, to the extent that the county court has acted during the pendency of this appeal, those actions are not void. 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. *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

*Remaining Assignments of Error Need Not Be Resolved.*

Having determined that the orders on appeal are not final, appealable orders, this court lacks jurisdiction to consider this appeal and, thus, declines to address Naomi's remaining assignments of error.

## CONCLUSION

Based on the foregoing reasons, we dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

WRIGHT, J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V.
DANNY L. BALL, APPELLANT.

710 N.W.2d 592

Filed March 3, 2006. No. S-05-175.

1. **Motions to Suppress: Search and Seizure: Appeal and Error.** In considering a trial court's ruling on a motion to suppress evidence obtained by a search, an appellate court first determines whether the search was illegal. If so, the court must determine whether the evidence that the defendant seeks to suppress is sufficiently attenuated from the illegal search.
2. **Motions to Suppress: Appeal and Error.** An appellate court will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are

clearly erroneous. In making this determination, the 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 considers the trial court observed the witnesses testifying in regard to such motions.

3. **Motions to Suppress: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court.
4. **Criminal Law: Confessions: Appeal and Error.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, an appellate court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and, in so doing, will look to the totality of the circumstances.
5. **Motions to Suppress: Search Warrants: Affidavits: Appeal and Error.** A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers it observed the witnesses.
6. **Constitutional Law: Search and Seizure.** Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures.
7. **Search and Seizure: Police Officers and Sheriffs: Evidence: Proof.** If the State shows by a preponderance of the evidence that the police would have obtained the disputed evidence by proper police investigation entirely independent of the illegal investigative conduct, then such evidence is admissible under the inevitable discovery doctrine.
8. **Constitutional Law: Criminal Law: Confessions: Arrests.** Under the Fourth Amendment, a confession obtained by exploitation of an illegal arrest is inadmissible against a criminal defendant unless the confession was an act of free will sufficient to purge the primary taint of the unlawful invasion.
9. **Police Officers and Sheriffs: Arrests: Probable Cause.** A warrantless arrest is valid when the arresting officers have probable cause to arrest the suspect at the moment of the arrest.
10. **Probable Cause: Words and Phrases.** Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.
11. **Police Officers and Sheriffs: Probable Cause: Words and Phrases.** Probable cause merely requires that the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense; it does not demand any showing that this belief be correct or more likely true than false.
12. **Police Officers and Sheriffs: Probable Cause.** Probable cause is evaluated by the collective information of the police engaged in a common investigation.
13. **Police Officers and Sheriffs: Arrests: Probable Cause.** The validity of an arrest hinges on the existence of probable cause, not the officer's knowledge that probable cause exists.

14. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
15. **Constitutional Law: Criminal Law: Right to Counsel.** The Fifth Amendment does not explicitly afford a right to counsel; it provides that no person shall be compelled in any criminal case to be a witness against himself.
16. **Miranda Rights: Right to Counsel.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), provides the right to have counsel present during custodial interrogation.
17. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates that its agents used procedural safeguards that are effective to secure the privilege against self-incrimination.
18. **Miranda Rights: Words and Phrases.** Under the *Miranda* rule, custodial interrogation takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way.
19. **Miranda Rights.** The dispositive factor in determining whether *Miranda* warnings should have been given is whether a reasonable person would have felt free to leave under the circumstances.
20. **Miranda Rights: Right to Counsel: Waiver: Police Officers and Sheriffs.** *Miranda* rights can be waived if the suspect does so knowingly and voluntarily. But once a suspect asserts the *Miranda* right to counsel, interrogation must cease and police may not approach the suspect for further interrogation until counsel is made available.
21. **Confessions: Miranda Rights: Waiver: Police Officers and Sheriffs: Presumptions.** If the police initiate contact with a suspect who has invoked his *Miranda* rights, the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.
22. **Miranda Rights: Right to Counsel.** A suspect cannot invoke *Miranda* rights anticipatorily, before or outside the context of custodial interrogation.
23. **Confessions: Miranda Rights: Waiver: Police Officers and Sheriffs.** When an accused initiates further communication with the police, is informed of his *Miranda* rights, and waives them before further interrogation, the court must determine whether the waiver was knowing and intelligent under the totality of the circumstances.
24. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.
25. ____: ____: ____. The Sixth Amendment right to counsel is triggered at or after the time that judicial proceedings have been initiated whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS II, Judge. Affirmed.

Robert P. Lindemeier, of Ruff, Lindemeier, Gillett & Wadewitz, and Gary J. Krajewski, of Krajewski Law Office, 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.

A jury convicted Danny L. Ball of first degree murder and use of a weapon to commit a felony. Law enforcement officers searched his truck and mobile home; detained him for questioning; and despite his asking for a court-appointed lawyer, interrogated him twice without counsel. Ball ultimately confessed to the crime. Ball moved to suppress his statements and the evidence obtained from searching his truck and mobile home. The trial court admitted everything but his first statement at trial. Ball argues several interrelated issues: (1) Police illegally searched and seized his truck, (2) police arrested him without probable cause, (3) police obtained his confession illegally, and (4) search warrant affidavits for his truck and mobile home relied on illegally obtained evidence.

## I. BACKGROUND

About 1:30 a.m. on October 7, 2003, while in his mobile home, Randy Tomjack was stabbed 59 times. Dying, he called the 911 emergency dispatch service without giving his name or a specific address. A dispatcher sent an ambulance to the subdivision where Tomjack's home was located. The emergency responders, however, had difficulty finding the caller and asked several local residents for help.

Meanwhile, the dispatcher sent Darrick Arndt, a deputy with the Keith County sheriff's office, to the scene. From the dispatcher's information, Arndt thought Tomjack might be the caller. Arndt met the emergency response team and some subdivision residents and guided them to Tomjack's home. Shortly thereafter, Ball arrived in his truck. Before following the emergency team, a resident told Ball that they were on their way to Tomjack's home.

On arriving at the home, Arndt and Earl Schenck, the Keith County sheriff, found Tomjack dead, slumped on the couch and covered in blood. Shortly after the emergency team arrived, Ball joined the crowd at Tomjack's home. While approaching the home, he asked an emergency medical technician if Tomjack was all right. Ball next asked Arndt and Schenck what had happened and asked if he could see Tomjack because he wanted to get cigarettes from him. Schenck told him to leave the scene and if he did not leave, he would be charged with obstructing justice.

When it became apparent Tomjack was dead, Ball became distraught. Because Ball was visibly drunk, Renee Lucero, a resident of the subdivision, offered to drive Ball home in his truck. Lucero testified that Ball was crying and upset, saying he had lost his friend. On the way to his home, Ball suddenly reached over and turned off the truck's ignition. Frustrated, Lucero then pulled over, and she began walking toward the nearby restaurant where Ball worked. Ball passed out in the ditch near the truck, and later his employer picked him up and drove him to the restaurant.

After leaving Tomjack's home, Arndt and Schenck went to the restaurant to speak with Ball. Arndt noticed that Ball had recently showered and had no physical injuries. Ball explained that he showered after he got off work around 10:30 p.m. Also, Schenck testified that while sitting with Ball, Ball said: "[Tomjack] made me so mad because he was lying about all the hours he was getting in this new job, and he bragged about it, and he made me so mad about that. . . . But I didn't want him to die." Schenck also heard Ball sobbing loudly at the restaurant.

Arndt then checked out Ball's truck and mobile home. Arndt said that it was dark and he could not see anything in the truck, but that there was a red liquid substance on the door handle of Ball's home. But testimony about the red liquid on the door handle differed. Arndt testified that he did not think the substance on the mobile home was blood; Gary Eng, a Nebraska State Patrol investigator, stated he could not locate the substance; and Schenck said he never looked at it. But Ball's employer testified without objection that the officers told him that night that they saw blood on the door of Ball's home, and then told him, "Well, we think we have got our suspect."

Between 6 and 6:20 a.m., Tim Arnold, a Nebraska State Patrol investigator, examined the truck for evidence. Arnold stated he saw nothing suspicious from the outside of the truck. After entering the truck, he conducted a warrantless "cursory inspection" to determine whether there were valuables present needing protection. He admitted, however, that he did not follow the State Patrol's inventory policy and that one reason for examining the truck was to look for evidence. He further admitted that once he arrived on the scene, he would not have released the truck to Ball.

While examining the truck, Arnold found what appeared to be blood on the steering wheel cover, on the gearshift knob, near and in the ignition device, and on the driver's-side lap seatbelt. Despite Arnold's testimony on direct examination that he saw nothing suspicious from outside the truck, on redirect, he said that the blood was visible from outside the truck. Arnold then had the truck towed to the State Patrol office in Ogallala, Nebraska, and applied for a search warrant.

Meanwhile, around 6:50 a.m. on October 7, 2003, when Ball tried to leave the restaurant, Arndt detained him by handcuffing him and driving him to the Keith County sheriff's station to await the arrival of Bill Redinger, a Nebraska State Patrol investigator. Despite admitting Ball was in custody, the officers claimed he was not under arrest because they lacked probable cause to arrest him.

Ball and Arndt arrived at the jail at 7:27 a.m. While waiting for Redinger, Ball became impatient and wanted to leave. Despite his demands to leave the station, Ball was "detained" in a small locked room called the "attorneys' room," and all officers who testified agreed he was not "free to leave." Angry about his detention, Ball punched holes in the ceiling tiles of the attorneys' room and had to be moved to a holding cell.

At 7:47 a.m., while waiting for Redinger, Ball told Arndt he wanted a court-appointed attorney. Arndt informed his superior, who called Redinger to pass along that information. Arndt's superior told him that Redinger would interview Ball. Arndt then told Ball that he would have the opportunity for counsel when Redinger arrived. No one informed Ball of his *Miranda* rights, nor did anyone question him while waiting for Redinger.

Redinger testified that he did not recall being told that Ball wanted a court-appointed attorney.

Redinger arrived between 8:10 and 9:15 a.m. Redinger advised Ball of his *Miranda* rights and determined that he was not impaired by alcohol or drugs. After Ball waived his rights, Redinger questioned him about the murder. Redinger tried to get him to admit he was in Tomjack's home that night and that he had stabbed him, but Ball accused Redinger of "making up stories." When Ball invoked his right to counsel, Redinger had him placed in a holding cell and told him he was being held because the officers suspected he had murdered Tomjack.

After 35 to 40 minutes, Ball told the jailer he wanted to speak with Redinger again. Redinger confirmed that Ball asked to speak to him, advised him again of his *Miranda* rights, and then interviewed him again. During the second interview, Ball dictated a confession, Redinger wrote it down, and Ball signed it. Both interviews were videotaped and the videotapes were admitted into evidence. The signed confession was also admitted into evidence.

During the second interview, Ball admitted that he went to Tomjack's mobile home that night wearing a mask, slipped in the back door, and stabbed Tomjack. He said that he left when Tomjack uttered his name. He stated that he then burned his clothes, his shoes, the mask, and the knife in his fireplace. After showering, he went back to Tomjack's to see what kind of damage he had caused. It was then that he ran into the emergency team. Ball was formally booked around 3 p.m. that day, October 7, 2003.

### 1. Issuance of Search Warrants

Eng, the lead investigator, applied for the warrants. He stated that after Redinger's second interview, he believed enough evidence existed to justify arresting Ball. He opined, however, that before the second interview, there was not probable cause to arrest. Using Ball's interview statements, he drafted search warrant affidavits for Ball's truck and home. Arnold executed the search warrant for the truck at 4 p.m. that afternoon. He photographed the red stains and swabbed them; the stains later tested positive for blood.

Eng executed the search warrant for Ball's home around 2:30 p.m. He found the blade of a large knife in the ashes of the stove. He also seized some pipes from the shower drain of Ball's home. The State Patrol crime laboratory analyzed the items seized, finding blood on the knife and the pipes. But because the samples were small, the laboratory could only match Tomjack's DNA to the blood on Ball's steering wheel cover and the door of Tomjack's home.

### 2. Suppression Hearing

Before trial, Ball moved to suppress his two statements and the evidence collected from his truck and home. He alleged that the officers violated his Fourth, Fifth, and Sixth Amendment rights. When ruling on the motion to suppress, the trial court found that Ball was in custody "from and after 6:50 a.m. when he was handcuffed and taken by . . . Arndt to the Keith County Sheriff's Office for questioning." The court also found that "as a matter of law," the officers had probable cause to take Ball into custody from and after 6 a.m.—about the time that Arnold found the blood in Ball's truck. The trial court detailed the following facts in its order:

> A. Randy Tomjack had been stabbed and killed in a rural area on the north side of Lake McConaughy in Keith County, Nebraska, just before 1:34 a.m. on October 7, 2003.
>
> B. Albee's Subdivision where the 911 call came from, is a resort area comprised of cabins and mobile homes which are generally unoccupied after the summer vacation season.
>
> C. While investigating the homicide, Sheriff Earl Schenck and Investigator [Darrick] Arndt observed [Danny L. Ball] between 2:30 a.m. and 3:00 a.m. come to [Tomjack's] mobile home asking about the condition of . . . Tomjack and wanting to borrow cigarettes. [Ball] was unusually persistent and inquisitory about Tomjack, and had to be threatened with arrest by the Keith County Sheriff when the Defendant would not leave the premises.
>
> D. [Ball] had recently showered. Although [Ball] states that there is a neutral explanation for this fact, it is a suspicious and unusual behavior during the hours immediately preceding or following midnight.

> E. Sheriff Schenck had been advised by Ball that Ball had not seen Tomjack for two days prior to October 7, 2003, but Ball later advised the sheriff that Tomjack had been to [Ball's] residence at approximately 11:00 p.m. on October 6, 2003. [Ball] had not answered the door. Sheriff Schenck further overheard Ball crying in the bathroom of [the restaurant where he worked] stating "I didn't want him to die, Tomjack always lies, but I didn't want him to die."
>
> F. At 6:00 a.m. on October 7, 2003, [Ball's] vehicle was inspected on the grass shoulder of Highway 92 and suspected drops of blood were observed on the steering wheel cover, gear shift knob and seatbelt. [Tomjack] had been repeatedly stabbed. Copious amounts of blood [were] observed surrounding his body. It was reasonable to assume that the assailant would have had blood on him or his clothing following the incident.

The court found that even if it was "incorrect on the issue of probable cause to arrest," Ball's second confession was an act of free will sufficient to purge the taint of unlawful detention under the Fourth Amendment. Similarly, the court found that under Fifth and Sixth Amendment precedent, Ball waived his right to counsel by initiating the conversation with Redinger. Thus, the court suppressed Ball's first statement, but admitted the second.

Regarding the warrantless search of the truck, the court found that the evidence of bloodstains was admissible under the plain view doctrine *and* that the evidence inside the truck would inevitably have been discovered later that day by the State Patrol when they inventoried the truck. Because the trial court excluded only the first statement, it concluded that the search warrants contained sufficient probable cause.

### 3. Rulings on Renewed Motion to Suppress

At trial, the court overruled Ball's continuing objections to admitting the confession, the sight of blood in his truck, and the evidence obtained using that evidence. When overruling Ball's renewed motion to suppress, the court stated that the evidence at trial was stronger than the evidence at the suppression hearing because of the testimony of Ball's employer. The court accepted the employer's recollection that the officers who secured

Ball's home believed the red substance on the door was blood, and the court concluded that this strengthened probable cause to arrest Ball.

The jury convicted Ball of first degree murder and use of a weapon to commit a felony. The court sentenced him consecutively to life imprisonment without the possibility of parole for the murder and 5 to 10 years' imprisonment for the weapon charge. Before sentencing, Ball moved for a new trial, primarily renewing his suppression argument. The court reiterated that it believed the evidence adduced at trial was more compelling than that from the suppression hearing and overruled the motion for new trial.

## II. ASSIGNMENTS OF ERROR

Ball assigns, consolidated and rephrased, that the trial court erred by overruling his motion to suppress and by admitting at trial his confession and evidence obtained from searching his truck and home. He specifically contends that (1) Arnold lacked probable cause to search and seize Ball's truck; (2) Arndt arrested Ball without probable cause; (3) Redinger ignored Ball's request for counsel; and (4) the search warrants relied on evidence obtained by violating the Fourth, Fifth, and Sixth Amendments, along with their Nebraska counterparts.

## III. STANDARD OF REVIEW

[1] In considering a trial court's ruling on a motion to suppress evidence obtained by a search, we first determine whether the search was illegal. If so, we must determine whether the evidence that the defendant seeks to suppress is sufficiently attenuated from the illegal search. See *State v. Manning*, 263 Neb. 61, 638 N.W.2d 231 (2002).

[2] We will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous. In making this determination, we do not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognize the trial court as the finder of fact and consider the trial court observed the witnesses testifying in regard to such motions. See *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991).

[3] In reviewing a trial court's ruling on a motion to suppress, we review the ultimate determination of probable cause de novo

and review the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court. See *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

[4] In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, we will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and, in so doing, we will look to the totality of the circumstances. See *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984).

[5] A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, we do not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognize the trial court as the finder of fact and consider it observed the witnesses. See *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004).

## IV. ANALYSIS

Relying on violations of the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution, Ball seeks to suppress evidence from three distinct sources: (1) Arnold's cursory inspection of Ball's truck, (2) Ball's statements to Redinger, and (3) the evidence seized from Ball's truck and home under the search warrants. Ball's multilayered arguments are cumulative and interrelated because each piece of evidence was later used to obtain more evidence.

Specifically, officers used the sight of blood in Ball's truck to support probable cause for his arrest. While under arrest at the station, he confessed to murdering Tomjack, and both the confession and the sight of blood in Ball's truck contributed to the probable cause justifying the search warrants for his truck and home. Consequently, if the blood and confession evidence evaporates, then the affidavits lack probable cause.

### 1. Blood in Truck

Ball contends that Arnold's testimony that he saw bloodstains inside Ball's truck should have been suppressed because Arnold

illegally searched and seized the truck the morning of the murder. Arnold testified that his supervising officers sent him to Ball's truck around 6 a.m. to look for evidence and to secure the truck. After walking around the truck, he found nothing unusual. He then opened the truck's door and conducted a "cursory inspection" of the truck's interior. He claimed to be inventorying the truck for valuables, but admitted he did not follow State Patrol protocol for inventory searches until later in the investigation.

Five to ten minutes after arriving, Arnold noticed what appeared to be blood. He then told his fellow officers what he found and stayed with the truck until 8:30 a.m., when it was towed to an impound lot. Arnold admitted that once he arrived on the scene, he would not have released the truck to Ball.

The trial court justified admitting this evidence under three alternate rationales: (1) plain view, (2) inventory, and (3) inevitable discovery. In its suppression order, the court found that the observation of the bloodstains in Ball's truck was admissible under both the plain view and the inevitable discovery doctrines. Moreover, when ruling on Ball's renewed suppression motion and on his new trial motion, the court found that it would also be admissible as an inventory search. Because we find the evidence admissible under the inevitable discovery doctrine, we need not address the other findings.

[6,7] Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures. See, U.S. Const. amend. IV; Neb. Const. art. I, § 7. But if the State shows by a preponderance of the evidence that the police would have obtained the disputed evidence by proper police investigation entirely independent of the illegal investigative conduct, then such evidence is admissible under the "inevitable discovery" doctrine. See *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

Ball argues that the State failed to meet its burden of establishing that the evidence would inevitably have been discovered by lawful means. In its suppression order, the trial court held that the evidence in the truck would have been discovered later that day when the State Patrol inventoried the truck. Ball, however, disputes this, arguing that there was no independent investigation into the truck and no legal source for a later inventory.

To overcome its burden, the State must demonstrate that some lawful means of discovery would have produced the evidence in question; that is, such evidence inevitably would have been discovered without the police misconduct. *Id*. Moreover, courts have recognized that evidence which would have been discovered in the course of a lawful inventory search can be admissible under the inevitable discovery doctrine. See, e.g., *U.S. v. Alvarez-Gonzalez*, 319 F.3d 1070 (8th Cir. 2003); *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984). See, also, Annot., 81 A.L.R. Fed. 331 (1987 & Supp. 2005) (collecting cases).

Here, the record shows that the State Patrol knew Ball left his truck sitting by the side of the road. It also shows that the State Patrol has an inventory policy for abandoned vehicles which would have allowed Arnold to impound Ball's truck and inventory its contents if Ball did not move it within 24 hours. Ball was arrested around 6:50 a.m.; he could not move his truck while in custody. Later that day, Arnold inventoried the truck according to the State Patrol's policy. Although Arnold impounded the truck prematurely after identifying the bloodstains, if he had not noticed the blood, the truck would have remained by the side of the road until the 24 hours had passed. At that point, Arnold would have lawfully entered the truck, inventoried it, and discovered the bloodstains just as he did earlier that day. Thus, even if the truck was illegally searched and seized, sufficient evidence exists that the blood would have been identified during a proper inventory search 24 hours later.

### 2. Confessions

Ball seeks to suppress the evidence obtained during his interviews with Redinger, claiming that Redinger violated his Fourth, Fifth, and Sixth Amendment rights and that thus, the fruits of those violations are inadmissible.

#### (a) Fourth Amendment

Ball argues that Arndt arrested him without probable cause and that *Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003), mandates suppressing the fruits of his illegal arrest. In *Kaupp*, the U.S. Supreme Court vacated the defendant's murder conviction, holding that when a state seeks to use a confession obtained following an illegal arrest, it must demonstrate that

the confession was an act of free will sufficient to purge the taint of the unlawful arrest.

[8] The Court relied on "the Fourth Amendment rule that a confession 'obtained by exploitation of an illegal arrest' may not be used against a criminal defendant." *Kaupp v. Texas*, 538 U.S. at 627. The Court found that the officers arrested the defendant without probable cause and that thus, "well-established precedent" required suppressing the confession unless the confession was " 'an act of free will [sufficient] to purge the primary taint of the unlawful invasion.' " 538 U.S. at 632 (quoting *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

Thus under *Kaupp v. Texas, supra*, suppression is necessary only when (1) the defendant was illegally arrested *and* (2) the State fails to demonstrate that the taint of unlawful arrest has dissipated. Ball argues that, like the defendant in *Kaupp*, he was arrested without probable cause. The trial court agreed that he was in custody from 6:50 a.m. when Arndt handcuffed him and transported him to the station, but found as a matter of law that Arndt had probable cause to do so. The State also concedes that Ball was in custody at this time. Thus, the crucial question is whether the officers had probable cause to arrest Ball.

[9-12] Whether Ball's arrest was valid depends on whether the officers had probable cause to arrest him at the moment they did so. See *Beck v. State of Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). See, also, Neb. Rev. Stat. § 29-404.02 (Reissue 1995). Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003); *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). Also, probable cause merely requires that the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense; it does not demand any showing that this belief be correct or more likely true than false. See *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). See, also, *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 2d 1879 (1949). Moreover, probable cause is evaluated by the collective information of the police engaged in

a common investigation. *Nauenburg v. Lewis*, 265 Neb. 89, 655 N.W.2d 19 (2003). See, also, *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997).

[13] Ball first argues that none of the officers involved believed they had probable cause to arrest him until after he confessed. But the validity of an arrest hinges on the existence of probable cause, not the officer's knowledge that probable cause exists. See, *State v. Vermuele*, 234 Neb. 973, 453 N.W.2d 441 (1990); *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990). As the Seventh Circuit explained:

> Police officers are not required to be legal scholars. This means, among other things, that the arresting officer's knowledge of facts sufficient to support probable cause is more important to the evaluation of the propriety of an arrest than the officer's understanding of the legal basis for the arrest.

*Williams v. Jaglowski*, 269 F.3d 778, 783 (7th Cir. 2001). Thus, we focus on the facts known to the officers, not the conclusions the officers drew from those facts.

Ball also argues that the record fails to support the trial court's conclusion that probable cause existed. We disagree. The trial court enumerated multiple factors supporting its conclusion: (1) Ball arrived at Tomjack's home late at night; (2) Ball had recently showered; (3) Ball persistently asked to see Tomjack; (4) Schenck heard Ball crying and saying that Tomjack lies, but he did not want him to die; and (5) Ball's truck contained what appeared to be blood. At trial, the court further found that (6) Schenck and Eng also believed the red substance on the door of Ball's home appeared to be blood.

[14] Although the record shows contradictory evidence about the red substance on the door of Ball's home, the trial court accepted the testimony of Ball's employer and found that the officers believed the substance was blood. The trial court's factual findings are not clearly erroneous. See *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). Moreover, when a motion to suppress is denied pretrial and again during trial on renewed objection, we consider all the evidence, both from trial and from the hearings on the motion to suppress. See *State v. Huffman*, 181 Neb. 356, 148 N.W.2d 321 (1967). Thus, we

consider all of the facts on which the trial court relied. But we pause to note that if the blood in Ball's truck had been discovered through a proper inventory search, the officers would have been unaware of its existence when they arrested Ball. We need not consider the bloodstains in Ball's truck in our probable cause analysis, because the other facts provide sufficient probable cause.

The trial court found the officers knew of at least five incriminating factors when Arndt arrested Ball. Although several of these, taken alone, are insufficient, the totality supports probable cause. Ball came to Tomjack's home late at night freshly showered and changed, claiming he wanted to borrow cigarettes. When he saw the crowd, he repeatedly inquired about Tomjack. It is true that these facts could have innocent explanations. Yet, we cannot ignore that Ball told Schenck: "[Tomjack] made me so mad because he was lying about all the hours he was getting in this new job, and he bragged about it, and he made me so mad about that. . . . But I didn't want him to die." Nor can we ignore the testimony of Ball's employer that the officers told him they saw blood on the door of Ball's home. See, e.g., *Butler v. State*, 217 So. 2d 3 (Miss. 1968) (finding probable cause when officers found large puddle of blood at crime scene and after identifying possible suspect, found blood on door of suspect's home).

Knowing that the murder scene was bloody and that the assailant, when leaving, had smeared blood on the door of Tomjack's home, the officers could reasonably infer that the assailant would have blood on his or her clothes or person. This would explain the apparent blood on the door of Ball's home and explain why he had recently showered. Ball, however, argues that his presence at Tomjack's home was not unusual because, like many of the others at the scene, he was a local resident. But the other residents came to help locate the 911 emergency caller, whereas Ball claimed to be interested in borrowing cigarettes.

"In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 2d 1879 (1949). A reasonable and prudent person could believe that

Ball committed the murder; therefore, the officers had probable cause to arrest Ball. Because we find no Fourth Amendment violation, there is no taint to purge under *Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003).

(b) Fifth Amendment

[15,16] Ball argues that both of his statements to Redinger should have been suppressed because Redinger violated his Fifth Amendment rights by ignoring his request for counsel. The Fifth Amendment does not explicitly afford a right to counsel; it provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. But the U.S. Supreme Court recognized the " 'inherently compelling pressures' " of custodial interrogation and established "prophylactic rights" designed to counteract those pressures; one such right is the right to have counsel present during custodial interrogation. *McNeil v. Wisconsin*, 501 U.S. 171, 176, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) (citing and quoting *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)).

[17-19] *Miranda* prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates that its agents used procedural safeguards that are effective to secure the privilege against self-incrimination. See, *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003); *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). Under the *Miranda* rule, a "custodial interrogation" takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). The dispositive factor in determining whether *Miranda* warnings should have been given is whether a reasonable person would have felt free to leave under the circumstances. *State v. Dallmann, supra*.

Here, the trial court found, and the State concedes, that Ball was in custody once Arndt handcuffed him and drove him to the station. Further, no one disputes that Redinger questioned Ball twice at the station. Because Redinger subjected Ball to custodial interrogation during those interviews, *Miranda* warnings were necessary before each interview. Here, Redinger informed

Ball of his *Miranda* rights before questioning him each time, and each time Ball waived them, signing his name at the end of the form.

[20,21] *Miranda* rights can be waived if the suspect does so knowingly and voluntarily. See *McNeil v. Wisconsin, supra*. But once a suspect asserts the *Miranda* right to counsel, interrogation must cease and police may not approach the suspect for further interrogation until counsel is made available. *McNeil v. Wisconsin, supra* (citing *Miranda v. Arizona, supra*).

> If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.

*McNeil v. Wisconsin*, 501 U.S. at 177 (citing *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). See, also, *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984).

[22] But a suspect cannot invoke *Miranda* rights anticipatorily, that is, before or outside the context of custodial interrogation. See, *McNeil v. Wisconsin, supra*; *State v. Mata, supra*. "It is clear . . . that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

Despite this, Ball argues that by asking Arndt for court-appointed counsel at the jail, he asserted his *Miranda* rights, which the police must strictly respect. Although the State concedes Ball was in custody when he invoked his right to counsel, we note that he was *awaiting* interrogation when he made the request. Nonetheless, we need not decide whether his invocation was anticipatory because the State implicitly concedes that Ball effectively invoked his *Miranda* rights. See brief for appellee at 19 (conceding that Ball's first statement to Redinger was "properly suppressed").

[23] Assuming that Ball effectively invoked his *Miranda* rights, what effect did the invocation have on the admissibility of his statements? Under *Edwards v. Arizona*, once a defendant

invokes his right to counsel, any subsequent questioning without counsel should be suppressed even if the suspect waives his *Miranda* rights. But when the accused "*initiates* further communication, exchanges, or conversations with the police," is informed of his *Miranda* rights, and waives them before further interrogation, we must determine whether the waiver was knowing and intelligent under the totality of the circumstances. (Emphasis supplied.) *Edwards v. Arizona*, 451 U.S. at 485. See, also, *State v. Smith*, 242 Neb. 296, 494 N.W.2d 558 (1993). As this court recognized in *Smith*, this determination depends on the particular facts and circumstances, including the background, experience, and conduct of the accused.

Ball does not dispute that he initiated further communication; instead, he contends that his request to speak with Redinger was not a willing choice to waive counsel because he had not slept, he had been kept from his home and truck, and he was interrogated without counsel. Although the record shows that Ball was intoxicated the night before the interrogation, neither exhaustion nor intoxication will necessarily invalidate a *Miranda* waiver. See *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005). Moreover, the trial court found that the State sustained its burden of showing that Ball's verbal and written statements during the second interview were made "voluntarily as an act of free will, and without coercion or intimidation."

A trial court's preliminary determination that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). Because the trial court's ruling was not clearly wrong, we defer to the trial court's findings that Ball waived the right voluntarily.

Although the trial court found the waiver voluntary, it made no explicit findings whether Ball waived his rights knowingly. Despite this, the record demonstrates that Ball knowingly waived his rights. Redinger advised him of his *Miranda* rights before he gave each statement. Moreover, Ball nodded his head when Redinger read him the waiver form. And most important, he asserted his right to counsel to end the first interview, which demonstrates that he understood the effect that exercising his rights would have. See *State v. Garza, supra*. See, also, *State v. Smith, supra*.

In summary, Ball's appeal to the Fifth Amendment as support for suppressing his confession is unavailing. We conclude that Ball knowingly and intelligently waived his *Miranda* rights after initiating the second interview with Redinger.

(c) Sixth Amendment

[24,25] Ball argues that Redinger violated his Sixth Amendment right to counsel and that his statements should be suppressed. We disagree. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The U.S. Supreme Court has clarified that the Sixth Amendment right to counsel is triggered " 'at or after the time that judicial proceedings have been initiated . . . "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." ' " *Fellers v. United States*, 540 U.S. 519, 523, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004) (quoting *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)). Accord *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

Here, Ball requested an attorney before he was formally charged. Thus, his Sixth Amendment right to counsel had not attached. However, Ball relies on *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), which suggested that a suspect's Sixth Amendment rights are implicated when an investigation begins to focus on a particular suspect.

Ball argues that once the State turns its prosecutorial focus on a defendant, the Sixth Amendment right to counsel attaches. But as this court recognized in *State v. Saylor*, 223 Neb. 694, 392 N.W.2d 789 (1986), the U.S. Supreme Court has gradually abandoned *Escobedo*, concluding that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges. Because Ball was not formally charged until after he confessed, his Sixth Amendment right to counsel had not attached, and thus, his assignments of error lack merit.

3. Search Warrant Affidavits

A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, we do not reweigh the

evidence or resolve conflicts in the evidence, but, rather, we recognize the trial court as the finder of fact and we consider it observed the witnesses. See *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004).

The court properly upheld the search warrant affidavits because both the evidence of bloodstains from Ball's truck and his confession were properly admitted at trial.

## V. CONCLUSION

The evidence of bloodstains in Ball's truck was properly admitted under the inevitable discovery doctrine because Arnold testified that the stains were readily visible from inside the truck's cab, the State Patrol's policy was to inventory abandoned vehicles after 24 hours, and Ball could not claim the truck because he was under arrest for murdering Tomjack.

Furthermore, Ball's confession was properly admitted because he cannot rely on the Fourth, Fifth, or Sixth Amendment to justify suppressing it. His arrest was justified by probable cause and need not be suppressed under *Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003). Assuming Ball invoked his Fifth Amendment rights in a timely manner, he knowingly and intelligently waived them after initiating the second interview, when he confessed to the murder. Moreover, his Sixth Amendment rights had not attached because the State had not formally charged him with the murder when he invoked his right to counsel. Finally, the court properly upheld the search warrant affidavits because both the evidence of bloodstains from his truck and his confession were properly admitted.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
SAMSON ALDACO, APPELLANT.

710 N.W.2d 101

Filed March 3, 2006. No. S-05-587.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
2. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.

3. **Right to Counsel: Conflict of Interest: Appeal and Error.** Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of interest is a mixed question of law and fact that an appellate court reviews independently of the lower court's decision.
4. **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.
5. **Constitutional Law: Conflict of Interest: Effectiveness of Counsel: Words and Phrases.** An "actual conflict of interest," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.
6. **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.
7. ____: ____: ____: ____. 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.
8. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
9. **Homicide: Intent.** Under Neb. Rev. Stat. § 28-303 (Reissue 1995), a specific intent to kill is not required to constitute felony murder, only the intent to do the act which constitutes the felony in question.
10. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
11. **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.
12. **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.
13. ____. 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.
14. ____. 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.

15. **Speedy Trial.** If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged.
16. **Final Orders: Speedy Trial: Notice: Appeal and Error.** Where a motion for discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Mark A. Weber and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Jon Bruning, Attorney General, Don Kleine, and Michael W. Jensen for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

Samson Aldaco was convicted of first degree murder, use of a deadly weapon to commit a felony, possession of a deadly weapon by a felon, and possession of a controlled substance for his actions on December 7, 2001. Aldaco was sentenced to life imprisonment for murder in the first degree, 10 years' imprisonment for use of a deadly weapon to commit a felony, 10 years' imprisonment for possession of a deadly weapon by a felon, and 1 year's imprisonment for possession of a controlled substance. We are presented with Aldaco's appeal of his convictions and sentences.

## BACKGROUND

Testimony adduced at trial established that in December 2001, Aldaco contacted Enrique Ramirez, Paul Hernandez, Jacinto Martinez, and Ray Lara to accompany him from Garden City, Kansas, to Omaha, Nebraska, to collect money owed to him from

his illegal drug business. Aldaco paid Hernandez, Martinez, and Lara each $200 for helping him.

On December 7, 2001, Ramirez, Hernandez, Martinez, and Lara met Aldaco at a hotel in Omaha, where Aldaco had reserved a room. Thereafter, the men drove to the residence of Dale Herman to collect money Herman owed Aldaco. Pursuant to Aldaco's instructions, each man carried either his own gun or a gun provided to him by Aldaco. Ramirez testified at trial that the men carried guns in an attempt to scare the individuals in the residence and take money from them. According to Aldaco's plan, Ramirez and Martinez entered the basement of the residence where Herman was staying, which was accessible only by a separate outside entrance, to see if Herman was there, and Aldaco and Hernandez entered the upstairs of the residence. Lara was supposed to be located outside the residence as a lookout.

Ramirez and Martinez both entered the basement brandishing their weapons. In the basement were six occupants, including Herman. Ramirez located Herman and, at gunpoint, took him upstairs to where Hernandez and Aldaco were located. Upon entering the upstairs of the residence, Herman was forced to the floor and a gun was held to his head. While he was lying on the floor, Herman was threatened and questioned regarding the money he owed Aldaco. Herman was also told that he "had until 2:00 the next day" to pay Aldaco $2,000.

While Ramirez was upstairs with Herman and Aldaco, Hernandez went to the basement where he brandished his weapon and ordered the remaining occupants to get on the floor face down. While the individuals were on the floor, Hernandez demanded their wallets, money, and drugs. Hernandez then took the wallets from the individuals, while Martinez provided coverage by pointing his and Hernandez' guns at the individuals.

At some point after the wallets were taken, Ramirez returned to the basement and found the occupants lying face down on the floor. After Ramirez returned to the basement, Hernandez left and Lara entered shortly thereafter. Upon entering the basement, Lara began yelling at the individuals on the floor, demanded their wallets, and kicked and pistol-whipped them as he patted them down. Stace Straw, one of the victims on the floor who was

being patted down, began to struggle with Lara. During this altercation, Lara fatally shot Straw in the head.

After Lara shot Straw, the men left the residence and eventually met at a casino in Iowa, pursuant to Aldaco's instructions. After meeting in a hotel room reserved by Aldaco, Aldaco, Ramirez, and Hernandez left in Aldaco's vehicle to collect Aldaco's luggage from another hotel. On the way, Aldaco was pulled over by Omaha police for driving without his headlights illuminated. The officer was subsequently advised that the vehicle and occupants matched the description of the vehicle and individuals involved in an earlier shooting. After assistance arrived, officers conducted a high-risk felony stop and all three men in the vehicle were arrested. Upon searching the vehicle, officers found a Ruger 9-mm handgun, a Beretta .40-caliber handgun, and a Taurus 9-mm handgun. Officers also found a baggie containing a white, powdery substance which tested positive for 17.2 grams of methamphetamine and dimethyl sulfone.

## PROCEDURAL HISTORY

The State filed an information charging Aldaco with murder in the first degree. Aldaco's attorney filed a motion to suppress. On the date the matter came on for hearing, Aldaco's attorney was granted leave to withdraw as counsel due to a conflict. Another attorney was then appointed to represent Aldaco, and the hearing on the motion to suppress was continued until further notice. Aldaco's new attorney filed motions to suppress the evidence obtained as a result of the stop and search of Aldaco's vehicle. Evidentiary hearings on the motions were concluded on March 21, 2003. At the conclusion of the proceedings, the parties were given the opportunity to submit briefs to the trial court and a trial date was set for June 2.

On April 18, 2003, Aldaco filed a pro se motion for discovery. On Aldaco's motion, the trial was continued until September 29. On August 21, the trial court entered an order overruling the motions to suppress. Aldaco filed a pro se notice of appeal of the denial of his motions to suppress. The trial court conducted a "status hearing," at which hearing it determined that since Aldaco had filed an appeal of the denial of his motions, the trial court was without jurisdiction to proceed to trial on the date

scheduled. The Nebraska Court of Appeals dismissed Aldaco's appeal. See *State v. Aldaco*, 12 Neb. App. lvi (No. A-03-1028, Oct. 1, 2003).

After the matter was remanded back to the trial court, a new trial date was set for January 5, 2004. During the pretrial conference, the trial court addressed the question of whether the requirement of a speedy trial had been conformed with and found that, for good cause, January 5 was the earliest the matter could be set for trial.

On January 2, 2004, Aldaco filed a motion to discharge on the ground that his right to a speedy trial had been violated. Aldaco's trial commenced on January 5. On that date, the court orally overruled Aldaco's motion to discharge, but did not enter a written order to that effect. The matter was then tried before a jury. During the cross-examination of a witness, Aldaco sought leave of the court to question a witness on his own. Aldaco was advised by the court that his attorney would decide what questions should be asked, and Aldaco then indicated to the court that he did not want to represent himself. At that point, Aldaco expressed for the first time his concern that his attorney had a conflict of interest as a result of his prior representation of the victim Straw's brother. Aldaco's attorney explained to the court that he had represented Straw's brother in connection with driving under suspension in a different matter which had been resolved and that he was not Straw's brother's attorney. Aldaco's attorney also explained that he had never had any dealings with Straw. Following a brief discussion on the matter, the trial court found that Aldaco had failed to show a conflict of interest.

The jury found Aldaco guilty of all charges. Aldaco filed a motion for new trial, and while the motion for new trial was still pending, Aldaco filed a pro se notice of appeal regarding the denial of his motion to discharge. This appeal was dismissed by the Court of Appeals for lack of a file-stamped order overruling the motion to discharge. See *State v. Aldaco*, 12 Neb. App. lxxix (No. A-04-155, Mar. 18, 2004). Thereafter, the trial court entered an order dated April 28, 2004, overruling Aldaco's motion to discharge. Aldaco then filed an appeal of the trial court's April 28 order, which this court summarily affirmed. See *State v. Aldaco*, 269 Neb. xxi (No. S-04-645, Jan. 12, 2005). On

April 12, 2005, Aldaco's sentencing hearing was held. At that time, the trial court orally overruled Aldaco's pending motion for new trial. The court then sentenced Aldaco to life imprisonment for murder in the first degree, 10 years' imprisonment for use of a deadly weapon to commit a felony, 10 years' imprisonment for possession of a deadly weapon by a felon, and 1 year's imprisonment for possession of a controlled substance. Counts I, III, and IV were ordered to be served concurrently, and count II was ordered to be served consecutively. Aldaco was given credit for 1,221 days previously served. On May 6, Aldaco filed the present appeal, and on May 11, the trial court entered an order overruling Aldaco's motion for new trial.

## ASSIGNMENTS OF ERROR

Aldaco assigns the following errors: (1) Aldaco was denied effective assistance of counsel, (2) Aldaco's conviction is not supported by the evidence, (3) the trial court erred in imposing excessive sentences, and (4) the trial court erred in overruling Aldaco's motion to discharge on speedy trial grounds.

## STANDARD OF REVIEW

The instant case presents four distinct issues with different standards of review. We, therefore, set forth the appropriate standard of review in the individual sections of our analysis.

## ANALYSIS

### Ineffective Assistance of Counsel

[1-3] In his first assignment of error, Aldaco claims the trial court erred in finding that Aldaco's defense counsel competently represented him at trial. Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id.* Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of interest is a mixed question of law and fact that an appellate court reviews independently of the lower court's decision. See, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984); *U.S. v. Infante*, 404 F.3d 376 (5th Cir. 2005). See, also, *State v. Smith, supra*.

[4] Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington, supra*, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). "As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), quoting *Strickland v. Washington, supra*.

But there is an exception to this general rule. The probable effect on the outcome of the proceeding is assumed where assistance of counsel has been denied entirely, or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. See *Mickens v. Taylor, supra*. But only in circumstances of that magnitude do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict. See *id*.

Circumstances of that magnitude may arise when the defendant's attorney actively represented conflicting interests. *Id*. Where defense counsel is forced to represent codefendants over counsel's timely objection, reversal is required, unless the trial court has determined that there is no conflict. See *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). In the absence of an objection, the court has a duty to inquire into a potential conflict of interest only when the trial court knows or reasonably should know that a particular conflict exists—which is not to be confused with a situation in which the trial court is aware of a vague, unspecified conflict of interest, such as that which inures in almost every instance of multiple representation. See, *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). But even where the trial court fails to inquire into a potential conflict, prejudice will be presumed only if the conflict has significantly affected counsel's performance,

thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown. *Mickens v. Taylor, supra*. See, also, *Cuyler v. Sullivan, supra*.

Here, Aldaco contends that defense counsel was ineffective in that the attorney had a conflict of interest due to the attorney's prior representation of Straw's brother in an unrelated matter. Aldaco also contends that he was denied his right to effective assistance of counsel because the trial court failed to inquire into the alleged conflict of interest.

[5] A review of the record clearly demonstrates that the trial court inquired into the potential conflict of interest stemming from defense counsel's prior representation of Straw's brother and that the court reasonably concluded that the prior representation did not create a conflict of interest. Defense counsel represented Straw's brother in connection with an unrelated traffic matter at least more than 1 year prior to his representation of Aldaco. The record further reflects that at no time did the attorney have any dealings with Straw. An "actual conflict of interest," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance. *Mickens v. Taylor, supra*. Based upon our review of the record, we find no evidence that counsel was affected by a conflict of interest. Thus, there is no evidence that counsel's performance was deficient, nor is there any basis for a presumption of prejudice pursuant to *Cuyler v. Sullivan, supra*. Aldaco's first assignment of error is without merit.

## Sufficiency of Evidence

In his second assignment of error, Aldaco claims that the evidence presented at trial was insufficient to sustain his conviction for first degree murder. Aldaco was charged with first degree murder for the death of Straw based upon either deliberate and premeditated murder or death during the perpetration or attempt to perpetrate a robbery. On appeal, Aldaco specifically contends the evidence fails to establish that a robbery was intended or that there was a plan to hurt or kill anyone.

[6-8] 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. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005). 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. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). 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. Muro, supra*; *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

[9] One may commit first degree murder either by committing premeditated murder or by killing another person while in the commission of certain felonies. Neb. Rev. Stat. § 28-303 (Reissue 1995), the version in effect at the time of Straw's murder, provided in relevant part, "[a] person commits murder in the first degree if he kills another person . . . (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . ." Under § 28-303, a specific intent to kill is not required to constitute felony murder, only the intent to do the act which constitutes the felony in question. See, *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982).

Viewed in the light most favorable to the prosecution, the record reflects that Aldaco orchestrated a plan whereby Hernandez, Martinez, Ramirez, and Lara drove from Kansas to Herman's residence in Omaha in order to collect money owed to Aldaco. Pursuant to a request by Aldaco, all five men carried with them either their own gun or a gun provided by Aldaco. At trial, Ramirez testified that one of their purposes for being at the residence where Herman was staying was to take money from the individuals. In the basement, Straw and the other individuals were forced to lie face down on the floor and were ordered not

to move, or they would be killed. While these individuals were lying on the floor, money was demanded of them and their wallets were taken. Thereafter, Lara began physically assaulting the individuals and ultimately shot and killed Straw.

[10] A person commits robbery if, with the intent to steal, he or she forcibly, or by putting in fear, takes from the person or another any money or personal property of any value whatsoever. Neb. Rev. Stat. § 28-324 (Reissue 1995). "Steal" is commonly understood to mean taking without right or leave with intent to keep wrongfully. See *State v. Blotzer*, 188 Neb. 143, 195 N.W.2d 199 (1972). The law is settled that when the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Leonor, supra*.

Based on the evidence, we conclude that a rational trier of fact could have found that a robbery was committed and that the essential elements of the crime of first degree murder were proved beyond a reasonable doubt. Aldaco's second assignment of error is, therefore, without merit.

### Excessiveness of Sentences

Aldaco next claims that the trial court erred when it sentenced him to life imprisonment for first degree murder, 10 years' imprisonment for use of a deadly weapon to commit a felony, 10 years' imprisonment for possession of a deadly weapon by a felon, and 1 year's imprisonment for possession of a controlled substance. First degree murder is a Class I felony punishable by death, or a Class IA felony punishable by life imprisonment. Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2002) and 28-303. 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). Possession of a deadly weapon by a felon is a Class III felony punishable by 1 to 25 years' imprisonment, a $25,000 fine, or both. § 28-105 and Neb. Rev. Stat. § 28-1206(3)(b) (Reissue 1995). Possession of a controlled substance is a Class IV felony punishable by a maximum of 5 years' imprisonment, a $10,000

fine, or both. § 28-105 and Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2002).

[11,12] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). 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. *Id.*

[13] 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. *Id.*

[14] 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. *Id.*

Aldaco argues that the trial court failed to consider his age, mentality, education, experience, social and cultural background, past criminal record, motivation for the offense, nature of the offense, amount of violence involved in the crime, and his character.

At sentencing, the trial court stated:

> The Court has reviewed your record. As I mentioned, I'm quite familiar with the circumstances of what happened. You may have not pulled the trigger in this matter, but you were as guilty if not more guilty than the one who pulled the trigger. You were the leader of this group. You were the one that brought these people up here to Nebraska to collect your drug debt or whatever it was. You put the ball in motion which eventually cost the victim his life.

The crimes involved in the instant case involved a violent, senseless incident which resulted in the death of an individual. As noted by the trial court, while Aldaco may not have pulled the trigger, it was he that "put the ball in motion" which led to Straw's death. The trial court, which reviewed the record and

was familiar with the circumstances of the case, imposed sentences which are within the statutory limitations. Considering the totality of the circumstances, we conclude that the trial court did not abuse its discretion in imposing the sentences.

## Speedy Trial

In his final assignment of error, Aldaco contends he was denied his right to a speedy trial.

[15] Neb. Rev. Stat. § 29-1207 (Reissue 1995) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged. Neb. Rev. Stat. § 29-1208 (Reissue 1995); *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). See *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005).

On January 5, 2004, the trial court orally overruled Aldaco's motion to discharge, and the matter then proceeded to trial. On February 2, Aldaco filed a pro se notice of appeal of the trial court's decision to overrule Aldaco's motion to discharge. This appeal was dismissed by the Court of Appeals for lack of jurisdiction because a file-stamped order dismissing the motion to discharge had not been entered by the trial court. See *State v. Aldaco*, 12 Neb. App. lxxix (No. A-04-155, Mar. 18, 2004). Aldaco did not seek further review of the Court of Appeals' ruling. The trial court entered a written order dated April 28, 2004, overruling Aldaco's motion to discharge. Aldaco appealed that order on May 21.

[16] In *State v. Ward*, 257 Neb. 377, 384, 597 N.W.2d 614, 619 (1999), *disapproved on other grounds, State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004), we stated:

> [W]here a motion to discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal.

Pursuant to *State v. Ward, supra*, the trial court's decision overruling Aldaco's motion to discharge was appealable on January 5, 2004, after the court verbally overruled the motion and proceeded to trial. Thereafter, Aldaco had 30 days in which to file an appeal. Although Aldaco filed a pro se notice of appeal on February 2, within the 30-day period, that appeal was dismissed, and Aldaco did not seek further review of that decision with this court. Regardless of whether Aldaco's February 2 appeal should have been dismissed, both his May 21, 2004, and his May 6, 2005, appeals are untimely challenges of the denial of his motion to discharge.

## CONCLUSION

For the reasons discussed herein, we affirm Aldaco's convictions and sentences.

AFFIRMED.

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# PONY LAKE SCHOOL DISTRICT 30, ROCK COUNTY, BASSETT, NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLANTS, v. STATE COMMITTEE FOR THE REORGANIZATION OF SCHOOL DISTRICTS ET AL., APPELLANTS AND CROSS-APPELLEES.

710 N.W.2d 609

Filed March 3, 2006. No. S-05-1438.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, and the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Constitutional Law: Supreme Court: Appeal and Error.** Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
4. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted unless the right to an injunction is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
5. **Constitutional Law: Legislature: Statutes: Injunction.** When a party seeks to enjoin the invocation or implementation of a legislative enactment, the judiciary may not declare an act of the Legislature unconstitutional unless it clearly contravenes some provision of the fundamental law.

6. **Constitutional Law: Statutes.** It is not the province of the court to annul a legislative act unless it clearly contravenes the Constitution and no other resort remains.
7. ____: ____. In addressing a constitutional challenge to a statute, the issue is whether the statute impinges on a constitutionally protected right or whether the statute creates a suspect classification.
8. **Constitutional Law: Statutes: Proof.** The party challenging the constitutionality of a statute bears the burden to clearly establish the unconstitutionality of a statutory provision.
9. **Constitutional Law: Legislature.** The Legislature has plenary legislative authority except as limited by the state and federal Constitutions.
10. ____: ____. The Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution.
11. **Constitutional Law: Statutes.** The rule invalidating legislation that hampers or renders ineffective the power reserved to the people is applicable only to "facilitating" statutes under article III, § 4, of the Nebraska Constitution.
12. ____: ____. Neb. Const. art. III, § 3, specifically reserves to the people the power of referendum and clearly defines the scope of that right and its limitations.
13. **Constitutional Law: Courts: Intent.** In ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed.
14. **Constitutional Law: Intent.** Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and therefore construction is necessary.
15. **Statutes: Initiative and Referendum.** Referendum sponsors must secure the signatures of at least 10 percent of the state's registered voters to suspend an act from taking effect prior to a referendum election.
16. **Constitutional Law: Courts: Intent.** It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto.
17. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.
18. **Constitutional Law: Voting.** All qualified voters have a constitutionally protected right to vote, in state as well as in federal elections.
19. **Voting.** The fundamental right to vote is the right to participate in representative government.
20. **Constitutional Law: Initiative and Referendum.** In contrast to the right to participate in representative government, the people's reservation in a state constitution of the right of referendum is a means for direct political participation.
21. ____: ____. The federal Constitution does not prohibit, but neither does it guarantee, the right of direct democracy.
22. **Constitutional Law: Voting.** Neb. Const. art. I, § 22, does not extend to issues outside of the right to participate in representative government.
23. **Constitutional Law: Statutes: Voting.** To the extent citizens have a right to directly vote on legislative enactments, that right is limited to what has been reserved to the people by the Nebraska Constitution.

24. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions.
25. **Constitutional Law: Initiative and Referendum.** If a state has conferred the right of initiative and referendum, it is obligated to do so in a manner consistent with the Constitution.
26. ____: ____. State restrictions on initiative and referendum rights violate the First Amendment's free speech guarantee when they significantly inhibit communication with voters about proposed political change and are not warranted by the state interests alleged to justify those restrictions.
27. **Statutes: Initiative and Referendum.** A legislative enactment rejected by the voters at a referendum election stands repealed.
28. **Legislature: Statutes: Initiative and Referendum.** When the people invoke the right to a referendum, they are exercising their coequal legislative power to expressly approve or repeal the enactments of the Legislature.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and injunction dissolved.

Jon Bruning, Attorney General, Dale A. Comer, Lynn A. Melson, and Leslie S. Donley for appellants.

Donald B. Stenberg, of Erickson & Sederstrom, P.C., and John F. Recknor, of Recknor, Williams & Wertz, for appellees.

Mark D. McGuire, of McGuire & Norby, for amicus curiae Nebraska State Education Association.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

HENDRY, C.J.

## I. NATURE OF CASE

This is an appeal from an order of the district court for Lancaster County permanently enjoining the State Committee for the Reorganization of School Districts (the State Committee) from "issuing, enforcing or implementing any orders to dissolve and/or attach the territories of the Class I school districts in the State of Nebraska pursuant to LB 126" until after the results of a referendum election regarding 2005 Neb. Laws, L.B. 126, are certified from the next general election to be held on November 7, 2006.

The district court's judgment was based on its determination that the June 15, 2006, effective date of the State Committee's dissolution and attachment orders impermissibly impedes the

ability of the people of Nebraska to exercise their referendum rights in a meaningful way. Implicit in this ruling is the district court's determination that the effective date of L.B. 126 is unconstitutional under the referendum provisions of the Nebraska Constitution. Both parties agree that this was the basis of the court's permanent injunction order.

## II. BACKGROUND

L.B. 126 was passed—over the Governor's veto on June 3, 2005. The act requires the reorganization of school districts so that all Nebraska school districts offer education in grades kindergarten through 12. See Neb. Rev. Stat. § 79-401(1) (Supp. 2005). Specifically, the act required the State Committee to dissolve Class I school districts and to attach their territory to one or more Class II, III, IV, and VI school districts with which the Class I district was previously associated with or a part of by December 1, 2005. Neb. Rev. Stat. §§ 79-4,113(1) and 79-4,114(1) (Supp. 2005). These orders are not effective until June 15, 2006. See §§ 79-4,113(4) and 79-4,114(7).

In response to the passage of L.B. 126, a group of Nebraska citizens identified as the "Nebraskans for Local Schools Committee" sponsored a referendum petition to refer L.B. 126 to the voters for their approval or rejection. See Neb. Const. art. III, § 3. On September 1, 2005, the sponsors timely filed their petition with the Secretary of State. On October 24, the Secretary of State found that of the 1,128,694 registered voters in Nebraska on September 1, the sponsors had collected 87,006 valid signatures statewide (a little more than 7.7 percent), and the valid signatures of 5 percent of registered voters in 67 out of 93 counties. These signatures constituted an amount and distribution sufficient to satisfy the constitutional requirements for placing the referendum measure on the ballot at the next general election to be held in November 2006. The Secretary of State also found, however, that the sponsors fell short of satisfying the requirement of obtaining the signatures of 10 percent of registered voters in order to suspend the act's operation. See Neb. Const. art. III, § 3. None of the parties contest the number of valid signatures.

On October 25, 2005, several Class I school districts, three individuals who were registered voters and patrons of the Class I

school districts, and a Class III school district (collectively plaintiffs) filed a class action suit against the State Committee and its members, seeking a preliminary and permanent injunction. Plaintiffs alleged four "causes of action."

First, plaintiffs alleged that by dissolving Class I school districts with an effective date of June 15, 2006, prior to the referendum election to be held in November 2006, the Legislature has "improperly and unconstitutionally stripped Nebraska voters of the right to vote on this question guaranteed to the voters by Article III, Sections 1, 3 and 4 of the Nebraska Constitution because the repeal of LB 126 . . . would not restore Class I school districts." Second, plaintiffs alleged that the June 15, 2006, effective date of the dissolutions violated their "fundamental right to vote" on "the question of the forced consolidation of Class I school districts" as "guaranteed by the First Amendment of the Constitution of the United States and by Article I, Section 22 of the Nebraska Constitution." Third, plaintiffs alleged L.B. 126 would render a successful repeal of the act an unauthorized advisory vote because the act's repeal would not reinstate Class I schools. Finally, plaintiffs alleged that the number of signatures they submitted was "more than ten percent of the number of votes cast for Governor at the general election in 2002" and that "therefore[,] the taking effect of LB 126 has been suspended pursuant to Article III, Section 3 of the Nebraska Constitution."

On October 27, 2005, plaintiffs filed an amended complaint, additionally requesting the court to declare unconstitutional all provisions of L.B. 126 that required the dissolution and attachment of Class I school districts before the referendum election to be held on November 7, 2006.

In a written order entered on November 14, 2005, granting plaintiffs' request for a temporary injunction, the district court recognized that the First Amendment prohibits states from impermissibly burdening the right to petition the government by initiative or referendum when the citizens of a state have reserved that right to themselves. However, the court concluded that the First Amendment protections were not violated by L.B. 126.

In addressing Nebraska's referendum provisions, the district court acknowledged that L.B. 126 was not intended or designed

to facilitate or impede the operation of the referendum process. Nonetheless, it found the act's "deadline for the dissolution and attachment of the territories of the Class I school districts impedes and hampers, or renders ineffective, the ability of the people to complete their exercise of the referendum power in a meaningful manner," because "at the time of the general election, the effects of the legislation [will] have already been accomplished." The court further found that because Class I districts would be dissolved and reorganized 5 months before the referendum election, the vote would "represent a meaningless exercise in futility. Such a result would perhaps best be described as 'a nonbinding expression of public opinion.' "

On November 18, 2005, plaintiffs filed a second amended complaint. The second amended complaint included the additional claim that unless L.B. 126 is enjoined, Nebraska voters and citizens would be denied their right to free speech. Specifically, it was alleged that because the referendum vote would be meaningless without an injunction, discussion of the referendum issues would be curtailed, the supporters of the referendum would be unable to reach a large audience, and their ability to raise money would be "all but impossible" when Class I school districts had already ceased to exist. Plaintiffs' claim for relief again requested a permanent injunction until after the November 7, 2006, election.

On November 22, 2005, the district court conducted a trial on plaintiffs' request for a permanent injunction and declaratory judgment. In a written order granting the permanent injunction, entered on November 29, the district court first determined that the suit could not be maintained as a class action. In regard to plaintiffs' request for a permanent injunction, the district court explicitly incorporated the previous findings from its temporary injunction order. The court restated its conclusion that while L.B. 126 was not intended to interfere with the people's right to exercise their power of referendum, the act nonetheless irreparably harmed the people of Nebraska because a referendum election would be rendered meaningless by the act's June 15, 2006, effective date for the State Committee's orders of dissolution and attachment of Class I schools. The court therefore granted a permanent injunction prohibiting the State Committee

from issuing those orders until the results of the referendum election were known.

The district court denied plaintiffs' request for a declaration that L.B. 126 was unconstitutional, concluding that because it had granted plaintiffs' request for a permanent injunction, there was no justiciable issue between the parties. Despite the court's denial of declaratory relief, however, the basis for the court's granting of the injunction was indisputably the purported unconstitutionality of the act's effective date.

The State Committee filed a notice of appeal on November 30, 2005. Given the questions involved, this court has expedited the appeal.

## III. ASSIGNMENTS OF ERROR

The State Committee assigns the district court erred in (1) determining that L.B. 126 impedes the exercise of the referendum power in violation of Neb. Const. art. III, §§ 1, 3, and 4; (2) granting a permanent injunction when plaintiffs have no clear right to relief under these referendum provisions; and (3) determining that plaintiffs would be irreparably harmed if L.B. 126 were fully implemented before the referendum election to be held in November 2006.

On cross-appeal, plaintiffs assign, restated, that the district court erred in failing to determine that allowing the State Committee to dissolve Class I school districts before the referendum election would result in (1) a denial of the right to vote guaranteed by the First Amendment to the U.S. Constitution and Neb. Const. art. I, § 22; (2) a denial of the right to free speech guaranteed by the First Amendment to the U.S. Constitution and Neb. Const. art. I, § 5; and (3) "an impermissible advisory vote." Plaintiffs also assign that the district court erred in failing to declare that L.B. 126 violates these constitutional provisions. Finally, plaintiffs argue this court's decision in *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994), should be overruled.

## IV. STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of

the findings of the trial court. *Denny Wiekhorst Equip. v. Tri-State Outdoor Media*, 269 Neb. 354, 693 N.W.2d 506 (2005).

[2] The constitutionality of a statute is a question of law, and this court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

[3] Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000).

## V. ANALYSIS

The State Committee contends that because the district court's order granting a permanent injunction was based on its determination that the effective date of the dissolution orders under L.B. 126 impermissibly burdened the people's right of referendum, this court may affirm the judgment only if it concludes that L.B. 126 violates the referendum provisions of the Nebraska Constitution. The State Committee argues that L.B. 126 does not violate those provisions.

Plaintiffs contend that the Legislature's imposition of a June 15, 2006, effective date for orders dissolving Class I school districts violates Neb. Const. art. III, § 4, because it impedes and hampers the people's ability to exercise their right of referendum in a meaningful way. In their cross-appeal, plaintiffs also argue that allowing Class I school districts to be dissolved before a referendum election violates the right to vote and the right to free speech guaranteed by the Nebraska and U.S. Constitutions.

[4] An injunction is an extraordinary remedy and ordinarily should not be granted unless the right to an injunction is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. See *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). In this case, the purported unconstitutionality of L.B. 126 is the only clear right to relief which plaintiffs claim as support for the injunction. Indeed, this is the only clear right to relief plaintiffs could claim to support an injunction against the implementation of L.B. 126. See *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 595, 544 N.W.2d 344, 349 (1996) (stating that "[u]nless

restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose").

[5,6] When a party seeks to enjoin the invocation or implementation of a legislative enactment, "[t]he judiciary may not declare an act of the Legislature unconstitutional unless it clearly contravenes some provision of the fundamental law." *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 200, 113 N.W.2d 63, 67 (1962). It is not the province of the court to annul a legislative act unless it clearly contravenes the Constitution, and no other resort remains. *Id.*

[7,8] In addressing a constitutional challenge to a statute, the issue is whether the statute impinges on a constitutionally protected right or whether the statute creates a suspect classification. See, *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995); *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992), quoting *Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989). The party challenging the constitutionality of a statute bears the burden to clearly establish the unconstitutionality of a statutory provision. *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999).

Plaintiffs do not contend that L.B. 126 creates a suspect classification. Their challenge is limited to the act's imposition of a June 15, 2006, effective date for orders dissolving Class I school districts, which date they claim violates various constitutional provisions of the Nebraska and federal Constitutions. Initially, we point out that there is nothing inherently improper about the Legislature's June 15, 2006, effective date for the dissolution and attachment orders under L.B. 126.

[9,10] The Legislature has plenary legislative authority except as limited by the state and federal Constitutions. *State ex rel. Stenberg, supra*. The Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution. *Id.* The only restriction on the Legislature's power to determine the effective date of its enactments comes from Neb. Const. art. III, § 27, which, in relevant part, provides:

> No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in

> case of emergency, which is expressed in the preamble or body of the act, the Legislature shall by a vote of two-thirds of all the members elected otherwise direct.

The 99th Legislature adjourned on June 3, 2005, the same day that L.B. 126 was passed—over the Governor's veto. None of the deadlines contained within the act required any action to be taken before September 10, 2005, which was more than 3 months after the Legislature adjourned. See Neb. Rev. Stat. § 79-4,112(1) (Supp. 2005). Further, there is no constitutional requirement that the Legislature delay the effective dates of its enactments until after a possible referendum election occurs. Thus, unless the effective date of the dissolution orders violates some other constitutional provision, this court may not interfere with this grant of constitutional authority. See *Read v. City of Scottsbluff*, 179 Neb. 410, 138 N.W.2d 471 (1965) (stating that courts should not interfere with legislative determination of emergency, making legislation effective upon passage and precluding suspension of act until next general election, unless act violates constitutional mandate).

With this background, we now turn to the central issue raised by the State Committee. Simply stated, that issue is whether the district court erred in concluding that the effective date of L.B. 126, for orders dissolving and reorganizing Class I school districts, violated the right of referendum reserved to the people by the Nebraska Constitution.

### 1. Nebraska's Referendum Provisions

#### (a) Neb. Const. art. III, § 4

Neb. Const. art. III, § 4, sets forth the number of votes required *to enact* a ballot petition. In addition, § 4 provides: "The provisions with respect to the initiative and referendum shall be self-executing, *but legislation may be enacted to facilitate their operation*." (Emphasis supplied.)

In contrast, article III, § 3, sets forth the number of signatures required *to invoke* the power to place a referendum measure on the ballot and the number of signatures required to simultaneously invoke the power to suspend an act's operation until approved by the voters. The district court and plaintiffs have relied on cases previously decided by this court applying the italicized

provision of § 4 to support the determination that L.B. 126 impermissibly burdens the right of referendum. However, as further explained below, we determine these cases are not applicable to the specific issues raised in this appeal.

This court has held that "[l]egislation which hampers or renders ineffective the power reserved to the people is unconstitutional." *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 211, 602 N.W.2d 465, 475 (1999) (holding that statute regulating initiative and referendum procedures, requiring exact match between signature information placed on initiative petitions and voter registration records, was unconstitutional because it hampered ability of public to engage in initiative process and did not act to prevent fraud). See, also, *State ex rel. Stenberg v. Beermann*, 240 Neb. 754, 757, 485 N.W.2d 151, 153 (1992) (holding, without reaching First Amendment challenge, that sections of regulating statute making it criminal offense to circulate ballot petition outside of county in which circulator is registered to vote "violate Neb. Const. art. III, § 4, by impeding the initiative and referendum process instead of facilitating the process as the Constitution requires"); *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966) (construing regulating statute as not requiring sponsors to include in referendum petition text of amendment to act they sought to repeal); *State, ex rel. Ayres, v. Amsberry*, 104 Neb. 273, 177 N.W. 179 (1920) (refusing to interpret regulating statute to require referendum sponsors to attach full copy of act to each petition sheet because such law would be unnecessarily obstructive), *vacated on other grounds* 104 Neb. 279, 178 N.W. 822.

In each of these cases, however, at issue were regulating statutes specifically intended to facilitate the initiative and referendum procedures and enacted pursuant to article III, § 4. The language extracted from these cases and relied upon by plaintiffs and the district court simply has no application outside of regulating legislation intended to facilitate the initiative or referendum procedures.

[11] *Klosterman, supra*, a case relied upon by plaintiffs and the district court, is illustrative. The district court's quotation of language from *Klosterman* in both its November 14 and 29, 2005, orders is not a reflection of its reliance on the *Klosterman*

holding, wherein this court held that the *timing and procedural* requirements of the constitutional provisions and relevant statutes relating to the referendum had been met in that case. Rather, the district court's conclusion, as well as plaintiffs' argument, that the effective date of L.B. 126 "impedes and hampers, or renders ineffective, the ability of the people to complete their exercise of the referendum power" rests upon the language from *State, ex rel. Ayres, supra*, as quoted in *Klosterman*, 180 Neb. at 513, 143 N.W.2d at 749, which states, " '*Any* legislation which would hamper or render ineffective the power reserved to the people would be unconstitutional.' " (Emphasis supplied.) The district court interpreted the word "any" to include even nonfacilitating statutes such as L.B. 126. The quoted language from *State, ex rel. Ayres,* however, must be read in the context in which it was written; i.e., in a case involving the constitutional validity of "facilitating" statutes as that term is used within article III, § 4. More precisely, the quoted language from *State, ex rel. Ayres,* has consistently been relied upon by this court only when considering the constitutionality of "any [*facilitating*] legislation which would hamper or render ineffective the power reserved to the people." See *State, ex rel. Ayres, v. Amsberry*, 104 Neb. at 276-77, 177 N.W. at 180. That was so in *Klosterman* as it was in all other cases relied upon by plaintiffs and the district court. The "*Ayres* test" is, therefore, applied to facilitating statutes, not all acts of the Legislature.

L.B. 126 does not present the same legal issue that concerned this court in *Klosterman, supra*, and *State, ex rel. Ayres, supra*, or the additional cases relied upon by plaintiffs and the district court. There is simply no provision within L.B. 126 intended to regulate the referendum process. Because neither the "facilitating" provision nor the enactment provisions of article III, § 4, are at issue, we determine this case is controlled by article III, § 3. We therefore turn our attention to that section.

(b) Neb. Const. art. III, § 3

[12] Neb. Const. art. III, § 3, specifically reserves to the people the power of referendum and clearly defines the scope of that right and its limitations. See *Klosterman v. Marsh*, 180 Neb. 506, 509, 143 N.W.2d 744, 747 (1966) ("[a]rticle III, section 3,

of the Constitution of Nebraska, specifically applies to the referendum").

[13,14] In ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed. *DeCamp v. State*, 256 Neb. 892, 594 N.W.2d 571 (1999). Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and therefore construction is necessary. *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000). Neb. Const. art. III, § 3, provides, in relevant part:

> The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act. Petitions invoking the referendum shall be signed by not less than five percent of the registered voters of the state, distributed as required for initiative petitions, and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed shall have adjourned sine die or for more than ninety days. . . . When the referendum is thus invoked, the Secretary of State shall refer the same to the electors for approval or rejection at the first general election to be held not less than thirty days after the filing of such petition.
>
> When the referendum is invoked as to any act or part of act, other than emergency acts or those for the immediate preservation of the public peace, health, or safety, *by petition signed by not less than ten percent of the registered voters of the state* distributed as aforesaid, it shall suspend the taking effect of such act or part of act until the same has been approved by the electors of the state.

(Emphasis supplied.)

The parties stipulated that at the time the referendum petitions were required to be filed with the Secretary of State, September 1, 2005, there were 1,128,694 registered voters in Nebraska and that the local schools committee had timely submitted 87,006

valid signatures to the Secretary of State with their referendum petition. Thus, the number of petition signatures was equal to a little more than 7.7 percent of the registered voters. Under the plain language of article III, § 3, this amount was sufficient to refer L.B. 126 to the voters at the next general election, but insufficient to suspend the operation of the act. Nonetheless, plaintiffs argue that the referendum provisions should be liberally construed to mean that "the ten percent method is not the exclusive means to prevent a statute from going into effect prior to a referendum election." Brief for appellee at 10.

This court has held that Nebraska's "[c]onstitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed *to make effective the powers reserved*." (Emphasis supplied.) *Klosterman v. Marsh*, 180 Neb. 506, 513, 143 N.W.2d 744, 749 (1966).

[15] In this circumstance, article III, § 3, imposes a specific requirement to suspend the operation of an act. Referendum sponsors must secure more votes to suspend an act from taking effect prior to a referendum election than required to place a referendum on the ballot at the next general election. Section 3 plainly states that in order to suspend an act's operation until it is approved by the voters, the referendum petition must include the signatures of 10 percent of the State's registered voters.

[16] A rule of construction cannot authorize this court to expand the right of referendum beyond what has been reserved or to ignore its plain limitations. "It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto." *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 200, 113 N.W.2d 63, 67 (1962). Because article III, § 3, specifically contemplates under what circumstances an act will be suspended pending a referendum election, this court must respect and give effect to that limitation.

As noted, plaintiffs' primary claim to a clear right to an injunction is their argument that the effective date of L.B. 126 will deny them the right of referendum. However, because plaintiffs have failed to obtain the necessary number of signatures that would suspend the operation of L.B. 126 pending a referendum election, they have received exactly the right reserved to them in

article III, § 3, which is the right to have L.B. 126 referred to the voters for approval or rejection at the next general election. Plaintiffs have not shown they are entitled to have the act suspended in the interim. The referendum provisions of the Nebraska Constitution are not violated by this result; to the contrary, they demand it.

The history of article III, § 3, is consistent with our determination. The initiative and referendum amendments to article III were originally adopted in 1912. At that time, what is now § 3 required referendum sponsors to obtain the signatures of 10 percent of the legal voters to place a referendum measure on the ballot: "It may be ordered by a petition of ten per cent of the legal voters of the state, distributed as required for initiative petitions." Neb. Const. art. III, § 1B (adopted 1912, 1911 Neb. Laws, ch. 223, § 2, p. 672). If the sponsors obtained this percentage of signatures, then the operation of any referred, nonemergency act would be suspended until approved by the voters. *Id.*

This provision was amended by the Constitutional Convention of 1919-1920. The amendment lowered the percent of signatures needed to place a referendum on the ballot from 10 percent to 5 percent, but *retained* the 10-percent requirement to suspend the operation of a nonemergency act until approved in a referendum election.

This history clearly demonstrates the people's decision to make the referendum process more attainable by requiring only 5 percent of the registered voters to invoke the power of referendum. It just as clearly demonstrates the people's desire to retain the higher threshold to suspend an act of the Legislature pending the referendum vote.

[17] A constitution represents the supreme written will of the people regarding the framework for their government. *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). When the language of the state Constitution is clear, unambiguous, and does not violate the U.S. Constitution, it is not for this court to read into it that which is not there. In the circumstance presently before the court, the state Constitution unambiguously sets forth the procedure the people of Nebraska have determined to follow in the event less than 10 percent of the registered voters have signed a referendum petition. It is not for this court to

apply article III, § 3, otherwise. We conclude that L.B. 126 does not violate Nebraska's referendum provisions.

Plaintiffs, however, contend that L.B. 126 violates other constitutional provisions. These questions comprise the substance of plaintiffs' claims in their cross-appeal, and it is to those claims that we now turn our attention.

### 2. Cross-Appeal Challenges

In their cross-appeal, plaintiffs primarily argue that allowing Class I school districts to be dissolved before a referendum election violates the right to vote and the right to free speech guaranteed by the Nebraska and U.S. Constitutions.

#### (a) Right to Vote

[18,19] Plaintiffs assert that dissolving Class I school districts before the referendum election violates their right to vote on the forced consolidation of Class I school districts. We disagree. The U.S. Supreme Court has stated that the right to vote is a fundamental political right under the federal Constitution because it preserves all other rights. *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). The Court in *Reynolds* explicitly held that "all qualified voters have a constitutionally protected right to vote . . . in state as well as in federal elections." *Reynolds*, 377 U.S. at 554. However, the fundamental right to vote in this country is the right to participate in representative government. See, *Kramer v. Union School District*, 395 U.S. 621, 626, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969) ("[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government"); *Reynolds*, 377 U.S. at 559-60 ("'our Constitution's plain objective' was that 'of making equal representation for equal numbers of people the fundamental goal . . .'"); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) ("[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live").

[20] In contrast to the right to participate in representative government, the people's reservation in a state constitution of

the right of referendum "is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976).

[21] The federal Constitution does not prohibit direct democracy, see *Eastlake*, 426 U.S. at 679 ("[a]s a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause"), but neither does it confer or guarantee such rights. See *Meyer v. Grant*, 486 U.S. 414, 416, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988) (stating that "Colorado is one of several States that *permits* its citizens to place propositions on the ballot through an initiative process" (emphasis supplied)).

[22] Neither has this court interpreted the right to vote under Neb. Const. art. I, § 22, to extend beyond issues involving the right to participate in representative government. See, e.g., *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995); *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966); *Baker v. Moorhead*, 103 Neb. 811, 174 N.W. 430 (1919); *State, ex rel. Harte, v. Moorhead*, 99 Neb. 527, 156 N.W. 1067 (1916); *Morrissey v. Wait*, 92 Neb. 271, 138 N.W. 186 (1912).

Because the rights of initiative or referendum are a means of direct democracy, federal courts have concluded that the partial reservation or total absence of the right of initiative or referendum in a state constitution does not violate a fundamental right to vote. See, e.g., *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993); *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204 (10th Cir. 2002); *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F. Supp. 1036 (M.D. Ga. 1985). Compare *Stone v. City of Prescott*, 173 F.3d 1172 (9th Cir. 1999).

[23] The reasoning of these courts is applicable to this appeal. Under both Neb. Const. art. I, § 22, and the federal Constitution, the constitutionally protected right to vote is limited to the right to participate in representative government. Because the right to participate in representative government is not implicated by a referendum proceeding, plaintiffs' constitutional right to vote has not been violated by the state constitution's limitations on their right to refer L.B. 126 to the voters. Thus, to the extent plaintiffs

have a right to directly vote on the issue of Class I school consolidations, that right is limited to what has been reserved to the people by the Nebraska Constitution. See *McPherson v. Blacker*, 146 U.S. 1, 25, 13 S. Ct. 3, 36 L. Ed. 869 (1892) ("sovereignty of the people [comprising the political community of a state] is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed").

We conclude plaintiffs' claim that L.B. 126 violates their constitutional right to vote is without merit.

(b) Right to Free Speech

[24] Plaintiffs also assign that dissolving Class I school districts prior to the November 7, 2006, referendum election results in a denial of the right of free speech guaranteed by the First Amendment to the U.S. Constitution and Neb. Const. art. I, § 5. Again, we disagree. The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions. *State v. Rabourn*, 269 Neb. 499, 693 N.W.2d 291 (2005).

[25] "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process . . . ." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). But if a state has conferred the right of initiative and referendum, it is "obligated to do so in a manner consistent with the Constitution." See *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

[26] State restrictions on initiative and referendum rights violate the First Amendment's free speech guarantee when they "significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." *Buckley*, 525 U.S. at 192 (holding that Colorado's requirements that circulators be registered voters and wear identification badges violated free speech guarantee). Direct restrictions on initiative and referendum procedures that curtail political expression are subject to "exacting scrutiny." *Meyer*, 486 U.S. at 420 (affirming court of appeals' decision that prohibition against paid circulators violated First

Amendment protections of free speech). Accord *State v. Radcliffe*, 228 Neb. 868, 424 N.W.2d 608 (1988).

Although plaintiffs primarily rely on *Meyer* and *Buckley* to support their position, neither case is applicable to initiative or referendum processes that do not restrict political communication or association. See, *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997); *Stone v. City of Prescott*, 173 F.3d 1172 (9th Cir. 1999); *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996). Neither do they apply to legislation which is not intended to regulate these procedures.

L.B. 126 does not impose any restrictions or conditions on plaintiffs' right to communicate with voters about the political change they seek. Compare *State ex rel. Stenberg v. Moore*, 258 Neb. 738, 605 N.W.2d 440 (2000) (holding that state restriction on timing and amount of independent expenditures by political groups supporting candidates was unconstitutional regulation of elections and impermissibly burdened right to engage in political speech). Nor does L.B. 126 attempt to regulate the circulation of initiative or referendum petitions. Compare *Radcliffe, supra*. Rather, plaintiffs' assertion that their right to free speech has been diminished is based entirely upon their claim that unless L.B. 126 is suspended until the referendum vote, the ability of those opposed to L.B. 126 to persuade voters to reject it will be more difficult. Plaintiffs' claim is not based upon any actual restrictions on their right to communicate with voters.

Given the conditions the people of Nebraska have imposed on their power to suspend an act's operation pending a referendum election, the "difficulty," as described by plaintiffs, can be avoided only by this court's expanding the scope of the referendum power itself. As discussed, the U.S. Constitution does not guarantee a right of referendum, and to expand this right would be to ignore the clear and unambiguous procedure set out by the people in article III, § 3, of the state Constitution. This we shall not do. See *Biddulph*, 89 F.3d at 1500 (" '[t]he state, having created such a procedure, retains the authority to interpret its scope and availability' ").

We conclude that plaintiffs' claim that L.B. 126 violates their constitutional right to free speech, based on the fact that Nebraska's referendum provisions make it difficult for them to

repeal the act and even more difficult to suspend its operation, is without merit.

(c) Impermissible Advisory Vote

Plaintiffs also contend the district court erred in failing to determine that dissolving Class I school districts before the referendum election would result in an impermissible advisory vote. The only case cited by plaintiffs in support of this argument is *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984). In *State ex rel. Brant*, this court refused to issue a writ of mandamus requiring the Secretary of State to place an initiative measure on the ballot. If passed, the initiative would have stated that the people of Nebraska favored a nuclear freeze and would have required the Governor to forward this statement of position to officials in the U.S. and Soviet Union governments. Because the proposed initiative was without the force of law, this court determined the measure was not a proper subject for initiative.

[27] *State ex rel. Brant* is not applicable to these facts. The power of referendum is the people's reservation of "power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature." Neb. Const. art. III, § 1. If the voters reject L.B. 126 at the referendum election, the act will stand repealed. See *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966) (stating that through power of referendum, people may repeal enactments of Legislature). To repeal is to rescind or abrogate an existing law. See Black's Law Dictionary 1325 (8th Ed. 2004).

[28] When the people invoke the right to a referendum, they are exercising their coequal legislative power to expressly approve or repeal the enactments of the Legislature. See, *Klosterman, supra*; *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 210-11, 602 N.W.2d 465, 474 (1999) (stating that "the Legislature and the electorate are concurrently equal in rank as sources of legislation" through power of initiative). In no sense can such an act be considered advisory to the Legislature or without the force of law. This assignment of error is without merit.

(d) *Duggan v. Beermann*

Plaintiffs argue that this court should overrule its decision in *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994)

(holding that 1988 amendment of article III, §§ 2 and 3, to require percentage of signatures from "registered voters" instead of "electors" on ballot petitions, had repealed by implication requirement in article III, § 4, that requisite percentage of signatures be based on number of votes cast in preceding gubernatorial election). Plaintiffs contend the reversal of *Duggan* would result in a sufficient number of signatures on the referendum petition to suspend the operation of L.B. 126.

Although not cited by plaintiffs, this issue is controlled by this court's decision in *State ex rel. Stenberg v. Moore*, 251 Neb. 598, 558 N.W.2d 794 (1997) (concluding that voters' rejection of 1996 initiative, which was intended to return state Constitution to pre-1988 requirement that percentage of signatures needed for ballot petitions be tied to number of votes cast for Governor in preceding election, defeated attorney general's argument that voters did not understand effect of voting for 1988 initiative to amend constitution). This court could not overrule *Duggan* except by ignoring the voters' clear rejection in 1996 of the construction of article III that plaintiffs now urge this court to adopt. See *Moore*, 251 Neb. at 606, 558 N.W.2d at 799 ("[t]o now ignore the results of the vote [on the 1996 initiative] would be to deny such voters the same rights that the Attorney General seeks to protect"). We find nothing in plaintiffs' argument to persuade us that *Duggan, supra*, was wrongly decided, and we decline plaintiffs' invitation to revisit that determination.

### (e) Declaratory Judgment

Finally, plaintiffs contend the district court erred by concluding there was no justiciable issue upon which it could declare L.B. 126 unconstitutional in light of its permanent injunction order. Having determined that plaintiffs have failed to show that L.B. 126 violates any of their constitutional rights, this court has no need to reach this assignment of error.

## VI. CONCLUSION

Plaintiffs have failed to show that they have a clear right to relief which would support a permanent injunction against a legislative enactment. Absent a showing that L.B. 126 violates some provision of the state or federal Constitution, this court is not free to enjoin or strike down laws enacted by the Legislature.

The people of Nebraska have unambiguously set forth in article III, § 3, of the state Constitution that an act of the Legislature shall be suspended *only* in the event that a referendum petition is signed by "not less than ten percent of the registered voters." In this case, there is no dispute that plaintiffs collected the signatures of only a little more than 7.7 percent of the registered voters in Nebraska. Under such circumstance, to suspend "the taking effect" of L.B. 126 pending the referendum vote would require this court to ignore the will of the people as clearly expressed in the state Constitution. This we will not do.

To the extent plaintiffs argue that the effective date of L.B. 126 illustrates a need to change the referendum process, such is for the people of Nebraska to address and decide, not this court. Our responsibility, absent an ambiguity or a constitutional impediment, is to apply the people's constitution as written. That is what we do today.

The judgment of the district court is reversed, and the injunction is dissolved.

REVERSED AND INJUNCTION DISSOLVED.

WRIGHT, J., not participating.

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PENNY SHIPLER, APPELLEE AND CROSS-APPELLANT, V. GENERAL MOTORS CORPORATION, A FOREIGN CORPORATION, APPELLEE AND CROSS-APPELLANT, AND KENNETH LONG, APPELLANT AND CROSS-APPELLEE.

710 N.W.2d 807

Filed March 10, 2006. No. S-03-1472.

1. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
2. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

4. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
5. **Jury Instructions: Appeal and Error.** If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
6. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.
7. ____: ____: ____. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence.
8. **Courts: Jury Instructions.** A trial court need not instruct the jury on an issue where the facts do not justify such an instruction.
9. **Judgments.** A general finding that a judgment should be for a certain party warrants the conclusion that the finder of fact found in favor of that party on all triable issues.
10. **Actions: Negligence.** Nebraska's comparative negligence law applies only to civil actions in which contributory negligence is a defense.
11. **Products Liability: Negligence: Statutes.** Whether contributory negligence is a defense to an action based upon strict liability is a matter of statutory interpretation.
12. **Statutes.** Statutory interpretation presents a question of law.
13. ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
14. ____. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose.
15. **Statutes: Legislature: Intent.** The last expression of legislative will is the law.
16. ____: ____: ____. 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. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
17. ____: ____: ____. The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.
18. **Statutes: Legislature: Presumptions: Intent.** The Legislature is presumed to know language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.
19. **Statutes.** Statutes pertaining to the same subject matter are to be construed together as if they were one law and effect given to every provision.
20. **Statutes: Legislature: Intent.** A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature.
21. **Products Liability: Evidence: Notice.** Relevant evidence of other similar accidents or occurrences is admissible to show that a defendant had notice and actual knowledge of a defective condition, provided that the accidents or occurrences were substantially similar; i.e., the prior accidents or occurrences happened under

substantially the same circumstances and were caused by the same or similar defects and dangers.

22. **Evidence.** Where an individual fails to adequately demonstrate how prior occurrences are substantially similar, evidence of prior occurrences is irrelevant and, thus, inadmissible.
23. **Products Liability: Proof.** A plaintiff in a strict liability case may rely on evidence of other similar accidents involving the product to prove defectiveness, but the plaintiff must first establish that there is a substantial similarity of conditions between the other accidents and the accident that injured the plaintiff.
24. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
25. **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 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
26. **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.
27. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
28. **Trial: Appeal and Error.** Where the grounds specified for an objection at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review.
29. **Damages: Evidence: Proof.** A plaintiff's evidence of damages may not be speculative or conjectural and must provide a reasonably certain basis for calculating damages. The general rule is that uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.
30. ____: ____: ____. Proof of damages to a mathematical certainty is not required, but a plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural.
31. **Damages: Evidence.** The question of whether the evidence of damages is reasonably certain is a question of law, and not a matter to be decided by the trier of fact.
32. **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.
33. **Trial: Evidence: Tort-feasors: Liability: Damages.** The underlying theory of the collateral source rule is designed to prevent a tort-feasor from escaping liability based on the actions of a third party, even if it is possible that the plaintiff may be compensated twice.
34. **Damages: New Trial: Appeal and Error.** In order for an award to be so excessive as to warrant a new trial, it must be so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law.

35. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
36. **Pretrial Procedure.** The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial.
37. **Negligence: Tort-feasors: Liability: Damages.** Under joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages.
38. **Negligence: Liability.** Where two causes produce a single indivisible injury, joint and several liability attaches.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Gail S. Perry and Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Jeanelle R. Lust and William Sutter, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., and Frank M. Hinman, David M. Heilbron, Marc R. Bruner, Lee G. Sullivan, May Y. Lee, and Rianne E. Nolan, of Bingham & McCutchen, L.L.P., and Fred J. Fresard and Andrea L. Laginess, of Bowman & Brooke, and Frank Nizio, of McGuire & Woods, L.L.P., for appellee General Motors Corporation.

Dan L. McCord, of McCord & Burns Law Firm, and Michael J. Piuze for appellee Penny Shipler.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for amicus curiae Nebraska Association of Trial Attorneys.

Gregory D. Barton, of Harding, Schultz & Downs, and Mark S. Olson, of Oppenheimer, Wolff & Donnelly, L.L.P., and, of Counsel, Hugh F. Young, Jr., for amicus curiae Product Liability Advisory Council, Inc.

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

WRIGHT, J.

## I. NATURE OF CASE

Penny Shipler brought this action against General Motors Corporation (GM) and Kenneth Long after she was injured in a motor vehicle rollover that rendered her a quadriplegic. GM and Long filed separate notices of appeal from a final judgment of

$18,583,900 entered following a jury trial in Lancaster County District Court. Shipler has cross-appealed.

## II. SCOPE OF REVIEW

[1] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

[2] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

## III. FACTS

On September 11, 1997, Long lost control of his 1996 Chevrolet S-10 Blazer, and the Blazer rolled at least four times. Shipler, who was riding in the front passenger seat, was rendered a quadriplegic as a result of the rollover.

Shipler sued GM and Long, claiming that the roof of the Blazer was defective and had crushed inward, causing her injury. She alleged that GM, the manufacturer of the Blazer, was negligent in failing to use reasonable care in designing the Blazer's roof and in failing to adequately warn her of the dangers associated with the roof. Her second theory, based upon strict liability, alleged that the roof structure of the Blazer was defective at the time it left GM's possession. Shipler alleged that the defect made the Blazer unreasonably dangerous for its intended use and created a risk of harm beyond that which would be contemplated by the ordinary foreseeable user.

GM asserted that Long was a proximate cause of the rollover. It denied any negligence and denied that the Blazer was designed with an unreasonably weak roof structure over the front passenger seat compartment or that there were any defects in the passenger restraint system. GM denied any knowledge that the design of the Blazer exposed passengers to an unreasonable risk of injury which was foreseeable by GM. It denied that the Blazer's roof design or restraint system created a risk of harm to a passenger or made the vehicle unreasonably dangerous for its

intended use as a passenger vehicle. Prior to trial, Long admitted that his negligence was the cause of the accident.

At trial, GM sought to present evidence of Shipler's alleged contributory negligence and Long's comparative fault. In an offer of proof, testimony was offered that Shipler and Long had been drinking before the accident. The trial court excluded evidence regarding alcohol consumption by Shipler and Long, concluding that such evidence was not relevant in a crashworthiness case.

When the accident occurred, Shipler's infant son was sitting in her lap, and the passenger seatbelt was fastened over both of them. The infant was ejected in the rollover, and GM offered to prove that the infant's presence under the seatbelt created slack and therefore enhanced Shipler's injury. In her initial petition, she alleged that she was restrained with both a lap belt and a shoulder belt. The trial court excluded evidence of Shipler's use of the seatbelt in this manner but reduced her damages by 5 percent under Nebraska's seatbelt law, Neb. Rev. Stat. § 60-6,273 (Reissue 2004).

The issues presented for trial were whether GM was negligent in the design of the Blazer's roof, whether GM was strictly liable for a defect in the design of the roof, whether the negligence or defect in design caused Shipler's injury, and the nature and extent of Shipler's damages.

Following a 6-week trial, the jury returned a verdict for Shipler and against GM and Long, and awarded her damages of $19,562,000. The trial court entered an amended judgment of $18,583,900, based on the court's determination that Shipler agreed to eliminate the issue of whether the seatbelt was faulty in exchange for a 5-percent reduction in the judgment amount as provided by statute. GM's motion for new trial was overruled. On January 14, 2004, the trial court entered an order finding that Shipler was entitled to prejudgment interest on the portion of the judgment that exceeded $5 million from February 21, 2001, at the rate of 7.052 percent per annum. GM and Long filed separate notices of appeal, and Shipler cross-appealed.

## IV. ASSIGNMENTS OF ERROR

GM claims, summarized and restated, that the trial court erred (1) in improperly instructing the jury, in refusing to provide a

defense verdict form, in giving oral instructions, and in giving a coercive *Allen* (*Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896)), or "dynamite," instruction to the deadlocked jury; (2) in barring GM's contributory negligence defense and in refusing to permit the jury to allocate liability for noneconomic damages in proportion to percentage of fault; (3) in excluding evidence of Shipler's seatbelt misuse; (4) in admitting evidence of dissimilar incidents; and (5) in allowing prejudicial testimony and giving improper instructions on the federal Motor Vehicle Safety Standard 216 (hereinafter FMVSS 216), the federal roof strength standard. GM also assigns as error that the verdict was excessive.

Long claims the trial court erred (1) in giving a limitation in the jury instructions that narrowed Shipler's injuries to quadriplegia only and in refusing to permit the jury to allocate damages between GM and Long based on which injuries were caused by the conduct of each; (2) in denying Long's multiple motions to dismiss because no issues were preserved against Long in the pretrial order; (3) in erroneously instructing the jury as to the possible verdicts that could be rendered and in failing to provide the jury with a defense verdict form allowing the jury to find in favor of GM and Long; (4) in failing to strike the award for future wage loss because such claim was supported by speculative and insufficient expert testimony; (5) in giving a detailed limiting instruction regarding Shipler's collateral source benefits that incited the jury's sympathy; and (6) in upholding the jury's excessive verdict, which was the result of passion and prejudice.

Shipler cross-appeals that the trial court erred in reducing the jury's damage award by 5 percent.

## V. ANALYSIS

### 1. Erroneous Jury Instructions and *Allen* Charge

GM asserts that the trial court erred in its instructions on liability; erred in refusing to provide a defense verdict form; erred in instructing orally, outside court and without notice; and erred in giving a second coercive *Allen* charge.

#### (a) Jury Instructions

GM argues the trial court erroneously instructed the jury that if Long was not found liable, GM must be held liable. It claims

such instructions amounted to granting a directed verdict for Shipler.

The trial court instructed the jury that it could reach one of three possible verdicts: (1) that only GM and not Long proximately caused Shipler's quadriplegia, (2) that only Long and not GM proximately caused Shipler's quadriplegia, or (3) that GM and Long each proximately caused Shipler's quadriplegia. It is GM's position that such instructions were legally incorrect and unfair because GM's liability depended upon Shipler's proof of negligence or defective design as the cause of her injury and the instructions told the jury to hold liable either Long or GM, or both. GM claims the jury should have been given a form allowing it to find both defendants not liable, which GM argues the court incorrectly concluded was not an option. Thus, GM claims the court erroneously directed the jury to find that GM was liable if Long was not, regardless of whether Shipler had proved her case against GM.

The trial court directed the jury that before Shipler could recover against GM, she must prove either negligence or strict liability. The court instructed that in order to prove negligence, Shipler must show by the greater weight of the evidence that GM breached its duty to her by failing to use reasonable care in the design of the Blazer's roof in view of the foreseeable risk of injury and that the negligence was a proximate cause of Shipler's damages.

The jury was instructed that to prove strict liability, Shipler must demonstrate that GM placed the Blazer on the market; that at the time the Blazer left GM's possession, it was defective in the way claimed by Shipler; that this defect made the Blazer unreasonably dangerous for its intended use or for any use GM could reasonably have foreseen; and that the defect was a proximate cause of Shipler's damages. The jury was instructed that if Shipler did not meet her burden of proof on either theory, the verdict must be for GM. If Shipler met the burden of proof on either of the theories against GM, the verdict must be for Shipler.

The jury was instructed as to Long that Shipler was required to prove his negligence was a proximate cause of her damages. If she did not meet the burden of proof against Long, then the verdict must be for Long. If she met the burden of proof, then the

verdict must be in favor of Shipler. If Shipler met her burden of proof as to both defendants, then a single verdict should be returned against both defendants without a determination of the amount that an individual defendant was obligated to pay.

[3] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

GM proposed an instruction stating if Shipler did not prove that GM failed to use reasonable care in the design of the roof structure of the Blazer and that such failure proximately caused her injury, then the verdict must be for GM. GM's proposed instruction concerning strict liability stated Shipler must prove that GM placed the Blazer on the market; that at the time it left GM's possession, the Blazer was defective in one or more of the ways claimed by Shipler; that the defect made the Blazer unreasonably dangerous for its intended use or for any use GM could reasonably have foreseen; and that the defect was a proximate cause of damage to Shipler.

[4-6] Both the proposed instructions and the instructions given by the trial court were similar to the Nebraska Jury Instructions. The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004). If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal. *Id.* A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

The jury was instructed as to the negligence and strict liability theories presented by the parties. The instructions given

correctly stated the law and adequately covered the issues to be submitted to the jury. GM has not shown that the instructions were prejudicial or otherwise adversely affected a substantial right of GM. It has not demonstrated any prejudice from the jury instructions given.

(b) Additional Verdict Form

GM claims that it should be granted a new trial because of an alleged oral communication between the trial court and the jury concerning an additional verdict form that would have allowed the jury to find for the defendants. At the hearing on its motion for new trial, GM offered a juror affidavit stating the foreperson had asked the bailiff about an additional verdict form that would allow the jury to find for the defendants. The juror asserted that the bailiff checked with the court and that the bailiff told the jury that it had "all possibilities before [it]." GM argues that the court's statement implied at least one of the defendants was liable and that this implication was by itself prejudicial error.

The trial court sustained Shipler's objection to the affidavit when it was offered at the hearing on the motion for new trial. GM has not assigned as error the trial court's ruling to exclude the affidavit. See *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005) (errors must be specifically assigned and argued to be considered by appellate court). Therefore, whether the court properly refused to admit the affidavit into evidence is not before us. Without the affidavit, there is no evidence that the jury requested an alternative verdict form or that the trial court communicated with the jury concerning the issue.

Even if the jury was told that it had all the necessary verdict forms, we conclude that the defendants were not prejudiced by the trial court's statement. In overruling the motion for new trial, the court concluded it would not have been proper to present a fourth verdict form to the jury. The court noted that Long had originally admitted that he negligently caused the rollover accident, but denied causing injury to Shipler. Long admitted later that he negligently caused the rollover accident and that he caused some injury to Shipler. The court stated that it had contemplated the possibility of a fourth verdict form, but when Long changed his position, a fourth verdict form was no longer

available. Long's defense was that had it not been for GM's design of the Blazer's roof, Shipler would not have sustained the paralyzing injury even though Long caused the accident and other injuries. The court said: "If the jury had found that GM was not negligent and had not placed an unreasonably dangerous product on the market, then Long was responsible for the paralyzing injury. There was simply no other alternative, given Long's admissions."

We conclude there were only three verdict forms that the jury could properly consider. Long admitted liability, and the parties stipulated that his operation of the Blazer caused the accident. The remaining issues were whether Long's negligence was the sole cause of the injury, whether the Blazer's roof was the sole cause of the injury, or whether both GM and Long proximately caused the injury.

[7,8] The jury may be instructed upon only those theories of the case which are supported by competent evidence. See *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). A trial court need not instruct the jury on an issue where the facts do not justify such an instruction. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003). The trial court correctly determined the jury could not be instructed that it could find in favor of both defendants. The verdict forms did not relieve Shipler of her burden of proof as to both defendants. The question was whether Long, GM, or both were liable for Shipler's quadriplegia.

(c) Oral Communication to Continue Deliberations

GM complains that the trial court improperly communicated with the jury through the bailiff and without notice to counsel, directing the jury to continue deliberations when it was deadlocked. On Tuesday, September 23, 2003, the court made a record that at some time after 4 p.m. on Monday, September 22, the presiding juror communicated by telephone with the bailiff that the jury was deadlocked. At that time, the court instructed the bailiff to tell the jury that it should continue deliberations for the remainder of the afternoon and that if the jury's status was the

same on Tuesday morning, the jury should inform the court. During a hearing outside the presence of the jury at 4 p.m. on Tuesday, the court stated that it had not received any further communication from the jury until 3:43 p.m. that day when the jury again stated that it was deadlocked.

Not every oral ex parte communication by the court to the jury is improper and requires a new trial. See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). The communication must be prejudicial. Here, no prejudice occurred. The jury was told that it should continue deliberating to the end of the day, which was less than an hour. We conclude that the communication was harmless because it had no tendency to influence the verdict. See *State v. Thomas, supra*.

(d) *Allen* Charge

GM claims that a formal supplemental instruction given by the trial court was an impermissible *Allen* instruction (directive from court to deadlocked jury to continue deliberating). See *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

The jury began deliberations at 4:56 p.m. on Thursday, September 18, 2003. At 4:30 p.m. on Tuesday, September 23, the trial court met with counsel for all parties outside the presence of the jury. The court stated that it had received a note that afternoon from the jury foreperson again stating that the jury was deadlocked. The court stated that it had conferred with counsel and planned to bring the jury in and, without asking as to the division of the jury, give a supplemental instruction, if appropriate. GM's counsel proposed its own instruction for use with a deadlocked jury, claiming that the court's proposed instruction was coercive and would cause jurors to go with a majority and give up their conscientious scruples.

At 4:42 p.m., on September 23, 2003, the jury returned to the courtroom, and all counsel were present. The foreperson told the trial court that the jury was deadlocked after 3 days of deliberation. The court then gave the jury a supplemental instruction stating that if the jury was not able to reach a verdict within a reasonable time, the court would declare the jury deadlocked or hung, the jury would be discharged, and a mistrial would be declared. The court informed the jury of the meaning of a mistrial

and offered some suggestions to consider as it resumed its deliberations, including rearranging seats, taking turns telling other jurors the weaknesses of their position, and avoiding interruption or comment until each had time to talk. The court explained that it was not seeking to force agreement or to make the jury think that it would be forced to deliberate until it agreed. Given this supplemental instruction, the jury continued to deliberate for another 3 days before it reached a verdict.

GM objects to the trial court's communication with the jury in part based on Neb. Rev. Stat. §§ 25-1115 and 25-1116 (Reissue 1995). These statutes prohibit oral instructions and relate to further explanation of instructions previously given or to explanation of the facts or the law of the case. In the present case, the complained-of communication was given in court after consultation with counsel for all parties, and counsel were present when the instruction was given. The instruction was recorded.

In *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), this court was asked to find that the defendant was prejudiced by an *Allen* charge. We noted that an *Allen* charge to the jury given orally without notice to the parties or their counsel violates §§ 25-1115 and 25-1116 and is improper. "If the record affirmatively shows that the defendant has been prejudiced by private communication between the trial court and jurors, it is reversible error, and a new trial should be granted. Reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict." *State v. Thomas*, 262 Neb. at 1001, 637 N.W.2d at 651. In *Thomas*, we found that the record indicated that the trial court only directed the jury to continue its deliberations and that the direction did not have a tendency to influence the verdict.

In *State v. Garza*, 185 Neb. 445, 176 N.W.2d 664 (1970), the trial court admonished the jury after being informed that it was deadlocked by a vote of 11 to 1. The court told the jury that although it had deliberated for more than 15 hours, the court could not be convinced that there was no possibility of agreement. A guilty verdict was arrived at 45 minutes later. This court noted that a factor to consider in reviewing this type of instruction is whether it tended to coerce a dissenting juror or jurors. See *Potard v. State*, 140 Neb. 116, 299 N.W. 362 (1941) (court

rejected *Allen*-type instruction; only purpose for instruction was to peremptorily direct agreement, which invaded province of jury). In *Garza*, this court referred to the ABA Standards Relating to Trial by Jury § 5.4 (Approved Draft 1968), which states that the court may require the jury to continue its deliberations, but that the court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

In order to obtain relief concerning the alleged oral instructions or the *Allen* charge, GM must demonstrate that it was prejudiced by the trial court's actions. An instruction directing the jury to continue its deliberations does not require reversal if it cannot be shown that it tended to coerce the jury. In this case, the supplemental instruction was given on Tuesday, September 23, 2003, after the jury had deliberated for 3 days. The jury verdict was not returned until 1:15 p.m. on Friday, September 26. The record does not support a finding that the jury was coerced by the supplemental instruction given in the presence of counsel.

GM has not demonstrated that it was prejudiced by any of the trial court's instructions, by the failure to provide a fourth verdict form, by the court's communicating with the jury outside the presence of counsel, or by the court's giving a supplemental instruction to continue deliberations. This assignment of error has no merit.

### 2. Contributory Negligence and Apportionment of Damages

GM argues that the trial court erred in barring its contributory negligence defense. Both GM and Long claim the court erred in refusing to permit the jury to allocate liability for noneconomic damages in proportion to a percentage of fault.

GM claims that Long's driving while under the influence of alcohol, his negligent control of the Blazer, and Shipler's knowing decision to drink alcohol and ride in the vehicle with Long were evidence of contributory negligence which the jury should have been entitled to consider. GM asserts that under Nebraska law, contributory negligence is a defense which would diminish proportionately the amount awarded as damages for any injury attributable to Long's negligence or Shipler's contributory

negligence. GM points out that in civil cases not involving a common enterprise or plan, where contributory negligence is a defense and multiple defendants are involved, noneconomic damages must be allocated in proportion to each defendant's percentage of negligence. See Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995). It argues that the trial court erred in concluding that contributory negligence did not apply to a crashworthiness case.

The trial court did not determine whether contributory negligence is a defense to a cause of action based upon strict liability. Instead, the court concluded:

> The particular theory under which [Shipler] seeks recovery in this case is what has been termed a crashworthiness theory of recovery. Contributory negligence is not a defense that has been recognized either by statute or by the courts as applying to a crashworthiness theory of recovery. It is arguable, and this court does not determine, whether or not § 25-21,185.09 recognizes contributory negligence as a defense in a strict liability action. . . .
>
> The inherent nature of the crashworthiness or enhanced injury theory of liability disallows the submission of issues of contributory negligence to a jury. A conceptual problem is created when one tries to apply concepts of contributory negligence under a crashworthiness theory of recovery that is unique to this theory as compared to other theories of strict liability. In crashworthiness cases, two distinct events are alleged by the Plaintiff: the initial accident and the subsequent "second collision" for which the Plaintiff seeks recovery from the defendant manufacturer. The crashworthiness theory, by its terms, assumes that manufacturers know accidents involving their vehicles will occur and that "[a]ny participation by the plaintiff in bringing the accident about is quite beside the point. . . . Any negligence by [the] driver [of the vehicle], or even by [the plaintiff] himself, in connection with the original crash cannot be used by the manufacturer in defending against [the plaintiff's] enhancement claim."

The trial court concluded that because Shipler had alleged that her quadriplegia was due entirely to GM's defective design, which caused a "second collision," and because Long had admitted

liability for the initial collision, evidence of alcohol consumption was inadmissible evidence not relevant to any disputed fact.

(a) Negligence Claim

GM argues that because Shipler conceded that contributory negligence was a defense to a cause of action for negligence in a crashworthiness case, Long's comparative negligence was an issue as to that claim. It asserts that both Shipler's and Long's negligence must be compared to GM's liability and that Shipler's noneconomic damages should be apportioned accordingly. See § 25-21,185.10. We will address this argument before proceeding further.

[9] A general finding that a judgment should be for a certain party warrants the conclusion that the finder of fact found in favor of that party on all triable issues. *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998). Because the jury returned a verdict under both theories of negligence and strict liability, we conclude that the jury found in favor of Shipler on both theories of recovery. Therefore, in order to establish prejudicial error that would require a new trial, GM must establish in the strict liability action that it was entitled to present evidence of Long's negligence and Shipler's alleged contributory negligence. We need not address whether the trial court should have permitted evidence of Long's and Shipler's negligence in the cause of action based upon GM's alleged negligence. See *id.*

In *Foiles*, the plaintiff alleged three theories of recovery: fraudulent misrepresentation, implied bailment, and negligence. The court entered a general verdict, finding in favor of the plaintiff, and we therefore presumed that the plaintiff prevailed on each theory. In order to succeed on appeal, the defendants were required to establish that the court was clearly wrong as to each theory of recovery. In the case at bar, GM must establish that Long's negligence and Shipler's alleged contributory negligence were defenses to Shipler's cause of action based upon strict liability in tort.

(b) Strict Liability Claim

In 1992, the Nebraska Legislature amended the comparative negligence scheme in which the contributory negligence of the claimant diminishes proportionately the amount awarded as

damages (as long as the claimant's negligence is less than 50 percent; otherwise, he or she is barred from recovery). See 1992 Neb. Laws, L.B. 262. GM argues that contributory negligence remains a defense to strict liability in tort and that had the Legislature wanted to eliminate the contributory negligence defense in strict liability claims, it would have explicitly done so. GM argues that the revised law provides a broader framework in which a plaintiff's negligence may be considered in any action where contributory negligence may be, pursuant to law, a defense, regardless of the theory of liability.

[10] On the other hand, Shipler argues that the 1992 amendment specifically removed all language extending the defense of contributory or comparative negligence to an action based upon strict liability. Shipler contends that Neb. Rev. Stat. § 25-21,185.07 (Reissue 1995) has limited application and applies only to civil actions to which contributory negligence may be, pursuant to law, a defense. Shipler points out that contributory negligence does not apply to all civil actions regardless of the theory of liability. For example, contributory negligence does not apply to intentional torts. See *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). It does not apply when a patient's conduct provides the occasion for medical action which later is the subject of a medical malpractice claim. See *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990). Nebraska's comparative negligence law applies only to civil actions in which contributory negligence is a defense. *Brandon v. County of Richardson, supra.* See *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 332 N.W.2d 196 (1983).

The question presented is whether Nebraska law permits contributory negligence to be asserted as a defense in an action based upon strict liability.

*(i) Background*

Nebraska adopted the doctrine of strict liability in product liability cases in *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961). In *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971), we held a manufacturer was strictly liable in tort when an article he placed on the market, knowing that it was to be used without inspection for defects,

proved to have a defect which caused an injury to a person rightfully using that product. In *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 567, 209 N.W.2d 643, 655 (1973), *disapproved on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983), the court stated: "It is clear that traditional 'contributory negligence' in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort, or for a breach of warranty. Assumption of risk and misuse of the product are."

Historically, the application of contributory negligence in strict liability cases has varied with legislative enactments. At the time of our decision in *Hawkins Constr. Co.*, the law addressed contributory negligence in actions based upon the negligence of another.

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison . . . .

See Neb. Rev. Stat. § 25-1151 (Reissue 1975).

In *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976), the federal appellate court had its first opportunity to examine our contributory negligence statute in an action based upon strict liability. The federal district court had instructed the jury that the defense of negligence or contributory negligence on the part of the plaintiff's decedent was not available to the defendant in an action based on product liability in the manufacture of a chattel. On appeal, the U.S. Court of Appeals for the Eighth Circuit stated that

> the application of the Nebraska comparative negligence statute would, under the language of the statute, be extremely confusing and inappropriate in a strict liability case. Under Nebraska law in order for the comparative negligence statute to be invoked the plaintiff's negligence must be slight and the defendant's negligence gross in comparison thereto. [Citations omitted.] In strict liability cases proof of negligence or degree of fault is not required.

*Id.* at 802.

Subsequently, the Nebraska Legislature amended § 25-1151 to permit consideration of the plaintiff's negligence in strict liability tort actions. The statute provided:

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence *or act or omission giving rise to strict liability in tort* of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence *or act or omission giving rise to strict liability in tort* of the defendant was gross in comparison . . . .

(Emphasis supplied.) See § 25-1151 (Reissue 1979). Therefore, by amendment, the Legislature expressly made contributory negligence applicable to strict liability in tort.

In 1992, the Legislature again amended the law regarding contributory and comparative negligence. Prior to the revised comparative negligence scheme implemented by the 1992 amendments, this court had not fully addressed whether contributory or comparative negligence applied in strict liability actions. In *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987), we stated that contributory negligence defenses in strict liability actions which consisted of merely a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence were not available defenses in actions based on strict liability for defective and unreasonably dangerous products. See, also, *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *disapproved on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983). We did not address whether contributory or comparative negligence generally applied in strict liability tort actions.

The 1992 amendment removed all references to strict liability from the comparative negligence statutes.

> In all actions *accruing before February 8, 1992*, brought to recover damages for injuries to a person or to property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the

> plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison . . . .

(Emphasis supplied.) Neb. Rev. Stat. § 25-21,185 (Reissue 1995). Section 25-21,185.07 provides in part:

> Sections 25-21,185.07 to 25-21,185.12 shall apply to all civil actions to which contributory negligence may be, pursuant to law, a defense that accrue on or after February 8, 1992, for damages arising out of injury to or death of a person or harm to property regardless of the theory of liability. Actions accruing prior to February 8, 1992, shall be governed by the laws in effect immediately prior to such date.

Since the 1992 amendment, this court has not entertained the question of whether evidence of contributory negligence is relevant in a product liability case based on strict liability. The case of *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002), involved the improper use of a strut spring compressor. We concluded that the defendant's allegation of improper use was in substance the affirmative defense of misuse, not contributory negligence.

Some states have revised their systems of comparative negligence and have replaced the term "negligence" with the term "fault." Although the terms may be used interchangeably, when a distinction is made, fault is generally regarded as a broader term "encompassing a wider range of culpable behavior or responsibility for injury than that covered by the term 'negligence.' " 3 American Law of Products Liability 3d § 40:10 at 40-17 (John D. Hodson & Richard E. Kaye eds., 2003). "Comparative fault" schemes generally provide that a plaintiff's recovery in a strict liability action may be reduced proportionately by the plaintiff's negligence. See, e.g., Wash. Rev. Code Ann. §§ 4.22.005 and 4.22.015 (West 2005); *Lundberg v. All-Pure Chemical Co.*, 55 Wash. App. 181, 186, 777 P.2d 15, 19 (1989) (commenting that "the Legislature has determined that the comparative fault doctrine shall apply to all actions based on 'fault,' including strict liability and product liability claims").

States that preclude the defense of contributory negligence in strict product liability actions reason that "[s]ince strict liability is based on a product defect rather than the negligence

of the manufacturer or seller, it is inappropriate and confusing to inject negligence principles into a strict liability action." 3 American Law of Products Liability 3d, *supra*, § 40:43 at 40-71 to 40-72. Other states holding that comparative fault principles are not applicable in strict product liability actions have based their rulings, at least in part, on the fact that their comparative negligence statutes are limited to negligence actions. See, *Young's Machine Co. v. Long*, 100 Nev. 692, 693, 692 P.2d 24, 25 (1984) (holding that comparative negligence statute cannot be interpreted to include strict product liability in "that class of actions in which contributory negligence may be asserted as a defense"); *Kirkland v. General Motors Corporation*, 521 P.2d 1353, 1367 (Okla. 1974) (stating that statutory comparative negligence scheme has "no application to manufacturers' products liability, for its application is specifically limited to *negligence actions*"); *Staymates v. ITT Holub Industries*, 364 Pa. Super. 37, 47, 527 A.2d 140, 145 (1987) (holding that comparative negligence is inapplicable in strict product liability actions and commenting that "Pennsylvania's Comparative Negligence Act . . . by its own terms, is applicable only to 'actions brought to recover damages for negligence' "); *Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561, 588 (Wyo. 1992) (comparative negligence statute does not " 'permit strict liability . . . to be considered and weighed in the same manner as negligence in determining each actor's "percentage of fault" for the plaintiff's injuries' ").

Other states have expressly excluded the defense of contributory negligence in strict product liability actions either by statute, see Ariz. Rev. Stat. Ann. § 12-2509B (West 2003), or by judicial fiat where strict product liability is part of common law, see *Smith v. Smith*, 278 N.W.2d 155, 160-61 (S.D. 1979) (holding that "the plaintiff's or the defendant's negligence is irrelevant and contributory negligence is not a defense in strict liability").

*Schneider Nat., Inc.* went to the Wyoming Supreme Court on certified questions from the U.S. Court of Appeals for the 10th Circuit. One of the questions to be answered was as follows:

> "Does Wyoming's current comparative negligence statute, W.S. § 1-1-109 (1988), which requires that damages in an action 'to recover damages for negligence' be allocated

> according to the 'percentage of fault attributable to each actor,' permit strict liability and breach of warranty to be considered and weighed in the same manner as negligence in determining each actor's 'percentage of fault' for the plaintiff's injuries and their corresponding liability for the plaintiff's damages?"

*Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d at 563.

In that case, the defendants sought indemnity against the third-party defendants and advanced the following three theories of recovery: strict liability for defective design and manufacture of a hitch that was unreasonably dangerous at the time it was sold; breach of an express and implied warranty; and negligent design manufacturing, testing, and inspection.

At the time, Wyoming's comparative negligence statute provided in relevant part:

> "Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence of the said person is not more than fifty percent (50%) of the total fault. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering. . . ."

*Id.* at 566.

Whether comparative negligence and comparative fault principles applied to theories of recovery based on strict liability or breach of warranty was controlled by the court's decision in *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (Wyo. 1991). The *Phillips* court had held that the specific language of Wyoming's comparative negligence statute limited its operation by referring to " 'a recovery in an action . . . to recover damages for negligence.' " 806 P.2d at 835.

The *Schneider Nat., Inc.* court stated that a cause of action premised on a theory of strict liability or breach of warranty was therefore unaffected by the principles of comparative negligence or comparative fault as stated in Wyoming's comparative negligence statute.

In *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979), an employee whose fingers and thumb were amputated by the blade of a

bandsaw brought a product liability claim against the manufacturer and distributor of the saw and a negligence claim against the employer who owned the saw. On appeal, the South Dakota Supreme Court held that submission of the issue of contributory negligence on strict liability claims against the manufacturer and distributor was prejudicial error requiring reversal.

The *Smith* court stated that with rare exceptions, courts that have adopted the doctrine of strict liability (whether in the precise language of the Restatement (Second) of Torts § 402A (1965) or otherwise) have held that it is substantive. These courts hold that strict liability is not a negligence action with the elements of proof changed, but, rather, it is a wholly different tort action.

> Strict liability is an abandonment of the fault concept in product liability cases. No longer are damages to be borne by one who is culpable; rather they are borne by one who markets the defective product. The question of whether the manufacturer or seller is negligent is meaningless under such a concept; liability is imposed irrespective of his negligence or freedom from it. Even though the manufacturer or seller is able to prove beyond all doubt that the defect was not the result of his negligence, it would avail him nothing. We believe it is inconsistent to hold that the user's negligence is material when the seller's is not.

*Smith v. Smith*, 278 N.W.2d at 160.

*(ii) Statutory Interpretation*

[11-15] Whether contributory negligence is a defense to an action based upon strict liability is a matter of statutory interpretation. Statutory interpretation presents a question of law. *Caspers Constr. Co. v. Nebraska State Patrol*, 270 Neb. 205, 700 N.W.2d 587 (2005). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003). A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. *Galaxy Telecom v. J.P. Thiesen & Sons*, 265 Neb. 270, 656 N.W.2d 444 (2003). The last expression of legislative will is the law. *Alegent*

*Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000).

[16,17] 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. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002). The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible. *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998).

With the 1992 amendment, the Legislature removed the term "strict liability" from the contributory negligence scheme. We therefore presume that the Legislature was aware that prior to such amendment, the "slight-gross" system applied to strict liability, see § 25-21,185, and that the Legislature purposely removed "strict liability" from the revised statutory scheme. The revised comparative negligence scheme speaks in terms of "negligence." See Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (Reissue 1995). Nowhere in the revised scheme has the Legislature employed the term "strict liability." See *id.*

The 1992 amendment created a cutoff point of February 8, 1992, regarding the application of contributory negligence to actions giving rise to strict liability in tort. The Legislature is presumed to have intended a change in the existing law. See *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004). Had the Legislature intended to permit consideration of the plaintiff's contributory negligence in actions involving strict liability in tort, there would have been no reason to establish a cutoff date for which actions prior to February 8, 1992, would be governed by the laws in effect immediately prior to that date. See § 25-21,185.07. Had the Legislature intended to permit contributory negligence as a defense in all civil actions, it would not have needed to carve out actions accruing prior to February 8, 1992. For actions after that date, the statute refers

to civil actions to which contributory negligence "may be" a defense. See *id.*

[18] The Legislature is presumed to know language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended. *Hall v. City of Omaha*, 266 Neb. 127, 663 N.W.2d 97 (2003). We conclude that the Legislature intended to exclude the defense of contributory negligence in strict liability actions.

In *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 438, 412 N.W.2d 56, 67-68 (1987), we pointed out the significant distinction between negligence and strict liability in the context of product liability actions:

> In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.

[19] Statutes pertaining to the same subject matter are to be construed together as if they were one law and effect given to every provision. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). The language of § 25-21,185.09 allows a jury to compare a plaintiff's contributory negligence to the negligence of a defendant or defendants. It does not provide that the plaintiff's negligence may be applied in the plaintiff's cause of action based upon strict liability in tort. Section 25-21,185.10 allows the jury to compare the negligent conduct of codefendants, mandating that "[e]ach defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence . . . ." Section 25-21,185.10 does not provide that one defendant's negligence may be compared to another in a cause of action for strict liability in tort.

When the Legislature enacted the 1992 amendment, it provided that the contributory negligence of the plaintiff was to be compared to the negligence of other persons against whom

recovery was sought. It did not provide for a comparison of negligence in an action for strict liability in tort.

*(iii) Legislative History*

GM claims that the language in § 25-21,185.07, "regardless of the theory of liability," means that contributory negligence may be asserted in a cause of action based upon strict liability. To the extent that such language could be considered ambiguous, the legislative history of the statute supports our interpretation of the law.

[20] We may look to the legislative history to determine intent. Legislative purpose and intent are the focus of our inquiry. A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature. *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002).

GM argues that the Legislature intended for contributory negligence to apply in strict liability claims. It points to language by an introducer of one of the comparative negligence bills, who stated: "[T]his standard of liability that we are adopting in LB 88 . . . applies to all cases." See Floor Debate, L.B. 88, 92d Leg., 1st Sess. 850 (Feb. 13, 1991). Our review of that statement indicates that it was not made with regard to theories of liability (e.g., negligence or strict liability), but was made in the context of debate over whether the comparative negligence scheme "should be applied to municipalities and counties as well as to normal cases that don't involve municipalities and counties." *Id.* at 849. The comments were later clarified by the following statement: "[H]istorically . . . negligence, the standard of liability[,] applied to political subdivisions as applied to everybody across the board." *Id.* at 854. The political subdivision issue evoked contentious debate and was eventually decided in a subsequent act (replacing 1991 Neb. Laws, L.B. 88) which provided that tort actions against the state or political subdivisions were to be governed by the State Tort Claims Act, and the Political Subdivisions Tort Claims Act, respectively. See 1992 Neb. Laws, L.B. 262, §§ 7, 8, and 11 (amending Neb. Rev. Stat. §§ 13-902 and 13-910 (Reissue 1991) and 81-8,219 (Cum. Supp. 1990)).

Another introducer of the comparative negligence legislation proposed an amendment (later adopted) which provided that the

law would "apply to actions to which contributory negligence is a defense." See Floor Debate, L.B. 88, 92d Leg., 1st Sess. 831 (Feb. 12, 1991). The introducer explained that "legally what this means is that it won't apply to strict liability and some of those other areas of law." *Id.* No opposition arose, and no counterargument was offered, to this assertion. No other reference was made to strict liability actions throughout the remainder of the debate on the bills that became the comparative negligence statutes.

After considering statutory language and legislative history, we conclude that the Legislature did not intend for the comparative negligence scheme to apply in actions based on strict liability after February 8, 1992. As a result, we determine that the trial court did not err in refusing to admit evidence of Long's and Shipler's negligence in Shipler's action based on strict liability.

### 3. Exclusion of Seatbelt Misuse Evidence

GM argues that the trial court erred in excluding evidence of Shipler's seatbelt misuse and its effect on her movement during the rollover accident.

Initially, Shipler alleged that GM was negligent in its failure to use reasonable care in the design and manufacture of the passenger restraint system. Before trial, Shipler moved to prohibit any evidence of or reference to the use or misuse of seatbelts at or prior to the time of the accident. Shipler asserted that the issue was irrelevant to the action and that any effort to bring the seatbelt issue before the jury would be an attempt to create unfair prejudice against Shipler and Long. The motion asserted that GM's expert had testified that Shipler would have sustained the same injuries regardless of her use or misuse of the seatbelt. Shipler stated that if the trial court overruled the motion in limine, she would request leave to dismiss the allegations concerning the seatbelt and would stipulate to a 5-percent reduction in damages as provided in § 60-6,273, which states:

> Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.

GM responded that it had evidence that Shipler had her 9-month-old son under the seatbelt in her lap at the time of the accident. It claimed that it had a seatbelt expert who would testify as to the impact of the child on the amount of slack in the seatbelt. GM claimed the manner in which Shipler moved around during the accident was crucial to how she sustained her injury.

The trial court first overruled Shipler's motion because she had placed the occupant restraint system at issue and because the court found that the prohibition of § 60-6,273 did not apply. Shipler then amended her petition, dismissing the allegations concerning the occupant restraint system.

In a later ruling on the motion in limine, the trial court found all parties had agreed that Shipler was wearing a three-point seatbelt. It found that neither Shipler's nor GM's expert testified that the seatbelt had had any effect on Shipler's movement within the vehicle. GM's expert had opined that Shipler was firmly fastened and that there was no indication of any slack in the belt. GM's expert stated that to some degree in this type of accident, in which the roof collapses, the use of the seatbelt actually enhances the injury by holding the passenger in place.

The trial court found Shipler's expert had stated that no seatbelt could fully restrain an occupant and that Shipler's seatbelt had some slight loosening when she was upside down as the roof was crushing in. The court found that neither expert identified any injury that was either created or enhanced by the way in which Shipler used the belt. It therefore excluded evidence of the seatbelt because it was not relevant to the issues presented to the jury.

GM made two offers of proof related to seatbelt use. GM sought to elicit testimony that Shipler's son was sitting in the front seat, that he was not in a car seat, that he was belted in between Shipler's legs and the seatbelt, and that the lap belt went over both Shipler and her son. GM also sought to question Richard Stalnaker, Ph.D., GM's biomechanics expert, concerning the effect of placing an infant underneath a lap belt. GM said Stalnaker would have testified that the infant's ejection created additional slack in the seatbelt which made Shipler's "impact into the ground . . . more severe." The trial court sustained the objections to this evidence.

Shipler was wearing a seatbelt, but GM claims that it was not worn properly, i.e., in conjunction with her infant, who was ejected, thereby creating slack in the seatbelt. In overruling the defendants' motions for new trial, the trial court found no error in its previous rulings on the seatbelt issue. The court noted that the Legislature had addressed the role of seatbelt misuse by passing a law that damages should be reduced by up to 5 percent if the seatbelt was not in use. The court found that Shipler stipulated before trial to a 5-percent reduction in the judgment when she dropped her claim that the seatbelt was faulty and that the judgment had been reduced in accord with the stipulation. The court stated: "The defendants have received the full benefit that could be accorded them even if the seatbelt [was] not used at all."

The evidence of seatbelt misuse was not admissible in regard to the issue of liability or proximate cause. This is true whether the seatbelt was misused or not used at all. The trial court's reduction of the jury's award by 5 percent represented the full mitigation of damages available. The defendants were not prejudiced by the court's refusal to admit evidence of alleged seatbelt misuse. The defendants have received the maximum benefit that § 60-6,273 allowed.

4. Admission of Evidence of Other Similar Incidents

GM asserts that the trial court erred in admitting four exhibits which described 40 other rollover accidents. GM argues that it was prejudicial to admit the evidence because the accidents involved secondary collisions, unbelted victims, partial ejections, and different vehicle models, and because many occurred after the Blazer was manufactured.

GM filed a motion in limine to bar evidence of dissimilar incidents. It argued that the designs of other GM vehicles and other manufacturers' vehicles were not substantially similar to the design of the 1996 Chevrolet S-10 Blazer and were therefore irrelevant and should be excluded.

At a pretrial hearing, one of Shipler's experts, Donald Friedman, testified regarding the elements which he claimed made the incidents similar to the case at bar. All the accidents depicted involved S-10 Chevrolet vehicles and were rollovers.

The accidents demonstrated roof crush that caused severe head or neck injury.

At one of the hearings concerning the admissibility of evidence of other similar incidents, GM made specific objections to each of 39 other similar incidents and to 16 other similar incidents that it claimed occurred after the crash in which Shipler was injured. It argued that other similar incidents were relevant only as to notice to GM of the defect. Shipler argued that evidence of other similar incidents provided proof that there was a defect in the design of the 1996 Chevrolet S-10 Blazer.

The trial court found the incidents were substantially similar because of the nature of the accident (i.e., rollover); there was more than a single revolution of the vehicle; the injury to the victim involved a head or neck injury sustained as a result of contact with the roof of the vehicle, which resulted in severe injury or death; the victim was seated in the same position as Shipler (i.e., in the front seat and on the side of the vehicle that was the second to have contact with the ground); and the vehicle was in the same family of GM vehicles (i.e., 1984 to 1999 Chevrolet S-10 pickup, S-10 extended-cab pickup, or two- or four-door Blazer).

The trial court instructed the jury that the evidence was presented for two purposes: first, in support of Shipler's allegation that the Blazer's roof structure design was defective and, second, to support Shipler's allegation that GM knew of the alleged roof design defect prior to the accident. The jury was directed that it could not use that evidence for any other purpose.

[21,22] Relevant evidence of other similar accidents or occurrences is admissible to show that a defendant had notice and actual knowledge of a defective condition, provided that the accidents or occurrences were substantially similar; i.e., the prior accidents or occurrences happened under substantially the same circumstances and were caused by the same or similar defects and dangers. *General Motors Corp. v. Lupica*, 237 Va. 516, 379 S.E.2d 311 (1989). "[W]here an individual fails to adequately demonstrate how prior occurrences are substantially similar, evidence of prior occurrences is irrelevant and, thus, inadmissible." *Holden v. Wal-Mart Stores*, 259 Neb. 78, 85, 608 N.W.2d 187, 193 (2000).

[23] A plaintiff in a strict liability case may rely on evidence of other similar accidents involving the product to prove defectiveness, but the plaintiff must first establish that there is a substantial similarity of conditions between the other accidents and the accident that injured the plaintiff. *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978 (Pa. Super. 2005). The proponent of the evidence bears the burden to establish the similarity between the other accidents and the accident at issue before the evidence is admitted. *Id.* The proffered evidence must satisfy the substantial similarity test for it to be properly admitted into evidence, whether to prove defect, causation, or knowledge/notice. *Id.*

[24-26] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. See *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins., supra.* 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. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

The trial court in the case at bar conducted an extensive hearing to consider the admissibility of evidence of other similar incidents. The expert witness, Friedman, explained the similarities in the accidents cited in his exhibits. All of them involved Chevrolet S-10 vehicles or the equivalent, all were rollover accidents, and all demonstrated roof crush that caused severe head or neck injury.

The trial court gave a limiting instruction, telling the jury that the evidence of other similar incidents was presented for two purposes: to support Shipler's allegation that the design of the Blazer's roof structure was defective and to support her allegation that GM knew of the alleged roof design defect prior to Shipler's accident. The court stated: "You may not use that evidence for any other purpose."

The similar incidents were reviewed and found to be substantially similar to the facts of Shipler's case. The trial court found that substantial similarity in this case related to the nature of the accident, the number of revolutions of the vehicle, the head or neck injury sustained as a result of contact with the roof, the victim's position in the vehicle, and the type of vehicle.

Our review of the incidents combined with the limiting instruction demonstrates that the trial court did not abuse its discretion in admitting the evidence of other similar incidents.

### 5. Testimony and Instructions Concerning FMVSS 216

GM asserts that the trial court erred in admitting "baseless and unconstitutional 'opinions' of a self-described 'advocate' " about GM's "supposed intent to undermine" FMVSS 216, the federal roof strength standard. GM also argues that the court erred in giving an improper and misleading jury instruction that FMVSS 216 is a federal regulation, without explaining that compliance with it is required by law.

#### (a) Background

Clarence Ditlow, executive director of the Center for Auto Safety, a nonprofit consumer organization, testified concerning federal government standards for automobile safety. It first conducts research on automobile safety and then determines areas of concern. If a standard is needed, the government issues a notice of proposed rulemaking and seeks comments from the public on the adequacy of the standard. The government then issues a final standard.

Ditlow testified that FMVSS 216, which governs roof strength in automobiles, was published in the Federal Register on December 8, 1971, with an effective date of August 15, 1973. The notice stated that the purpose of the standard was to set minimum strength requirements for a passenger car roof to reduce the likelihood of roof collapse in a rollover accident. The standard has been codified at 49 C.F.R. § 571.216 (1998).

GM submitted comments on the proposed standard on April 5, 1971, and these comments were received into evidence. In the document, GM recommended a test procedure if the government deemed it necessary to have a standard on roof strength. GM said

it could comply with an effective date of 24 months after issuance of the standard, assuming that the effective date coincided with the introduction of a new model year. In its comments, GM also recommended deletion of the requirement that the test be repeated so that both front corners of the roof were tested.

(b) Expert Testimony on FMVSS 216

GM argues that the trial court erred in permitting Shipler's expert, Ditlow, to testify regarding the history of FMVSS 216 and its effect on automobile safety.

At the time of trial, Ditlow had been the executive director of the Center for Auto Safety for more than 30 years. The center is an organization founded in 1970, and its mission is to improve the safety, reliability, and efficiency of vehicles. It analyzes 50,000 consumer complaints related to automobile safety every year. Ditlow has testified before Congress on more than 30 occasions. GM did not object at trial to Ditlow's qualification as an expert on government regulation of the automobile industry.

Ditlow explained that manufacturers participate in rulemaking by stating their position on the proposed standard. Ditlow said GM's position concerning a proposed rule on roof intrusion was that roof crush did not relate to injury. Ditlow said that if the rule had been implemented as GM proposed, GM would have been able to meet the standard without changing the structure of its vehicles. He asserted: "The standard is to improve safety, but if you amend the standard as General Motors later proposed, they wouldn't have to modify the vehicles, they wouldn't have to strengthen the roofs." GM objected when Ditlow was asked: "So rather than making the cars strong enough to pass the test, they made the test weak enough so the cars would pass?" The objection was overruled, and Ditlow responded, "Yes."

In a sidebar, GM objected that Shipler was attempting to elicit testimony about GM's "exercise of its Constitutional rights to petition the federal government." If the trial court allowed the testimony, GM asked for an instruction stating that corporations have a right to petition the government. The court overruled the objection, stating that GM was "putting forward [FMVSS] 216 as a reasonable standard by which to measure its conduct" and

that Shipler had the right to attack it. The court declined to give a limiting instruction.

Later, Ditlow was asked if FMVSS 216 ensured safety of motorists in rollover accidents, and GM objected on the ground that the answer from this expert would invade the province of the court and the jury. The objection was overruled, and Ditlow said that the standard did not ensure motorists' safety and that there was no federal motor vehicle safety standard that reduced the likelihood of a rollover. Ditlow opined the roof strength standard was not stringent enough to ensure adequate roofs. In a "real world crash where there is a first side impact followed by a second side impact the roof will crush inward and you will see the levels of roof intrusion that . . . caus[e] deaths and serious injuries in vehicles on the road." Ditlow opined that stronger roofs would prevent that type of injury and death.

[27] On appeal, GM objects to Ditlow's testifying as an expert on government regulation of the automobile industry as it relates to safety because he was a "self-proclaimed consumer advocate lawyer," and not an expert. See brief for cross-appellant GM at 43. GM did not object when Ditlow referred to himself as an expert on automobile safety or when he explained his background in the automobile safety area. It did not move to strike the testimony on the basis that Ditlow was an advocate rather than an expert. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

The two objections made during Ditlow's testimony do not support GM's argument that he gave improper opinions. Ditlow was asked during direct examination about the timeframe of GM's general technical committee meetings. The first meeting was held prior to the date that the proposed roof crush standard was issued. Shipler's counsel asked if the second meeting was held after the proposed standard had been issued and after an internal report showed that five of six GM cars "flunked" the proposed tests, and Ditlow responded, "Yes." GM objected to the "argumentative use of the word 'flunk' " and to foundation, because it was not known if Ditlow knew about GM's internal information system. The objection was overruled as to foundation, and the trial court found that the word "flunked" had

previously been used in relation to the document. The other objection occurred when Ditlow said FMVSS 216 did not ensure the safety of motorists in rollover accidents. The objection was asserted on the ground that the answer would invade the province of the court and the jury. The objection was overruled.

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. 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. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). We conclude there was no abuse of discretion in the trial court's rulings on these objections.

[28] GM argues that Ditlow had no special knowledge, skill, experience, training, or education to qualify him as an expert on the subject of GM's motivation in commenting on the proposed safety standard, but it did not object to Ditlow's testifying as an expert witness or when Ditlow stated that he was an expert on government regulation of automobile safety. Where the grounds specified for the objection at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

GM also argues that Ditlow's speculation about GM's participation in the regulatory process was constitutionally out of bounds, because corporations, like any other citizen, have a constitutional right to petition the government and cannot be subject to liability for exercising that right. During Ditlow's testimony, GM objected that his testimony implied that GM was attempting to petition the government and that his testimony somehow violated GM's constitutional rights. The trial court overruled GM's objection and declined to give a limiting instruction informing the jury that GM had the right to petition the government. The court noted GM's position implied that its conduct should be measured by FMVSS 216.

GM points out that its "central defense" was its compliance with FMVSS 216, which it claimed was sufficient in and of itself to produce vehicles that were crashworthy in rollover accidents.

See brief for cross-appellant GM at 42. In its opening statement, GM told the jury that GM not only complied with FMVSS 216, but that GM exceeded it by a significant margin. In closing arguments, GM asserted that its standard exceeded that set by the government.

GM has not shown that it was unfairly prejudiced by Ditlow's testimony. The trial court did not abuse its discretion in allowing Ditlow to testify.

(c) Jury Instruction

GM also complains that the trial court gave an improper jury instruction regarding FMVSS 216. On the fourth day of deliberations, the jury sent a request to the court asking the following question: "Is FMVSS 216 a Federal Law . . . or is it a standard for the automotive industry?" The court told the parties that it planned to tell the jury that FMVSS 216 is a federal regulation. GM objected and asked the court to use one of the following alternatives as an instruction: (1) Compliance with FMVSS 216 is required by federal law, (2) federal law requires compliance with FMVSS 216, (3) FMVSS 216 is a mandatory requirement to federal law, or (4) FMVSS 216 is a federal regulation required by federal law. GM claimed that the court's proposed response did not answer the question. The court gave the following instruction: "FMVSS 216 is a federal regulation."

GM now argues that the instruction as given was ambiguous because it did not explain whether the law or industry set the standard. Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005). The instruction as given was a correct statement of the law. FMVSS 216 is codified in the Code of Federal Regulations. Thus, it is a federal regulation. The jury

did not request an explanation of the distinction between a law and a regulation. Rather, it asked whether FMVSS 216 was a law or an industry standard.

The trial court's instruction did not differ in meaning from the instruction proposed by GM. In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). GM has not demonstrated any prejudice from the instruction.

### 6. Errors Related to Verdict

GM makes three assignments of error related to the verdict. It argues that the trial court erred in failing to strike the award for future wage loss; that the court erred in giving a detailed limiting instruction regarding Shipler's collateral source benefits; and that the court erred in upholding the jury's verdict, which resulted from passion and prejudice.

#### (a) Future Wage Loss

GM claims the award of future wages was based upon improper speculation and, therefore, was not proved to a reasonable certainty. It argues that one of Shipler's experts, Charles Linke, who holds a doctor of business administration degree, did not opine to a reasonable degree of economic certainty regarding her loss of earning capacity. It claims that Linke had inadequate information to be able to express an opinion to a reasonable degree of certainty and therefore looked to the jury to fill in the blanks and that the only evidence that Shipler cited to support her future earnings was 2 years of prior earnings.

At trial, Linke testified that Shipler's worklife expectancy was 19.5 years. He explained variables, including the growth rate of compensation and the interest or discount rate. He provided examples of the application of his formula and explained the use of the calculation to determine Shipler's future loss of wages based upon the findings of earning capacity. He testified to Shipler's total earnings in 1996 and 1997 based upon her income tax returns and testified that the earnings of an average female

worker who had a high school education and was 35 to 39 years of age, like Shipler, was $25,811 in 2001.

Because Linke was unable to state Shipler's earning capacity precisely, GM moved for a directed verdict on the future wage-loss issue. It claimed that no witness had quantified such loss with any certainty. The motion was overruled.

Leonard Matheson, Ph.D., an occupational rehabilitation expert, testified about Shipler's goals for the future, stating that Shipler would never work again. He testified that Shipler had been earning $6.50 per hour for a 40-hour week plus tips as a bartender prior to the accident.

Shipler argues that neither GM nor Long objected to Linke's testimony as being speculative, nor did they present any evidence to contradict it. Shipler claims that the evidence provided the jury with a range of possible earning capacity.

[29,30] A plaintiff's evidence of damages may not be speculative or conjectural and must provide a reasonably certain basis for calculating damages. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). "The general rule is that uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss." *Id.* at 226-27, 665 N.W.2d at 572. Proof of damages to a mathematical certainty is not required, but a plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural. See *id.* The proof is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness. See *id.*

[31] The question of whether the evidence of damages is reasonably certain is a question of law, and not a matter to be decided by the trier of fact. *Id.* The trial court must first determine whether the evidence of damages provides a basis for determining damages with reasonable certainty, i.e., is not speculative or conjectural. *Id.* If such a basis is provided, the issue of damages can be submitted to the jury. The jury is instructed that the plaintiff must prove the nature and extent of the damages by the greater weight of the evidence, not whether the evidence of damages is reasonably certain. See *id.* The jury is to award such

damages only where the evidence shows that the future earnings or pain and suffering for which recovery are sought are reasonably certain to occur. See *id.*

> When the plaintiff seeks prospective damages, the contingent nature of the damages claimed inherently requires consideration of future events that can only be reasonably predicted, but not conclusively proved, at the time of trial. In such instances, the jury should be instructed, when the evidence warrants, that the plaintiff may recover damages for injuries "reasonably certain" to be incurred in the future.

*Id.* at 229, 665 N.W.2d at 574.

[32] The fact that Shipler would incur damages in the future was reasonably certain. The question for the jury was the amount of her damages. The jury was given sufficient evidence from which it could determine a range of damages for Shipler's future loss of wages. 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. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

We also note that the jury returned a general verdict that did not delineate the type and amount of damages included therein. We are unable to determine the specific amounts it awarded for medical expenses, future loss of wages, and pain and suffering. The trial court instructed the jury that if it decided Shipler was entitled to recover damages for any future losses, it must determine the present cash value of those losses. We conclude the evidence supports the jury's verdict and is reasonably related to the elements of the damages proved.

(b) Collateral Source Instruction

Shipler testified that the federal and state governments paid her medical expenses and living costs. GM objects to what it terms the trial court's "limiting instruction" concerning evidence of government benefits paid to Shipler. It asserts that the instruction violated the collateral source rule, which provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish

the damages otherwise recoverable from the wrongdoer. See *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997). GM argues that Shipler's testimony regarding government payments improperly informed the jury of her limited financial means and thus induced the jury through sympathy to find for her and, at the least, to increase its award based upon its perception of her financial status. We conclude that this argument is without merit.

[33] The underlying theory of the collateral source rule is designed to prevent a tort-feasor from escaping liability based on the actions of a third party, even if it is possible that the plaintiff may be compensated twice. *Id.* Shipler testified that her medical bills were paid by Medicaid, her rent and household expenses were paid by disability and Social Security benefits, she received aid for dependent children benefits for her son, and all her medical care and living expenses were provided by either the state or the federal government. GM did not object to the testimony. The jury was instructed that if it found one or both of the defendants liable, it could not reduce the damages by the amount paid by these other sources because if Shipler recovered, she might be required to reimburse the funds paid by the other sources. The law prevents a wrongdoer from escaping paying damages because of the actions of these other sources. We conclude that this instruction was not erroneous and was not prejudicial.

(c) Excessive Verdict

[34] GM argues the verdict was excessive and the result of passion and prejudice. One of the bases for a new trial is excessive damages appearing to have been given under the influence of passion or prejudice. See Neb. Rev. Stat. § 25-1142(4) (Cum. Supp. 2004). In order for an award to be so excessive as to warrant a new trial, it must be so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. See *Mahoney v. Nebraska Methodist Hosp., supra.*

In the case at bar, the trial court overruled the defendants' motion for remittitur, noting that the past and future medical

expenses had a present value of between $9 and $10 million and that neither of the defendants had contested this evidence. The evidence established that Shipler is unemployable and will incur an ongoing loss of income for the rest of her projected life expectancy of 45 years from the time of trial, which she will live as a quadriplegic.

The jury awarded Shipler $19,562,000. The trial court later amended the judgment by reducing it by 5 percent based upon the court's conclusion that Shipler had agreed to a 5-percent reduction in mitigation as to whether the seatbelt was misused. Judgment was then entered in the amount of $18,583,900. In overruling the defendants' motion for remittitur, the court found no evidence that the damages were excessive or that they were awarded in the heat of passion or under any other undue influence.

The jury was instructed as to the items it could consider in determining the amount of damages. The list included the reasonable value of medical care and supplies actually provided and reasonably certain to be needed in the future, lost wages, the reasonable value of the earning capacity Shipler was reasonably certain to lose in the future, the reasonable monetary value of the physical pain and mental suffering she had experienced and was reasonably probable to experience in the future, the reasonable monetary value of the inconvenience she had experienced and was reasonably probable to experience in the future, and the reasonable monetary value of her loss of enjoyment in the past and which she is reasonably probable to experience in the future.

[35] As noted previously, 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 damage to be proved. On appeal, the fact finder's determination of damages is given great deference. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). Since the jury returned a general verdict, there is no way for the court to determine the specific amounts it awarded for medical expenses, future wage loss, or pain and suffering. A jury verdict will not be set aside unless clearly

wrong. See *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). We conclude the verdict was not excessive or clearly wrong.

### 7. Long's Motions to Dismiss

Long appealed from the judgment and assigned a number of errors which have been addressed by our discussion above. Long also asserts that the trial court erred in denying his motions to dismiss, because no issues were preserved involving him in the pretrial order.

One of the pretrial issues was the nature and extent of Shipler's injury and damages. In the pretrial order, the parties stipulated and agreed that Long's negligent operation of the 1996 Chevrolet S-10 Blazer proximately caused the accident. Following the pretrial order, which was entered on June 24, 2003, Shipler filed an amended petition in which she asserted that Long lost control of the Blazer and that the proximate cause of the rollover was Long's negligence. She sought judgment against GM and Long on the negligence cause of action. Long claims that Shipler should have sought a modification of the pretrial order after she filed the amended petition. Long does not offer any authority to support this contention, and we conclude it is without merit.

[36] The purpose of a pretrial conference is to "simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial." *Cotton v. Ostroski*, 250 Neb. 911, 917-18, 554 N.W.2d 130, 135 (1996). After the pretrial order was entered, Shipler requested leave to file an amended petition. Long made no objection. When asked by the trial court if he would offer the same answer as that filed prior to the pretrial conference, Long responded in the affirmative. He did not file any objection to the amended petition. We conclude the trial court did not err in denying Long's motions to dismiss. Long admitted negligence, and the allocation of damages was an issue to be determined at trial.

### 8. Long's Argument Regarding Narrowing of Injury

Long also argues that the trial court erred in giving a limitation in the jury instructions that narrowed Shipler's injuries to quadriplegia only and in refusing to permit the jury to allocate

damages between GM and Long based on which injuries were caused by the conduct of each.

Shipler alleged in her amended petition that the negligence of the defendants proximately caused her "personal injuries including a complete spinal cord injury at about C-6 resulting in permanent quadriplegia." In the statement of the case presented in the jury instructions, the court stated: "Shipler received injuries resulting in quadriplegia."

At the jury instruction conference, Shipler sought leave to amend her petition "to conform with the evidence and, in particular, with respect to the spinal cord injury as being the only claim for damages [she] is making in this case." The trial court overruled Shipler's motion as unnecessary. The court stated: "Well, as I understand, and [GM's attorney] has read it to us a number of times, that the allegation is only for the spinal cord injury in the current petition; is that right?" GM responded: "That's true, Your Honor." The court went on to declare: "It does seem to me that the existing petition is consistent with the evidence that's been submitted and how the case has proceeded, so I'll overrule that motion."

Long construes Shipler's allegation concerning injury to mean she suffered " 'injuries' which 'included' quadriplegia." See brief for appellant at 30. He does so in order to argue that the case involved other unenhanced injuries (i.e., bumps, bruises, lacerations, and possible broken clavicle sustained in the initial crash), as well as an enhanced injury (i.e., quadriplegia) sustained in the "second collision" resulting from the roof crush. Such distinction is made in crashworthiness cases. See, e.g., *Kudlacek v. Fiat, S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

Limited evidence was presented regarding other injuries, including bumps, bruises, lacerations to the face and head, a laceration to the arm, and a possible broken clavicle. During testimony by Anthony Sances, Ph.D., a retired professor of biomedical engineering and biomechanics who testified on behalf of Shipler, a computer model of a drawing of a human body was offered into evidence. The drawing indicates "bruises, bumps to extremities - location not specified"; "several face lacerations"; and a laceration on the right arm. Sances testified that the information on the exhibit was drawn from medical

records. No evidence was presented that Sances personally examined Shipler. Nor was evidence offered from any physician who treated Shipler. GM's expert, Stalnaker, a biomedical engineer, also testified concerning Shipler's lacerations and possible fracture of the clavicle based upon a review of her medical records. Shipler testified that she did not notice the bumps, abrasions, and cuts at the time of the accident and that she did not remember them later because they were overshadowed by the spinal injury.

The record does not show that either Long or GM distinguished these other injuries to the jury as arising from the "first collision" as opposed to the "second collision." The trial court stated nothing in the record indicated that Shipler was trying "to secure recovery for any injury other than the broken neck, so we just have a single injury." Thus, the court denied a request to instruct the jury on apportionment of damages, because Shipler was "only requesting recovery for a single injury, that being quadriplegia." The court continued: "[T]here is no ability to divide that so far as I can see, and it's not divisible, and I'll not give that instruction."

Shipler was required to show that GM's negligence and defective design were substantial factors in causing her injuries. See *Kudlacek v. Fiat S.p.A., supra*. The jury found that she met her burden of proof against both GM and Long. She was not required to prove which injuries she would have received in the absence of the alleged defect or which injuries would have occurred if an alternative design had been used. See *id*. Since Shipler established "substantial factor" causation, the burden was on GM and Long to show apportionment of damages. See *id*. Having failed to do so, GM and Long could be held jointly and severally liable for the entire damage. See *id*.

At the jury instruction conference, Long's attorney objected to the statement of the case because it set forth Shipler's injury as "injuries resulting in quadriplegia." Long's attorney complained that "this goes into spinal cord injury only." Counsel asserted that "the evidence in this case included minor injuries . . . in addition to the . . . spinal cord injury," and counsel sought an "opportunity to argue a small recovery for the minor injuries." The court overruled Long's objection, reasoning:

> The pleadings themselves . . . on which this case went forward do limit the request for recovery to the quadriplegia.
>
> And at least as I read Nebraska law, unless there is some evidence of divisibility of the injury, there is no option available for the jury to say one defendant is responsible for X . . . amount of dollars and the other defendant is . . . responsible for Y amount of dollars.
>
> And, therefore, it seems to me . . . the options before the jury are that . . . Long is fully responsible for the . . . quadriplegia, GM is fully responsible for the quadriplegia[,] or the two of them are responsible for the quadriplegia. I take the quadriplegia to be a single injury in my . . . analysis.

[37,38] A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). A trial court need not instruct the jury on an issue where the facts do not justify such an instruction. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003). Under joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). Where two causes produce a single indivisible injury, joint and several liability attaches. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

Accordingly, the trial court did not err in instructing the jury as to Shipler's injury. The record demonstrates that Shipler's injury (i.e., quadriplegia) was not divisible, and the court did not err in refusing to permit the jury to allocate damages based on whether separate injuries were caused by each defendant.

### 9. Shipler's Cross-Appeal

On cross-appeal, Shipler assigns as error the trial court's reduction of the jury's damage award. The jury returned a verdict of $19,562,000 in favor of Shipler against GM and Long, and the trial court entered judgment in that amount. The court later entered an amended judgment on its own motion reducing the jury's award by 5 percent to $18,583,900. The court noted that Shipler had been given leave to file an amended petition eliminating the issue of whether the seatbelt was faulty and

agreed to a 5-percent reduction in the judgment as provided by statute. The court had accepted the agreement and granted leave to file an amended petition.

Shipler now argues that the reduced judgment was error because she never agreed to the reduction. The record shows that during a pretrial hearing, Shipler stated she would stipulate that any verdict obtained by her could automatically be reduced by 5 percent by the court so that GM would not be required to introduce evidence of mitigation of damages.

In response, GM argued that the seatbelt use was still important to the case because it related to Shipler's movement within the vehicle. GM asked that it be allowed to present evidence as to the manner in which Shipler was using the seatbelt, even if Shipler stipulated to the 5-percent reduction. GM was not allowed to present evidence of the misuse of the seatbelt.

Shipler now argues that GM declined the offer of the stipulation and that, therefore, there was no agreement, demonstrating that the trial court erred in reducing Shipler's damages. In its order overruling the motion for new trial, the trial court concluded that Shipler had stipulated to the reduction of damages. This court has previously stated:

> "[S]tipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy. Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo. . . .
>
> "Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances."

(Citation omitted.) *In re Estate of Mithofer*, 243 Neb. 722, 726-27, 502 N.W.2d 454, 457-58 (1993).

The trial court did not err in concluding that Shipler had stipulated in open court to a reduction of the award by 5 percent regarding the seatbelt issue. The record shows that she offered to

accept the reduction in exchange for dismissing the allegations that the passenger restraint system was defective. Shipler was bound by the stipulation, and we find no exceptional circumstances to warrant relief from it. There is no merit to Shipler's cross-appeal, and it is dismissed.

## VI. CONCLUSION

For the reasons set forth herein, the judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
RYAN E. LYKENS, APPELLANT.

710 N.W.2d 844

Filed March 10, 2006. No. S-04-844.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Due Process: Evidence: Prosecuting Attorneys.** The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.
4. **Constitutional Law: Trial: Evidence.** Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the District Court for Dodge County, JOHN E. SAMSON, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Avis R. Andrews for appellant.

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.

## NATURE OF CASE

Following a jury trial, Ryan E. Lykens was convicted of robbery and was sentenced to imprisonment for a term of 2 to 5 years. The district court for Dodge County denied Lykens' motions for new trial. On appeal, the Nebraska Court of Appeals determined that the trial court had abused its discretion by denying Lykens' supplemental motion for new trial. The Court of Appeals reversed Lykens' conviction and remanded the cause for a new trial. *State v. Lykens*, 13 Neb. App. 849, 703 N.W.2d 159 (2005).

The State petitioned for further review, asserting that the Court of Appeals erred in finding that the prosecution had withheld evidence from Lykens and in applying the wrong standard to determine whether such nondisclosure required a new trial. We granted the State's petition for further review. We reverse, and remand to the Court of Appeals for further proceedings.

## STATEMENT OF FACTS

In its opinion, the Court of Appeals described the facts of this case as follows:

> On November 1, 2003, an individual entered a convenience store in Fremont, Nebraska. The individual displayed a gun to the clerk on duty and demanded that she give him the money out of the cash register and a carton of cigarettes. The clerk gave the individual roughly $130 in cash and a carton of cigarettes. The individual then left the store and fled on foot. When police responded to the scene, the clerk described the individual as a white male, approximately 22 years of age, 5 feet 7 inches tall and 140 pounds with a line of blond facial hair. The clerk said that the individual was wearing a dark-colored, waist-length jacket.

On November 3, 2003, Lykens entered a Fremont police station. He intended to surrender himself, as he believed that there was an outstanding warrant for his arrest on an unrelated offense. Sgt. Robert Buer of the Fremont Police Department saw Lykens and believed that Lykens fit the general description of the individual who had committed the robbery at the convenience store. Sgt. Buer asked Lykens about his whereabouts during the time of the robbery, and Lykens indicated that he was en route from Ohio to Nebraska at the time of the robbery. Lykens did confirm that he was currently living with his sister in Fremont. Lykens consented to having his picture taken to be placed in a photographic lineup. After Sgt. Buer completed his questioning of Lykens, Lykens was arrested on an outstanding arrest warrant for a March 2003 offense of "driving under the influence."

Lykens was charged with the robbery by an information filed on December 9, 2003. On January 9, 2004, Lykens filed two motions to suppress; one of the motions was to suppress the statements he made to police officers on November 3, 2003, and the other motion was to suppress the physical evidence gathered by law enforcement personnel "for the reason that said evidence was obtained pursuant to an illegal search and seizure or was otherwise obtained without sufficient probable cause." On February 24, 2004, both motions to suppress were overruled. A trial was held in the instant case on May 4 through 7. On May 5, Lykens made a motion for a mistrial based on juror misconduct, and that motion was denied.

On May 7, 2004, the jury found Lykens guilty of robbery. On May 17, Lykens filed a motion for new trial, alleging that there was irregularity in the proceedings of the court, that the verdict was not sustained by sufficient evidence or was contrary to law, and that an error of law occurred at the trial. On June 16, the district court sentenced Lykens to 2 to 5 years' imprisonment for the robbery conviction. On June 21, Lykens filed a supplemental motion for new trial on the basis of "[n]ewly discovered evidence material for [Lykens] which he could not with

> reasonable diligence have discovered and produced at the trial." On July 1, the district court denied both the motion for new trial and the supplemental motion for new trial.

*State v. Lykens*, 13 Neb. App. 849, 851-52, 703 N.W.2d 159, 162-63 (2005).

In addition to the evidence against Lykens noted by the Court of Appeals, the record shows that the clerk who was working at the convenience store the night of the robbery identified Lykens as the robber both in a photographic lineup and in court at trial. There was also evidence that following the robbery, Lykens was in possession of cigarette packs that were of the same brand and lot number as a carton found disposed of outside the convenience store shortly after the robbery. The lot number also matched a carton still in stock at the store. Further, there was evidence that Lykens owned a jacket fitting the description of the jacket worn by the robber, that Lykens owned a BB gun, and that Lykens lived within a 5-minute walk of the convenience store.

Lykens appealed to the Court of Appeals and assigned that the district court had erred in (1) failing to grant his motion to dismiss based on insufficient evidence at the end of the State's evidence, (2) overruling his motion for mistrial due to a juror's knowledge of and relationship with a potential witness, (3) overruling his motion for new trial based on "newly discovered evidence," and (4) overruling his motions to suppress. The Court of Appeals rejected Lykens' assignment of error relating to the motions to suppress but concluded that the district court had abused its discretion in denying Lykens' supplemental motion for new trial.

With respect to Lykens' supplemental motion for new trial, the Court of Appeals noted the following:

> The supplemental motion was supported by the affidavits of Dawn Lykens, who is Lykens' mother, and Avis Andrews, who is Lykens' attorney. In Dawn's affidavit, she asserts that she "visited [Lykens] in the Dodge County Jail; that on one such visit in March, 2004, [Dawn] was in the visitation room and happened to talk to a man also in the visitation room waiting for a visit with his son, later identified as Thomas Brainard; that a third individual, . . .

also present in the visitation room, initiated a conversation with Thomas Brainard that was overheard by [Dawn]; that Thomas Brainard stated he was visiting his son, Joseph Brainard, who had been sentenced to ten days for robbery; that [Dawn] then said her son, [Lykens], was accused of robbing [the convenience store]; that Thomas Brainard then said that it was his son[, Joseph Brainard,] who had robbed [the convenience store] and that [Joseph Brainard] had done it once before too; [and that] at that point, the inmates were brought in for visitation and no further conversation among the three waiting took place."

Dawn further stated in her affidavit that she "was contacted by [detectives] regarding this conversation in April 2004; that [she] related the incident as set forth [above] to the detectives; [and] that [she] also told them that [the third individual] had heard the conversation."

Andrews also filed an affidavit. In her affidavit, Andrews asserts that "law enforcement investigated the information regarding statements made by Thomas Brainard and[,] following said investigation, the results were conveyed to [Andrews] by the [Dodge] County Attorney in a letter dated April 27, 2004." The letter notes: "Law enforcement has figured out that the person who made the comment to [Dawn] was Thomas Brainard of Hooper, Nebraska. [He] advised the police that he recalled meeting [Dawn] while visiting his son[, Joseph Brainard,] in the county jail in March, 2004. When he asked [Dawn] why her son was in jail, she said he was charged with the [convenience store] robbery. [Thomas] Brainard replied to her that [Joseph Brainard] had robbed [that convenience store] also. When the police asked him what he meant by that comment, he said he was referring to an earlier shoplifting incident when . . . Joseph Brainard had stolen some beer from the [convenience store]. . . . Apparently Thomas Brainard, Joseph [Brainard's] father, would equate the term of shoplifting and robbery or robbing, which is what he explained to the detectives when they spoke with him." The affidavit of Andrews further asserts that she "attempted to contact Thomas Brainard independently but was only able to locate

a message number for him [and] did not receive a call from [him] until after both sides had rested at the trial[,] at which time he made a statement similar" to that described in the county attorney's letter.

Andrews further asserted in her affidavit that "on June 10, 2004, [she] first became aware that Joseph Brainard was interviewed by the Fremont Police Department on April 27, 2004, upon reading the same as part of the presentence investigation report prepared by the Probation Office for use in this case." Andrews alleged that the interview with Joseph Brainard "constitutes newly discovered evidence material to this cause of action in light of the statements of Thomas Brainard, the resemblance of Joseph Brainard to the perpetrator, the statement by Joseph Brainard that he is a smoker and owns a BB gun shaped like a pistol, and his history of theft from [a similar convenience store]."

A hearing on the motion for new trial and supplemental motion for new trial was held on June 28, 2004. At the hearing, the court took judicial notice of the affidavits filed by Andrews and Dawn and accepted a transcript of the April 27 interview of Joseph Brainard conducted by officers of the Fremont Police Department into evidence. A thorough review of the transcript of the interview indicates that at the time of the interview, he was 18 years old, stood 5 feet 7 inches to 5 feet 8 inches tall, had facial hair, had a history of shoplifting, including an incident when he shoplifted from a similar convenience store, was a smoker, had access to a gun similar to the one described by the clerk in the instant case's convenience store robbery, and occasionally wore hats. The interview also indicates that the officers conducting the interview took pictures of Joseph Brainard, but the pictures were not included with the transcript.

At the hearing on the supplemental motion for new trial, Andrews asserted: "[O]ur whole defense was that . . . Lykens did not commit this crime and, therefore, someone else must have committed this — did commit this crime. And late in the progress of this case, the name

> of Joseph Brainard came up through comments made by [Thomas Brainard], as indicated in the affidavits. And, in fact, [the transcript of Joseph Brainard's interview] itself indicates a connection with [a similar convenience store], that he is basically the same age [and] height as the individual that robbed [the convenience store], that he's a smoker, that he had access to a BB gun, which was alleged to be the . . . weapon used in the robbery, all of these very similar to the identity of the traits used to identify the suspect in this particular case. That's why we feel that this additional information is important. I think it[s] importance is borne out by the fact that it was included in the [presentence investigation report] and that it would serve as a basis for a new trial." The district court took the matter under advisement at the conclusion of the hearing and subsequently denied both of Lykens' motions for new trial on July 1, 2004.

*State v. Lykens*, 13 Neb. App. 849, 855-57, 703 N.W.2d 159, 164-66 (2005).

In reviewing the denial of Lykens' supplemental motion for new trial, the Court of Appeals first determined that the transcript of the interview with Joseph Brainard (hereinafter Brainard) had been withheld by the State and that it constituted newly discovered evidence because it was evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings. The Court of Appeals then concluded that the court should have granted the motion for new trial based on such newly discovered evidence.

In reaching its conclusion, the Court of Appeals relied on certain language in *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994), and interpreted *Atwater* "to mean that in cases when the evidence alleged to be newly discovered was withheld by the State, a defendant is entitled to a new trial if the omitted evidence *could have created* a reasonable doubt that he or she committed the alleged crime or crimes." *Lykens*, 13 Neb. App. at 861, 703 N.W.2d at 168. Using this interpretation, the Court of Appeals determined that the interview with Brainard would have allowed Lykens "to provide the jury with an alternate suspect who could have committed the crime in the instant case,"

and "reasonable doubt could have been created in the minds of the jurors." *Id.* at 862, 703 N.W.2d at 169. The Court of Appeals therefore concluded that the district court abused its discretion in denying Lykens' motion for new trial based on newly discovered evidence.

The Court of Appeals reversed Lykens' conviction and remanded the cause for a new trial. Because of its disposition of the appeal on the basis of the new trial issue, the Court of Appeals did not consider Lykens' assignments of error relating to the motion to dismiss and the motion for mistrial.

The State petitioned for further review of the Court of Appeals' decision. We granted the petition.

## ASSIGNMENTS OF ERROR

The State asserts on further review that the Court of Appeals erred in determining that the evidence in question had been withheld by the State. The State further argues that even if the evidence had been withheld, the Court of Appeals applied the wrong standard to determine whether the district court erred in denying the motion for new trial based on such evidence.

## STANDARD OF REVIEW

[1,2] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

## ANALYSIS

### *Lykens' Motion for New Trial Should Be Analyzed as a* Brady *Issue.*

Although Lykens framed his supplemental motion for new trial as based on "[n]ewly discovered evidence," in substance, the basis on which Lykens sought a new trial was a claim that the prosecution violated its duty under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to disclose material evidence favorable to the defendant. Because Lykens

framed the issue as one regarding "newly discovered evidence," the parties and the Court of Appeals analyzed the issue using a mix of principles regarding newly discovered evidence and principles relating to the prosecution's claimed failure to disclose evidence favorable to the defendant. We conclude that the Court of Appeals analyzed Lykens' supplemental motion for new trial under the wrong principles.

The substance of Lykens' allegations in support of his supplemental motion for new trial was that the State had failed to disclose the police interview of Brainard to Lykens prior to trial. Lykens claimed that such evidence was favorable to him and that therefore, the State should have disclosed the interview to him prior to trial. Although Lykens described such evidence as being "newly discovered evidence," the claims Lykens made in support of his motion for new trial are more akin to those made by the defendants in cases such as *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003); and *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999), which we analyzed under *Brady*. In *Shipps*, we described the defendant's basis for new trial as an assertion that "the State wrongfully withheld exculpatory material . . . depriving [the defendant] of a fair trial under U.S. Const. amend. XIV and Neb. Const. art. I, § 3." 265 Neb. at 352, 656 N.W.2d at 631. Our cases echo the language in *Brady*, which language states that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87.

Despite Lykens' references in the supplemental motion for new trial to "newly discovered evidence," his allegations in support of the motion were in substance an assertion that the State had wrongfully withheld exculpatory material in contravention of *Brady*, and we determine that the motion should have been analyzed as raising a *Brady* issue. Therefore, it was not necessary for the Court of Appeals to consider whether the interview was "newly discovered evidence" and instead, it was only necessary to consider whether, under the standards discussed below, the evidence was "wrongfully" withheld by the State such that Lykens was deprived of a fair trial.

*The* Brady *Issue Raised by Lykens' Motion for New Trial Should Be Analyzed Under the* Bagley *Standard.*

[3] We recently observed in *Shipps, supra*, that the State's duty to disclose exculpatory evidence to the defendant was recognized by the U.S. Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In *Shipps*, we referred to *Brady* and stated that "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 the bad faith of the prosecution." 265 Neb. at 352, 656 N.W.2d 631. Accord *Castor, supra*. We note that although *Brady* spoke of the suppression of evidence "upon request," the Court in *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), made clear that the prosecution's duty under *Brady* to disclose evidence which is material covers "the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused." See, also, *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (duty to disclose material evidence applicable even though there has been no request by accused and duty may be violated where evidence has been suppressed either willfully or inadvertently).

[4] In *Bagley*, the U.S. Supreme Court considered what evidence is material such that its nondisclosure was prejudicial to the defendant. The standard for materiality set forth in *Bagley* formed the basis for the "*Bagley* standard," which standard we have adopted and set forth in cases such as *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003), and *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). In *Shipps*, we stated:

> Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.

*Shipps*, 265 Neb. at 352, 656 N.W.2d at 631-32 (citing *Castor, supra*). Accord, *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420

(2005); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Lotter*, 255 Neb. 456, 586 Neb. 591 (1998); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989).

Notwithstanding our adoption and consistent application of the *Bagley* standard, the Court of Appeals focused upon incidental language in *State v. Atwater*, 245 Neb. 746, 752, 515 N.W.2d 431, 435 (1994), which referred to *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), which language stated that "when the evidence has been withheld by the prosecutor, the proper standard is that a constitutional error has been committed if the omitted evidence creates a reasonable doubt of guilt that otherwise did not exist." Utilizing this language in *Atwater*, the Court of Appeals incorrectly concluded that "in cases when the evidence alleged to be newly discovered was withheld by the State, a defendant is entitled to a new trial if the omitted evidence *could have created* a reasonable doubt that he or she committed the alleged crime or crimes." *State v. Lykens*, 13 Neb. App. 849, 861, 703 N.W.2d 159, 168 (2005).

The "reasonable doubt" standard set forth by the U.S. Supreme Court in *Agurs* and mentioned in *Atwater* was superseded in *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). We must therefore disapprove *Atwater* to the extent it can be read to indicate that the "reasonable doubt" standard of *Agurs* rather than the *Bagley* standard is the proper standard to analyze whether evidence was wrongfully withheld by the prosecution. Similarly, we disapprove of the "could have created a reasonable doubt" language in the Court of Appeals' opinion in *Lykens*, and reiterate that the *Bagley* standard is the appropriate framework under which to analyze a *Brady* issue raised in a motion for new trial.

*Applying the* Bagley *Standard to the* Brady *Issue—There Was No* Brady *Violation.*

In view of our discussion above, we determine that Lykens' supplemental motion for new trial should properly have been analyzed as a *Brady* issue and that the *Bagley* standard should have been used to analyze whether the Brainard interview was

material. Lykens claims that the Brainard interview could have been useful at trial to support Lykens' theory that the robbery was committed by another individual. The State responds that the nondisclosure of the interview did not deprive Lykens of a fair trial. The parties do not dispute that the interview of Brainard was evidence that the State had in its possession and did not disclose to Lykens prior to trial. This fact is sufficient to establish that the evidence was "withheld," and the question in this case is therefore properly analyzed as a *Brady* issue.

We begin by noting that the mere determination that evidence was withheld does not automatically indicate that the prosecution violated its *Brady* duty. As the U.S. Supreme Court stated in *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999),

> the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

The U.S. Supreme Court continued: "There are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S. at 281-82. It has been observed that "[p]rejudice in this context is interchangeable with the concept of materiality . . . ." 5 Wayne R. Lafave et al., Criminal Procedure § 24.3(b) at 232 (2d ed. Supp. 2006).

In view of the foregoing, the relevant inquiry in this case is whether the nature of the evidence at issue was such that the State's failure to disclose it to Lykens prior to trial violated Lykens' due process rights. We conclude that in this case, the evidence was not material under the *Bagley* standard and that therefore, the State's failure to disclose it did not violate Lykens' due process rights and was not a sufficiently serious nondisclosure so as to arise to a *Brady* violation. Therefore, the district court did not abuse its discretion by denying Lykens' supplemental motion

for new trial, and the Court of Appeals' conclusion to the contrary was error.

As noted above, the State has a duty under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to disclose exculpatory evidence that is material, and favorable evidence is material under the *Bagley* standard "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Shipps*, 265 Neb. 342, 352, 656 N.W.2d 622, 631 (2003). In this regard, in *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the U.S. Supreme Court stated: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in [the absence of the nondisclosed evidence] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

We now focus on the Brainard interview while noting that Brainard was not a witness. In the interview, Brainard provided a physical description of himself and stated that he smoked cigarettes and occasionally wore hats. Brainard stated that he had fired BB guns in the past, but he did not state that he owned one. Although Brainard admitted that he had shoplifted, he denied that he had ever robbed a convenience store using a gun, and he specifically denied that he had committed the robbery that was the subject of this prosecution. The interview evidence was not of an impeaching nature, nor did it serve directly to exculpate Lykens. We do not think that the absence of the Brainard interview denied Lykens a fair trial, and on the contrary, the guilty verdict is worthy of confidence. See *Kyles, supra*. We conclude that there is not a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. We conclude there was no *Brady* violation.

Because we determine that there was no *Brady* violation resulting from the State's nondisclosure of the evidence at issue, we conclude that the district court did not err in denying a new trial on the basis of such evidence. The Court of Appeals therefore erred in reversing the district court's denial of Lykens' supplemental motion for new trial and in remanding the cause

for a new trial, and accordingly, we reverse the ruling of the Court of Appeals.

## CONCLUSION

We conclude that the Court of Appeals used an improper standard to analyze whether the nondisclosure of the Brainard interview required a new trial. We further conclude that the Court of Appeals erred in concluding that the district court had abused its discretion by denying Lykens' supplemental motion for new trial and in therefore reversing Lykens' conviction and remanding for a new trial. Accordingly, we reverse the Court of Appeals' decision.

We note that neither party sought further review of the Court of Appeals' conclusion that the district court did not err in denying Lykens' motion to suppress, and that conclusion is the law of the case. Therefore, although we reverse the Court of Appeals' decision with respect to the motion for new trial, we do not disturb the decision with respect to the motion to suppress. We further note that because of its disposition of the new trial issue, the Court of Appeals did not consider Lykens' assignments of error with respect to his motion to dismiss and his remaining motion for mistrial. We therefore reverse, and remand to the Court of Appeals to consider Lykens' remaining assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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STATE OF NEBRASKA, APPELLEE, V.
LESTER WAGNER, APPELLANT.

710 N.W.2d 627

Filed March 10, 2006. No. S-04-1104.

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: Appeal and Error.** On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Effectiveness of Counsel: Proof.** A defendant claiming ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant.

4. **Constitutional Law: Attorney and Client: Appeal and Error.** Counsel has a constitutionally imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or (2) that this particular defendant reasonably demonstrated to counsel that he or she was interested in appealing.
5. **Courts: Appeal and Error.** Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.
6. **Effectiveness of Counsel: Proof: Appeal and Error.** To show prejudice related to the failure to file an appeal, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him or her about an appeal, the defendant would have timely appealed.
7. **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.
8. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to obtain a new direct appeal as postconviction relief, a 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.

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

Darla S. Ideus, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

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

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

WRIGHT, J.

## NATURE OF CASE

Pursuant to a plea agreement, Lester Wagner was charged by amended information with manslaughter and use of a firearm to commit a felony. Wagner entered pleas of no contest to the charges, and he was convicted and sentenced. No direct appeal was taken. Approximately 4 years after sentencing, Wagner filed a motion for postconviction relief claiming ineffective assistance of counsel because counsel failed to consult with him concerning a direct appeal. Following an evidentiary hearing, the district court denied Wagner's motion for postconviction relief.

## 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. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

[2] On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

## FACTS

On July 2, 1998, Wagner was charged by information with first degree murder. The information alleged that Wagner killed Christopher Rucker in the perpetration of or attempt to perpetrate a robbery or burglary. Pursuant to a plea agreement, Wagner was charged via an amended information with manslaughter and use of a firearm to commit a felony. Wagner pleaded no contest to the amended charges and was subsequently sentenced to a term of 10 to 20 years in prison on the manslaughter conviction and a consecutive term of 7 to 12 years in prison on the use of a firearm conviction. He was given credit for 545 days served.

On September 5, 2003, Wagner filed a motion for postconviction relief, asserting (1) that he was denied effective assistance of counsel at trial because his trial counsel allowed him to enter a plea of no contest to use of a firearm in conjunction with a manslaughter charge and did not file a notice of appeal, (2) that the trial court lacked subject matter jurisdiction over the offense of use of a firearm to commit a felony and jurisdiction over Wagner, (3) that the State engaged in prosecutorial misconduct by allowing him to plead to the use of a firearm charge, and (4) that he was denied effective assistance of counsel on appeal because counsel did not inform Wagner that he had a right to appeal. Wagner claimed that trial counsel informed him that if a direct appeal was filed, the State would refile a felony murder charge against him.

The district court denied an evidentiary hearing on Wagner's claim that he could not be convicted of manslaughter, an unintentional crime, and use of a firearm to commit a felony, an intentional crime. The court noted that when the felony which

serves as the basis for a use of a firearm charge is an unintentional crime, the accused cannot be convicted of use of a firearm to commit a felony. See *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002). However, the court found that the firearm charge in Wagner's case was based on the underlying felony of attempted robbery, an intentional crime. Therefore, the court concluded there was no merit to this claim.

The district court found that Wagner was entitled to an evidentiary hearing on the issue of whether his trial counsel advised him concerning his right to a direct appeal and all matters related solely to that issue. At the evidentiary hearing, Wagner testified that prior to his signing the plea agreement, and as a part of his discussions with trial counsel, he was informed that the county attorney had stated that Wagner could not file a direct appeal if he accepted the plea agreement. Wagner further testified that although he was aware he would usually have a right to a direct appeal, he believed he had "forfeited" that right by executing the plea agreement. Wagner did not broach the issue of a direct appeal with his trial counsel.

Wagner's trial counsel testified that in his opinion, because Wagner entered a plea, the only issue on appeal would have been alleged excessive sentences. He had no recollection of discussing that issue or the issue of a direct appeal with Wagner. Counsel said that if he had been asked by Wagner to appeal the sentences, he would have because he had an ethical obligation to do so. Counsel stated that he typically discussed with his clients the right to appeal and the likelihood of success. Counsel recalled advising Wagner of the penalties for the two charges that were included in the plea agreement and the parameters of the sentences for those charges. He also recalled informing Wagner that he had to be truthful in his cooperation with the State. Counsel remembered informing Wagner that if he did not take the plea agreement, the State would proceed with a felony murder charge. Immediately following sentencing, counsel asked Wagner whether he was "okay" with the sentences, and Wagner responded that he was. There was no discussion concerning a direct appeal.

At the postconviction evidentiary hearing, the plea agreement was received into evidence. The agreement provided that Wagner

would truthfully disclose all information regarding his activities and those of others related to the murder of Rucker and that he would testify against certain codefendants. In exchange for Wagner's cooperation, the State would allow him to plead guilty to manslaughter and use of a firearm to commit a felony. The agreement stated: "No promises, agreements, or conditions have been entered into other than those set forth in this letter, and none will be entered into unless in writing and signed by all parties."

The bill of exceptions from the plea hearing was also received into evidence. It indicated that Wagner was arraigned on the amended information and was informed of the possible penalties for manslaughter and use of a firearm to commit a felony. He was told that the maximum sentence he faced was a term of imprisonment of not more than 70 years, a fine of not more than $25,000, or any combination of the two, and that the minimum sentence was 2 years in prison. The trial court also told Wagner there was no maximum minimum sentence on the charges, so he could be sentenced to 20 to 20 years in prison for the manslaughter charge and 50 to 50 years in prison for the firearm charge. Wagner indicated that he did not need additional time to talk to counsel about the possible sentences.

The bill of exceptions established that the trial court asked Wagner if anyone had made any threat or used any force or held out any inducement or promise, other than a plea agreement, to get him to waive the rights explained to him and that Wagner responded, "No." Wagner said he voluntarily and freely waived the rights as explained, and his counsel stated he believed that Wagner understood the rights and the consequences of waiving them and that the waiver was freely, voluntarily, knowingly, and intelligently made. The court found beyond a reasonable doubt that Wagner waived his rights freely, voluntarily, knowingly, and intelligently, and it accepted his waiver.

Wagner also stated that he was satisfied with the job done by his trial counsel, that he believed counsel was competent, that he had sufficient time to talk to counsel, and that he did not need additional time to talk to counsel. Wagner stated that counsel had read and explained the plea agreement to him, that he understood it, and that there had been no other promises made to him in exchange for the pleas. At sentencing, Wagner stated that he had

had an opportunity to talk with counsel about the presentence investigation report and was not aware of any changes, corrections, or additions needed. He indicated that he was ready to be sentenced.

After the postconviction hearing, the district court found that Wagner did not reasonably demonstrate that he was interested in filing a direct appeal. During a discussion with trial counsel, Wagner informed counsel that he was "okay" with the sentences imposed. As a result of Wagner's telling trial counsel he was "okay" with the sentences, counsel did not discuss with Wagner his right to a direct appeal. His trial counsel did not believe the sentences were excessive. The district court found that following sentencing, Wagner did not request that his counsel file a direct appeal.

The district court found that Wagner knew he had the right to a direct appeal, that he informed his trial counsel he was satisfied with the sentences imposed, and that he did not request that a direct appeal be filed. The court concluded that it was only after Wagner was sentenced and incarcerated and had conferred with a legal aide that he began to think about the length of the sentences imposed and the issues he raised on postconviction. The court concluded that Wagner's request for postconviction relief should be denied in its entirety.

## ASSIGNMENTS OF ERROR

Wagner assigns as error (1) the district court's finding that Wagner knew he had a right to a direct appeal and (2) the district court's finding that counsel did not have a constitutionally imposed duty to consult with Wagner about his right to a direct appeal and its finding that counsel's performance did not fall below an objective standard of reasonableness.

## ANALYSIS

It is Wagner's burden to establish a basis for postconviction relief. 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. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

The district court found that Wagner's trial counsel was an experienced criminal defense attorney and that Wagner discussed

the contents of the plea agreement with counsel prior to its execution. The court determined that following sentencing, Wagner did not request that his trial counsel file a direct appeal. There was a discussion between Wagner and his trial counsel about the sentences imposed, and Wagner informed counsel that he was "okay" with the sentences. As a result, counsel did not discuss with Wagner his right to a direct appeal. The court found that although Wagner testified he thought he had forfeited his right to a direct appeal, he knew he had such a right. On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003). Wagner has not demonstrated that the district court's findings of fact were clearly erroneous.

[3] Pursuant to *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant claiming ineffective assistance of counsel must show that counsel's representation "fell below an objective standard of reasonableness" and that counsel's deficient performance prejudiced the defendant. In the context of failure to file a direct appeal, the U.S. Supreme Court has held that the test to determine whether counsel provided ineffective assistance announced in *Strickland* applies to claims that counsel was constitutionally ineffective for failing to file a notice of appeal. See *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

In *Flores-Ortega*, the question concerned whether counsel was deficient for not filing a notice of appeal when the defendant had not clearly conveyed his wishes concerning an appeal. The Court rejected the bright-line rule adopted by lower courts that counsel must file a notice of appeal unless the defendant specifically instructs otherwise and that failing to file an appeal is per se deficient. *Id.* Where a defendant has not specifically given instructions concerning an appeal, the first question to be asked is whether counsel consulted with the defendant about an appeal. *Id.* If counsel has consulted, that is, advised the defendant about the advantages and disadvantages of taking an appeal, "[c]ounsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." 528 U.S. at 478.

[4] Although the Court agreed that the better practice is for counsel to routinely consult with the defendant regarding an appeal, it rejected a bright-line rule requiring counsel to always consult with the defendant concerning an appeal. *Id.* Instead, the Court held that

> counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

528 U.S. at 480.

[5] The Court stated that to make this determination, postconviction courts "must take into account all the information counsel knew or should have known." *Id.* The Court continued: "Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id.*

[6] The Court concluded that to show prejudice related to the failure to file an appeal, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Whether a defendant meets his burden depends on the facts of a particular case. "[E]vidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination." 528 U.S. at 485.

> To prove deficient performance, a defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal. But such evidence alone is insufficient to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal.

528 U.S. at 486.

In the case at bar, the convictions followed the entry of a plea agreement. In such a case, the court reviewing for ineffective assistance of counsel should take into consideration whether the

defendant received the sentence he bargained for as part of the plea agreement and whether any appeal rights were reserved by the agreement. Wagner was informed by the trial court as to the possible sentences he could receive for the charges to which he pleaded no contest, and the sentences imposed were within that range. The plea agreement, which was received into evidence at the evidentiary hearing, made no reference to Wagner's appeal rights or to a waiver of those rights.

The testimony offered at the evidentiary hearing supported a finding that trial counsel's performance was not deficient. See *Roe v. Flores-Ortega, supra*. The evidence here does not suggest that Wagner gave express instructions to counsel regarding an appeal.

Wagner entered pleas of no contest, and on appeal, he could have claimed the sentences were excessive. Wagner was sentenced to a term of 10 to 20 years in prison for manslaughter and a term of 7 to 12 years in prison for use of a firearm to commit a felony. Manslaughter is a Class III felony, Neb. Rev. Stat. § 28-305 (Reissue 1995), and Wagner faced a minimum sentence of 1 year in prison and a maximum sentence of 20 years in prison, a $25,000 fine, or both, see Neb. Rev. Stat. § 28-105 (Reissue 1995). Under Neb. Rev. Stat. § 28-1205 (Reissue 1995), use of a firearm to commit a felony is a Class II felony, and the sentence for such a crime is consecutive to any other sentence imposed. Wagner faced imprisonment for a term of 1 to 50 years for this conviction. See § 28-105.

[7] Wagner's sentences were within the statutory ranges. 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. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). Wagner had no nonfrivolous basis for an appeal, and thus, he has not shown that he was prejudiced by the fact that no appeal was filed. He also has not shown there was a reasonable probability that he would have timely appealed but for the fact that counsel did not specifically consult with him about an appeal.

[8] We have held that "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, 983, 637 N.W.2d 599, 605 (2002). Wagner has not demonstrated that he was denied his right to appeal due to the negligence or incompetence of counsel. The district court did not err in finding that Wagner was not entitled to postconviction relief.

## CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. THOMAS M. PETERSEN, RESPONDENT.

710 N.W.2d 646

Filed March 10, 2006. No. S-04-1173.

1. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive.
2. ____: ____. A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
3. **Appeal and Error.** Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
4. **Disciplinary Proceedings.** Violation of a disciplinary rule is a ground for discipline.
5. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
6. ____. An attorney's admission of responsibility for his or her actions reflects positively upon his or her attitude and character and is to be considered in determining the appropriate discipline.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Jeffrey A. Silver for respondent.

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

PER CURIAM.

The issue presented in this attorney disciplinary proceeding is what sanction should be imposed on the respondent, Thomas M. Petersen, for his serial neglect of client matters. For the reasons that follow, we impose an indefinite suspension from the practice of law with no possibility of reinstatement prior to February 1, 2008.

## BACKGROUND

[1] There were no exceptions filed to the referee's report in this case. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive. *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003). We must also consider the circumstances of two prior disciplinary proceedings involving Petersen. Thus, the following facts are found in either the referee's report to this case; *State ex rel. Counsel for Dis. v. Petersen*, 264 Neb. 790, 652 N.W.2d 91 (2002) (*Petersen I*); or *State ex rel. Counsel for Dis. v. Petersen*, 267 Neb. 176, 672 N.W.2d 637 (2004) (*Petersen II*).

### JENNIFER WEEKS (*PETERSEN I*)

Petersen was admitted to the practice of law in Nebraska on April 14, 1995. In 1998, Petersen was retained by Jennifer Weeks to represent her in a personal injury claim arising from a motor vehicle accident. On July 5, 2000, the Counsel for Discipline received the complaint from Weeks that gave rise to our opinion in *Petersen I*. Generally, Weeks complained that Petersen had negotiated a settlement on Weeks' behalf, but had retained settlement funds to which he was not entitled. Petersen was charged with violation of a disciplinary rule; conduct involving dishonesty, fraud, deceit, or misrepresentation; and knowingly making a false statement of law or fact. Although the evidence in that case showed that Petersen failed to supervise and control the activities of his employees and that his office management was sloppy, Petersen had not been charged with that conduct. Thus,

we dismissed the charges against Petersen. Our decision was entered on October 18, 2002. See *Petersen I*.

JUDITH STARK

In June 2000, Judith Stark retained Petersen to represent her in a claim arising out of a motor vehicle accident that occurred on September 8, 1998. Petersen and his associates began working on the case. In February 2001, Stark sent a letter to Petersen advising him about the state of her health, explaining that her insurance company was contacting her, and asking for advice. No one from Petersen's firm replied to Stark's letter or returned her telephone calls. In June 2001, one of Petersen's associates sent Stark a "Personal Impact Questionnaire," soliciting information from Stark to be incorporated into a demand letter. Stark completed the questionnaire. No member of Petersen's firm ever contacted the driver of the other vehicle involved in Stark's accident or the owner of the vehicle. No member of Petersen's firm contacted Stark's insurance company regarding underinsured or uninsured motorist coverage. No specific demand was ever made of the other driver's insurance company.

On February 28, 2002, Petersen claims to have sent a letter of disengagement to Stark; Stark claims not to have received it. On October 10, Petersen was contacted at his office, and he sent another letter to Stark, enclosing a copy of the letter dated February 28, 2002. Petersen advised Stark that the statute of limitations had elapsed on her claim, but that he would try to secure a $5,500 settlement offer that had been proposed earlier by the other driver's insurer. Petersen advised Stark that he was acting out of courtesy, not "re-accepting" her case.

Nonetheless, Petersen later filed suit against the insurer in the Douglas County District Court seeking to enforce the settlement offer. The insurer sent discovery requests to Petersen to which Petersen did not respond, despite the filing of motions to compel. The case was dismissed on August 11, 2003, as a sanction for failing to respond to discovery. In December, Petersen paid Stark $5,000 to resolve her claim against him and his firm. Stark believed that the funds came from the insurer, and the respondent admitted that he may have contributed to that misunderstanding, although he said he did not intend to mislead her.

### MICHAEL COLE

In October 2002, Petersen was retained to represent Michael Cole in his appeal of a state court criminal conviction. Petersen had not represented Cole at trial. On October 21, 2002 (3 days after we entered our decision in *Petersen I*), Petersen perfected Cole's appeal. The initial brief was due on January 9, 2003. On January 8, Petersen requested an extension of brief date until February 10, which request was granted. On February 12, the Clerk of the Nebraska Supreme Court and Court of Appeals (Clerk's Office) sent Petersen a notice of default. On February 19, Petersen filed another motion to extend the brief date, and the brief date was extended to April 1. On April 14, the Clerk's Office sent another notice of default and advised Petersen that the appeal would be dismissed if the brief were not filed within 10 days. Petersen finally replied on April 29, with another motion to extend brief date. The brief date was extended until May 19. On June 10, the Clerk's Office sent another notice of default, and on June 27, the appeal was dismissed for failure to file briefs. The Court of Appeals' mandate issued on July 29, 2003. On August 1, Petersen filed a motion to recall the mandate, which was overruled on August 7.

Petersen had been paid $10,000 to prosecute Cole's appeal. Some of the money has been refunded.

### LEONEL GARCIA-GARIBAY (*PETERSEN II*)

On April 28, 2003, the U.S. Court of Appeals for the Eighth Circuit entered an order for Petersen to show cause why he should not be disciplined for failing to file the brief of Leonel Garcia-Garibay, whom Petersen was representing on appeal in that court. The brief had been due on March 21, but had not been filed. A similar order to show cause, in the same case, was filed on May 22. Petersen filed a response on May 22, claiming that Petersen's former secretary had been "intentionally attempting to harm [him] and [his] business" and intentionally hiding mail and failing to forward messages or calendar important items. Petersen claimed that his secretary had been to blame for failing to file the brief. Petersen sought a 60-day extension of brief date. The brief date was extended to July 14. On July 25, the court entered an order relieving Petersen of his

appointment for failure to file a timely brief. On the same date, the court entered an order suspending Petersen from practice before the court for 2 years.

On August 4, 2003, Petersen filed a motion for reconsideration of his suspension. In the motion, Petersen claimed that on May 30, he had fired two of his support staff and his only associate and that since then, he had associated with other attorneys in an effort to reduce his caseload. Petersen attached a copy of a motion to extend brief date that he claimed he had filed before the brief was due but "which was apparently not received by the Court." Petersen also asserted that his "longtime friend and confidant" had been seriously ill "involving some strange injury that periodically caused paralysis of the upper extremities, confusion and strange behavior" and that Petersen had been preoccupied by concern, time for doctor's visits, and other support, to the detriment of his legal practice. The motion was overruled on August 6.

On August 8, 2003, Petersen filed a motion for a stay and expedited hearing, seeking an opportunity to apologize to the court and demonstrate that the occurrence was inadvertent. Petersen stated that he had reordered and improved his practice "to ensure nothing remotely similar happens in the future." Petersen explained that the damage from the court's suspension to him, his clients, and his employees would be irreparable. A hearing was held on September 11, and on September 17, the court granted Petersen's motion for further reconsideration and modified the suspension to a period of 30 days from the date of the order.

On January 2, 2004, we granted Counsel for Discipline's motion for reciprocal discipline and suspended Petersen for 30 days. See *Petersen II*.

### Brian Lacy

On October 21, 2002 (3 days after our decision in *Petersen I*), Petersen filed a declaratory judgment action in the U.S. District Court for the District of Nebraska on behalf of Brian Lacy, arising out of Lacy's claim against his underinsured motorist coverage insurer. The insurer served discovery on Petersen in May and June 2003. On July 23, the court scheduled a scheduling conference for November 14 and notified Petersen of the conference.

On October 17, 2003 (a month *after* the Eighth Circuit granted Petersen's motion to reconsider his suspension before that court), the insurer filed a motion to compel responses to its previous discovery. Petersen did not respond to the motion to compel. On November 10, the court granted the motion to compel and entered an order to show cause why sanctions should not be entered if the discovery responses were not served by November 24. On November 18, the scheduling conference was rescheduled for December 19. Petersen did not comply with the order to show cause and did not attend the scheduling conference. Sometime thereafter, Petersen called the magistrate judge's chambers to apologize. On December 23, the insurer filed an additional motion to compel. On January 2, 2004, as previously noted, we suspended Petersen for 30 days. See *Petersen II*.

On January 7, 2004, the magistrate judge granted the insurer's motion for attorney fees resulting from the motion to compel and entered an order to show cause why Petersen should not be held in contempt for failing to attend the scheduling conference. The scheduling conference was rescheduled for January 23. Petersen filed a written notice of his suspension with the Clerk of the U.S. District Court on January 13 and did not attend the scheduling conference. The magistrate judge recommended that as sanctions for failing to comply with discovery orders or attend conferences, Petersen be ordered to pay attorney fees and the lawsuits be dismissed. Petersen's successor counsel avoided dismissal of the lawsuits; Petersen was sanctioned $891 in attorney fees, which have been paid.

### Evidence of Mitigating Circumstances

Petersen testified that the "overwhelming situation" that he had was that when he graduated law school, he wanted a big firm. Petersen said that he chose some "poor people" to run his firm with him, and "it all sort of came to a head about the time that [he] started getting Bar complaints, and [he] was overwhelmed with cases, several hundred of them at the time, and [he] had some employees that [he] had to let go." Petersen said that he "tried as best [he] could to discharge many of them, but in some cases the damage had already been done." Petersen admitted that

he accepted some cases in areas of the law in which he did not have the appropriate expertise.

Petersen testified that since the complaints had come forward, he had discharged any type of case other than criminal defense and had reduced his caseload to less than 20 cases. Petersen also testified that in response to his first suspension, he suffered from depression for a while and that "there was [sic] some indications of [his] substance abuse, alcohol and so forth, and [he] was starting to drink more." Petersen testified that he had addressed those issues through Alcoholics Anonymous (AA) and the Nebraska Lawyers Assistance Program, stating: "I go to a meeting a day. I go to — I have sponsors. I have somebody that I address on a daily basis." Petersen also testified that he was seeing a counselor. Petersen stated that he had a supervising attorney through this court who assisted him when necessary and that he was also assisted by judges and lawyers he encountered through his AA meetings. Petersen admitted that he had never gone under a formal contract with the Nebraska Lawyers Assistance Program, however, because he "wasn't going to go to formal treatment."

At oral argument, Counsel for Discipline offered evidence that Petersen had been accepted into a "highly structured sober living, modified social model, alcohol and drug free program" in California. The evidence indicated that Petersen had signed a 90-day contract, but had verbally committed to a 6-month to 1-year program. Counsel for Petersen did not object to the evidence, and this court accepted it into the record. See, *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005) (proceeding to discipline attorney is trial de novo on record); *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000) (appellate court may consider agreed circumstances presented to it in brief or argument).

## Referee's Recommendations

The referee found, pursuant to Petersen's admissions, that Petersen's conduct constituted violations of Canon 1, DR 1-102(A)(1) (violation of disciplinary rules) and DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 6, DR 6-101(A)(3) (neglecting legal

matter entrusted to him); Canon 6, DR 6-102(A) (attempting to exonerate himself from or limit his liability to client for his personal malpractice); and Canon 7, DR 7-101(A)(2) (failing to carry out contract of employment entered into with client for professional services), of the Code of Professional Responsibility. The referee recommended a suspension from the practice of law for 180 days. The referee disagreed with the parties' recommendation that Petersen be given credit for the period of his prior suspension. The referee further expressed concern with Petersen's failure to obtain "formal treatment" for substance abuse. The referee recommended that reinstatement to the practice of law be conditioned on proof of fitness to practice law and that Petersen be placed on probation for 2 years and be required to engage an attorney to monitor his practice during his probation.

## EXCEPTIONS

As previously noted, there were no exceptions filed to the referee's report in this case. 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. Simmons*, 270 Neb. 429, 703 N.W.2d 598 (2005). Thus, the only issue in this case is the appropriate discipline to be imposed.

## STANDARD OF REVIEW

[2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee. *Id.*

## ANALYSIS

[3] Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Under Neb. Ct. R. of Discipline 10(L) (rev. 2005), the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive. *Id.* Accordingly, we find, on our de novo examination of the record, clear and convincing evidence that Petersen's conduct, set forth above, violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), DR 6-102(A), and DR 7-101(A)(2).

We note that all of the conduct at issue in this case occurred prior to the September 1, 2005, effective date of the Nebraska Rules of Professional Conduct and is, thus, governed by the now-superseded Code of Professional Responsibility.

[4,5] Violation of a disciplinary rule is a ground for discipline. *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004). To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005).

In this case, our primary concern is the protection of the public. Petersen's repeated neglect of client matters has obviously been injurious to those who have trusted him with their legal problems. While Petersen's after-the-fact explanations of his conduct have changed from instance to instance, Petersen's record shows a clear pattern of neglect. The protection of the public demands that Petersen not again abuse the trust of a client.

Nor are we persuaded that Petersen's recent revelation of a substance abuse problem is a sufficient mitigating circumstance to avoid a lengthy suspension. Petersen's testimony before the referee indicated that his problem with substance abuse began after his first suspension from the practice of law. There is no evidence in the record to indicate otherwise. But most of the instances of neglect contained in this record occurred before that suspension. In other words, based on our de novo review of this record, we cannot conclude that Petersen's substance abuse was a cause of these instances of neglect. Rather, the record indicates that Petersen has repeatedly and consistently neglected client matters for a period of years, however inconsistent he may have been in explaining his behavior.

[6] An attorney's admission of responsibility for his or her actions reflects positively upon his or her attitude and character and is to be considered in determining the appropriate discipline. *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671

N.W.2d 765 (2003). Petersen's admissions of responsibility for his conduct have come only when faced with discipline, and even when discipline has been imposed, those sanctions have not prevented further misconduct. In fact, in some cases, new misconduct has arisen only days after the resolution of a previous disciplinary proceeding. It is one thing to admit responsibility for past actions, but quite another to display that responsibility by modifying behavior. This record displays some of the former, but none of the latter. To the contrary, while Petersen claims to be addressing his substance abuse problem, the record also evidences many other instances in which Petersen has claimed to have addressed the issues leading to his misconduct, only to have new issues arise.

The other dispositive factor is Petersen's present fitness to practice law, which is not demonstrated in the record before us. Petersen has professed to have turned over new leaves before. It is the sincere hope of this court that Petersen is able to solve the problems that have afflicted him, whatever they may be. But unlike past incidents, in this case, Petersen will be required to demonstrate that he has addressed those problems before he is again placed in a position of trust. We accept the evidence that Petersen is seeking treatment, but we are unwilling to accept another of Petersen's assurances, that nothing similar will happen again, without proof to that effect.

We conclude protection of the public demands that Petersen be suspended from the practice of law for an indefinite period, with no possibility of reinstatement prior to February 1, 2008. Compare *State ex rel. NSBA v. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999). Upon application for reinstatement, Petersen shall have the burden of proving that he has not practiced law during the period of suspension and that he has met the requirements of Neb. Ct. R. of Discipline 16 (rev. 2004). In addition, reinstatement shall be conditioned upon (1) the payment of all costs of this action, which are hereby taxed to Petersen; (2) a showing by independent third-party proof that Petersen has continued active participation in a recovery program and has maintained abstinence from the use of alcohol during the period of suspension; and (3) the submission by Petersen and approval by this court of a probation plan, to be in effect for a period of 2

years following reinstatement, whereby Petersen's recovery program, his office management, and his compliance with the Nebraska Rules of Professional Conduct would be monitored by the Nebraska Lawyers Assistance Program and the Counsel for Discipline. Failure to comply with the terms of the probation plan would constitute grounds for further disciplinary action.

We are aware that new formal charges have been filed against Petersen, based upon other allegations of serious misconduct that have not been discussed in this opinion. Those charges have not been considered in our deliberations in the instant case, and will proceed and be resolved separately.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

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RUTH POHLMANN, BY AND THROUGH MERLYN POHLMANN, HER ATTORNEY IN FACT AND NEXT FRIEND, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLEES.

710 N.W.2d 639

Filed March 10, 2006. No. S-04-1327.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Medical Assistance: Federal Acts: States.** A state is not obligated to participate in the Medicaid program; however, once it has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.
5. **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: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

Les Seiler, Lisa D. Stava, and Adam D. Pavelka, of Seiler & Parker, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, Royce N. Harper, Douglas D. Dexter, and Jerry M. Harre, Senior Certified Law Student, for appellees.

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

STEPHAN, J.

This is an appeal from an order of the district court for Lancaster County affirming an order of the Nebraska Department of Health and Human Services (DHHS) which denied Ruth Pohlmann's application for Medicaid benefits. The denial was based upon Ruth's status as a beneficiary of a testamentary trust established by her late husband, Herman Pohlmann. We reverse, based upon our conclusion that DHHS and the district court erred in determining that the trust corpus was a disqualifying asset.

## FACTS

On August 10, 1982, Herman executed his last will and testament, which provided for the creation of two separate trusts following his death. A marital trust was to be established using the residue of any property that Herman owned at death and that he did not otherwise dispose of in the rest of his will. Herman's wife, Ruth, was to receive all of the net income from this trust and was entitled to disbursement of all or a part of the principal upon her written request or, should she become incapacitated, at her trustee's discretion, for her health, education, support, or maintenance. The second trust, the Herman and Ruth C. Pohlmann Family Trust (Family Trust), was to be funded with an amount of Herman's property, real or personal, "equal to the unified credit (allowable in determining the federal estate tax payable by reason of [Herman's] death, i.e. unified credit $62,800 equals $225,000 tax exempt property)." The will directed that Ruth was to receive from the Family Trust "all of the accumulative income from the individual funds and such portion of the principal as [the trustee] may, from time to time, deem appropriate for her health, education, support or maintenance." Ruth's

rights with respect to the corpus of the Family Trust were to end should she remarry, at which time she would be entitled to the income only. Herman and Ruth's children and grandchildren were beneficiaries of the remainder of the Family Trust. Herman's will appointed Ruth as personal representative of his estate or, alternatively, their two children Merlyn Pohlmann and Verona Lee Gumaer as copersonal representatives.

Following Herman's death, his will was admitted to probate, and on January 24, 2000, the copersonal representatives executed two deeds of distribution conveying four parcels of real property to the trustee of the Family Trust. The deeds of distribution were recorded in Thayer County, Nebraska, on March 2, 2002. The marital trust was never funded.

On June 6, 2003, Merlyn, as attorney in fact for Ruth, applied to DHHS for Medicaid benefits on her behalf. At that time and during the pendency of this case, Ruth was a resident of a nursing home in Deshler, Nebraska. On June 30, DHHS denied Ruth's request for Medicaid benefits after determining that she was ineligible for assistance because she had available resources exceeding the program standard of $4,000. The decision was based in part upon the balance in her bank accounts and in part upon resources which DHHS believed were available to Ruth under the testamentary trust established by Herman's will. Merlyn appealed the decision on Ruth's behalf, contending that while the income from the Family Trust was an available resource, the corpus of the trust was not. A hearing was held on October 1. At the time of the hearing, the balance in Ruth's bank accounts was less than the $4,000 disqualification limit. The hearing officer affirmed the DHHS decision, based upon her reading of the provisions concerning the marital trust and the application of 42 U.S.C. § 1396p(d)(3)(B)(i) (2000), which deems that resources of an irrevocable trust are available to an applicant if there are "any circumstances" under which payment could be made for the benefit of the applicant.

A petition for review of the DHHS decision was filed on Ruth's behalf pursuant to the Administrative Procedure Act. The district court for Lancaster County affirmed the DHHS decision. In its order, the court noted that the marital trust had never been funded and thus limited its review to the Family Trust. Applying

the "any circumstances" test of § 1396p(d)(3)(B)(i) and 469 Neb. Admin. Code, ch. 2, § 009.07A5b(2) (2001), to the language of the Family Trust, the district court found that Ruth "*could* receive payments from the irrevocable Family Trust to pay for her medical expenses." It held that she was therefore ineligible for Medicaid benefits. Ruth filed this timely appeal.

## ASSIGNMENT OF ERROR

Ruth assigns, restated, that the district court erred in determining that the corpus of the Family Trust was an available resource for purposes of determining her eligibility for Medicaid benefits.

## STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *McCray v. Nebraska State Patrol, ante* p. 1, 710 N.W.2d 300 (2006); *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). 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. *McCray v. Nebraska State Patrol, supra*; *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

## ANALYSIS

[4] The marital trust provided for in Herman's will was never funded. Therefore, we need only examine the decision below in the context of the Family Trust. We are presented with the question of whether the corpus of an irrevocable, discretionary testamentary trust is a resource available to the beneficiary spouse of the grantor for purposes of determining the spouse's eligibility for Medicaid benefits. Medicaid is a cooperative federal program supervised by the U.S. Department of Health and Human Services through the Health Care Financing Administration. See, 42 U.S.C. § 1396 et seq. (2000); *Bethesda Found. v.*

*Nebraska Dept. of Soc. Servs.*, 243 Neb. 130, 498 N.W.2d 86 (1993); *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 659 N.W.2d 848 (2003). Medicaid funds are used to provide medical assistance to persons whose resources are insufficient to meet the cost of necessary medical care. *Boruch v. Nebraska Dept. of Health & Human Servs., supra*. A state is not obligated to participate in the Medicaid program; however, once it has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations. *Haven Home, Inc. v. Department of Pub. Welfare*, 216 Neb. 731, 346 N.W.2d 225 (1984); *Boruch v. Nebraska Dept. of Health & Human Servs., supra*. Nebraska has elected to participate in the Medicaid program by its enactment of Neb. Rev. Stat. § 68-1018 et seq. (Reissue 2003, Cum. Supp. 2004 & Supp. 2005), and DHHS is responsible for the administration of the Medicaid program in this state. *Bethesda Found. v. Nebraska Dept. of Soc. Servs., supra*; *Boruch v. Nebraska Dept. of Health & Human Servs., supra*.

Under federal law, a state participating in the Medicaid program must establish resource standards for the determination of eligibility. § 1396a(a)(17)(B). These standards must take into account "only such income and resources as are, as determined in accordance with standards prescribed by the Secretary [of the U.S. Department of Health and Human Services], available to the applicant or recipient." § 1396a(a)(17)(B). See, *Himes v. Shalala*, 999 F.2d 684 (2d Cir. 1993); *Martin v. Kansas Dept. of SRS*, 26 Kan. App. 2d 511, 988 P.2d 1217 (1999).

Both DHHS and the district court utilized § 1396p(d) in determining whether the Family Trust corpus was a resource available to Ruth. For purposes of that subsection,

> an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust *other than by will*:
>
> (i) The individual.
>
> (ii) The individual's spouse.
>
> (iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

> (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(Emphasis supplied.) § 1396p(d)(2)(A). With respect to irrevocable trusts, the federal statute further provides that

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual.

§ 1396p(d)(3)(B)(i).

In this case, DHHS and the district court applied the "any circumstances" test of § 1396p(d)(3)(B)(i) and the corresponding provision in 469 Neb. Admin. Code, ch. 2, § 009.07A5b(2), and concluded that because the trustee in the exercise of his discretion *could* make payments from the Family Trust to Ruth, the corpus was an available resource which disqualified her from receiving Medicaid benefits. This reasoning mirrors that of the Nebraska Court of Appeals in *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 718, 659 N.W.2d 848, 853 (2003), in which the Court of Appeals wrote that

> under the plain language of § 1396p(d), if a person establishes an irrevocable trust with his or her assets and the individual is able, under *any circumstances*, to benefit from the corpus of the trust or the income derived from the trust, the individual is considered to have formed a trust which is counted in the determination of Medicaid eligibility.

However, *Boruch* involved a self-settled inter vivos trust in which the Medicaid applicant was both the grantor and the beneficiary. Here, it is undisputed that the Family Trust was established through the will of Herman. Ruth argues that this fact precludes application of the "any circumstances" test because the "other than by will" language in § 1396p(d)(2)(A) specifically exempts testamentary trusts from the scope of § 1396p. See, also, 469 Neb. Admin. Code, ch. 2, § 009.07A5a.

We find merit in this argument. As the Court of Appeals noted in *Boruch*, § 1396p was enacted in 1993 to restrict a loophole in the Medicaid act through which self-settled trusts were used

to exclude assets from consideration for Medicaid eligibility purposes. See, also, *Skindzier v. Com'r of Social Services*, 258 Conn. 642, 784 A.2d 323 (2001). For Medicaid eligibility purposes, the corpus of a self-settled trust is an available resource under § 1396p(d)(3)(B)(i) if the "any circumstances" test is met. If the test is not met, the corpus is considered an asset disposed of by the individual for purposes of § 1396p(c). See § 1396p(d)(3)(B)(ii). However, the plain meaning of the phrase "other than by will" in § 1396p(d)(2)(A) and the corresponding Nebraska regulation make it clear that a Medicaid applicant cannot be considered to have established a trust for purposes of the restrictions imposed by § 1396p(d) if the trust was established by will. See *Skindzier v. Com'r of Social Services, supra*. The State Medicaid Manual, promulgated by the Health Care Financing Administration as a means of issuing policies and procedures to state agencies administrating Medicaid, specifically provides that for purposes of determining eligibility under § 1396p, the term trust "does not cover trusts established by will." Health Care Fin. Admin., U.S. Dept. of Health and Human Servs., Pub. No. 45, State Medicaid Manual § 3259.1(A)(1) at 3-3-109.24 (rev. 64, Nov. 1994). Because the trust at issue here was not self-settled, but, rather, was testamentary, it was not within the purview of § 1396p(d)(3)(B)(i) and 469 Neb. Admin. Code, ch. 2, § 009.07A5b(2). DHHS and the district court thus erred in applying the "any circumstances" test to determine the availability of the trust corpus for purposes of Ruth's Medicaid eligibility.

We acknowledge the argument made by DHHS that the statutory exemption of testamentary trusts from § 1396p seems inconsistent with the underlying purpose of Medicaid, which is to provide medical assistance to those who have no other financial means. However, we must also agree with the statement by the Supreme Court of Connecticut in *Skindzier* that "we have no authority to impose a different rule simply because, in our opinion, it would better implement the legislative policy of minimizing the fiscal risk to [Medicaid]." *Id.* at 661, 784 A.2d at 335. Instead, like the Connecticut court, we are " 'precluded from substituting [our] own ideas of what might be a wise provision

in place of a clear expression of legislative will.' " See *id.* at 661, 784 A.2d at 336.

[5] DHHS alternatively argues that by not exercising her right of election as a surviving spouse, Ruth allowed her assets to fund the Family Trust created by Herman's will, thus bringing the trust within the scope of § 1396p(d). DHHS relies upon *Miller v. SRS*, 275 Kan. 349, 64 P.3d 395 (2003), in which the Kansas Supreme Court upheld an administrative determination that a widow's decision not to claim her spousal elective share resulted in a trust established by the widow with her own funds for her own benefit, and not a trust created by will, thereby bringing the trust corpus within the scope of § 1396p(d). We do not reach this issue because neither DHHS nor the district court was asked to make a determination that Ruth created a self-settled trust by not electing her spousal share, and the record is silent on the issue. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005); *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005).

Our determination that the "any circumstances" test was erroneously applied in this case does not conclusively resolve the question of whether the Family Trust corpus was an available resource for Medicaid eligibility purposes. Nebraska regulations provide that "[t]estamentary trusts may be excluded as resources, depending on the terms of the trust." 469 Neb. Admin. Code, ch. 2, § 009.07A5g (2001). Under the Nebraska Uniform Trust Code, " '[t]erms of a trust' means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." Neb. Rev. Stat. § 30-3803(19) (Supp. 2005). See, also, Neb. Rev. Stat. § 30-38,110 (Cum. Supp. 2004). In analyzing the terms of a testamentary trust to determine if the corpus is "available" to a beneficiary for purposes of Medicaid eligibility, courts have looked to whether the trust is a support trust or a discretionary trust. See, *Miller v. SRS, supra*; *Eckes v. Richland Cty. Soc. Ser.*, 621 N.W.2d 851 (N.D. 2001). We find the following formulation by

the Supreme Court of North Dakota helpful where, as here, the beneficiary is not a cotrustee:

> The settlor's intent determines whether a trust is classified as a support or a discretionary trust, which in turn determines what portion of the trust is available to an applicant for the purpose of qualifiying for Medicaid benefits. . . . A support trust essentially provides the trustee "shall pay or apply only so much of the income and principal or either as is necessary for the education or support of a beneficiary." . . . A support trust allows a beneficiary to compel distributions of income, principal, or both, for expenses necessary for the beneficiary's support, and an agency may consider the support trust as an available asset when evaluating eligibility for assistance. . . .
>
> Conversely, a discretionary trust grants the trustee "uncontrolled discretion over payment to the beneficiary" and may reference the "general welfare" of the beneficiary. . . . Because the beneficiary of a discretionary trust does not have the ability to compel distributions from the trust, only those distributions of income, principal, or both, actually made by the trustee may be considered by the agency as available assets when evaluating eligibility for assistance.

(Citations omitted.) *Eckes v. Richland Cty. Soc. Ser.*, 621 N.W.2d at 855-56. See, also, Restatement (Third) of Trusts § 60 (2003).

The key provision of the Family Trust stated that the trustee was to pay Ruth "all of the accumulative income from the individual funds *and such portion of the principal as it may, from time to time, deem appropriate for her health, education, support or maintenance*." (Emphasis supplied.) Although not in the context of a Medicaid eligibility determination, we have held that similar discretionary powers granted to a trustee do not create a right of the beneficiary to compel payments from the trust. See, *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000); *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994). In this case, DHHS concedes that the Family Trust is discretionary with respect to distributions of corpus, and we likewise conclude. Because Ruth cannot compel a distribution

from the Family Trust corpus, it is not an available asset for purposes of determining her eligibility for Medicaid benefits.

## CONCLUSION

The judgment of the district court affirming the order of DHHS does not conform to the law because it is based upon the "any circumstances" test of § 1396p(d)(3)(B)(i) and 469 Neb. Admin. Code, ch. 2, § 009.07A5b(2), both of which are inapplicable to the testamentary trust at issue in this case. We conclude as a matter of law that the Family Trust created by Herman's will is discretionary in nature, such that the beneficiary, Ruth, may not compel a distribution from its corpus and that therefore, such corpus is not an available asset for purposes of determining Ruth's eligibility for Medicaid benefits but must be excluded for this purpose under 469 Neb. Admin. Code, ch. 2, § 009.07A5g. Accordingly, we reverse the judgment of the district court and remand the cause with directions to vacate the DHHS order and remand to that agency for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLANT, V.
THOMAS J. SCHINZEL, APPELLEE.

710 N.W.2d 634

Filed March 10, 2006. No. S-05-679.

1. **Mental Health: Final Orders: Proof: Appeal and Error.** An appellate court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Criminal Law: Insanity: Courts.** Under Neb. Rev. Stat. § 29-3703(2) and (3) (Reissue 1995), following the annual status review of a person committed to treatment in a regional center, the court may either order the person released unconditionally, order the person to remain committed to the regional center, or order the person discharged from the regional center and placed in a less restrictive treatment program.

4. **Criminal Law: Insanity.** Under Neb. Rev. Stat. § 29-3703 (Reissue 1995), a person cannot be placed in the "joint legal custody" of two separate agencies or treatment programs.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for further proceedings.

Jon Bruning, Attorney General, and Samuel G. Kaplan, Special Assistant Attorney General, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, Shawn Elliott, and Allyson Mendoza, Senior Certified Law Student, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Thomas J. Schinzel was committed to the Lincoln Regional Center (LRC) in 1996 after being found not guilty of various charges by reason of insanity. Following a statutory annual review hearing in 2004, the district court for Lancaster County ordered that Schinzel's physical custody be transferred to a community residential facility but that his legal custody remain with LRC. Further hearings were held to address concerns raised by LRC with regard to the arrangement. On April 26, 2005, the court entered an order providing that LRC and the Lancaster County Community Mental Health Center (LCCMHC) "shall have joint legal custody" of Schinzel and directing that Schinzel's physical placement be transferred to the community residential facility. The State appeals. Because "joint legal custody" is not authorized under the controlling statutes, we reverse, and remand for further proceedings.

## STATEMENT OF FACTS

On October 19, 1995, Schinzel was charged in the district court with various counts including attempted assaults, attempted murders, and weapons violations. On May 9, 1996, the court found Schinzel not guilty by reason of insanity. Following a hearing held pursuant to Neb. Rev. Stat. § 29-3701(1) (Reissue 1995), Schinzel was found to be dangerous to himself or others

by reason of mental illness and defect. Schinzel was ordered to undergo an evaluation at LRC. Following the evaluation, a hearing was held pursuant to Neb. Rev. Stat. § 29-3702 (Reissue 1995), and the court, on September 26, 1996, ordered Schinzel committed to LRC for treatment.

Annual reviews of Schinzel's status were subsequently conducted pursuant to Neb. Rev. Stat. § 29-3703 (Reissue 1995). A statutory annual review hearing was held on May 6, 2004. In a report prepared for the annual review, the LRC treatment team opined that inpatient hospitalization of Schinzel was no longer the least restrictive alternative consistent with public safety. The team recommended that Schinzel be discharged from LRC but that he receive outpatient mental health services through LCCMHC with residency at Prescott Place, Inc., a residential living facility. LRC is a state facility administered by the Department of Health and Human Services, while LCCMHC is operated by Lancaster County. Prescott Place is a private entity that is not managed or directly funded by LRC or the State. Following the May 6 hearing, the court entered an order dated June 15, 2004, that Schinzel's physical custody be transferred to Prescott Place but that his legal custody remain with LRC.

LRC subsequently notified the court of its concerns regarding the June 15, 2004, order, under which LRC was to retain legal custody of Schinzel while transferring his physical custody to Prescott Place. A hearing was held to address these concerns, and following the hearing, the court on February 17, 2005, ordered Schinzel to be discharged from LRC and committed to a LCCMHC treatment program with his physical placement at Prescott Place. The February 17 order included directions to various agencies as to what steps they were to take if Schinzel's conduct did not comport with public safety. The court conditioned the February 17 order upon the signing of affidavits by law enforcement agencies, including the Lincoln Police Department, the Lancaster County Sheriff's Department, and Lancaster County Corrections, and by the treatment agencies. The affidavits were to state that all such agencies would comply with the elements of the court's order. The law enforcement agencies were unwilling to sign affidavits, and, therefore, another hearing was held.

On April 26, 2005, the court filed an order in which it expressed concern for the protection of the public safety while Schinzel was being treated outside a locked inpatient facility. As a consequence, the court ordered that Schinzel's physical placement be transferred to Prescott Place, with treatment provided by LCCMHC, but that LRC and LCCMHC "shall have joint legal custody" of Schinzel. According to the order, such an arrangement would facilitate Schinzel's physical return to LRC if "there is a basis to believe that his presence in the community is a danger to the public."

The State appeals the April 26, 2005, order.

## ASSIGNMENTS OF ERROR

The State asserts that the district court erred in placing "joint legal custody" of Schinzel with LRC and LCCMHC and in failing to order Schinzel discharged from LRC when it placed him in a less restrictive facility. The State argues that joint legal custody is not authorized by statute.

## STANDARDS OF REVIEW

[1] An appellate court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. *State v. Simants*, 248 Neb. 581, 537 N.W.2d 346 (1995).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

## ANALYSIS

The State argues on appeal that the district court was without authority to order that LRC and LCCMHC share "joint legal custody" of Schinzel. We agree that the relevant statutes do not provide for the arrangement ordered by the district court, and we therefore reverse the order and remand the cause for the district court to determine whether Schinzel should remain committed to LRC or whether Schinzel should be discharged from LRC for

the reason that a less restrictive alternative would be consistent with his treatment needs and with public safety.

In 1996, Schinzel was ordered committed to LRC for treatment pursuant to § 29-3702. Commitment to LRC was a permitted option under § 29-3702(2), which provides that a person found to be dangerous shall be ordered to participate in an appropriate treatment program and that such treatment program "may involve any public or private facility or program which offers treatment for mental illness and may include an inpatient, residential, day, or outpatient setting."

Once a person has been committed to a treatment program, § 29-3703(1) provides that the court shall annually review the status of the committed person. Following such review, § 29-3703(2) provides the reviewing court with options. Section 29-3703(2) provides:

> If as a result of such hearing the court finds that such person is no longer dangerous to himself, herself, or others by reason of mental illness or defect and will not be so dangerous in the foreseeable future, the court shall order such person unconditionally released from court-ordered treatment. If the court does not so find, the court shall order that such person participate in an appropriate treatment program specifying conditions of liberty and monitoring consistent with the treatment needs of the person and the safety of the public. The treatment program may involve any public or private facility or program which offers treatment for mental illness and may include an inpatient, residential, day, or outpatient setting. The court shall place the person in the least restrictive available treatment program that is consistent with the treatment needs of the person and the safety of the public.

We further note that § 29-3703(3) provides:

> If the person has been treated in a regional center or other appropriate facility and is ordered placed in a less restrictive treatment program, the regional center or other appropriate facility shall develop an individual discharge plan consistent with the order of the court and shall provide the less restrictive treatment program a copy of the discharge plan and all relevant treatment information.

[3,4] We read § 29-3703(2) and (3) together to provide that following the annual status review of a person committed to treatment in a regional center, the court may either order the person released unconditionally, order the person to remain committed to the regional center, or order the person discharged from the regional center and placed in a less restrictive treatment program. With respect to an individual who is not released unconditionally, the relevant statutes speak only of a person's being committed to a treatment program in a regional center or committed to another treatment program. Where the treatment program is "less restrictive," the person is subject to a "discharge plan." § 29-3703(3). Thus, under § 29-3703, when it is determined that a less restrictive treatment program is warranted, then the person should be discharged from his or her present program and should be ordered committed to the less restrictive program. The statutes do not mention the concept of "legal custody" with respect to commitments and therefore do not authorize "joint legal custody" as set forth in the court's April 26, 2005, order at issue in this case. Because the statutes do not authorize the "joint legal custody" ordered in this case, we conclude that under § 29-3703, a person cannot be placed in the "joint legal custody" of two separate agencies or treatment programs. See *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999) (concluding statutes and case law do not authorize placement of juvenile in "dual custody" of two separate agencies simultaneously).

Because the district court in the present case ordered an arrangement that was not authorized by the statutes, we reverse the April 26, 2005, order. From our reading of the order, the court may have determined that the LCCMHC treatment program was consistent with Schinzel's treatment needs, but the court appeared uncertain as to whether such placement was consistent with public safety. The court apparently attempted to reconcile these concerns with the "joint legal custody" arrangement which is not authorized by the statutes, and such order was an error of law. Accordingly, we reverse, and remand to the district court to determine the status of Schinzel consistent with the statutes and this opinion.

## CONCLUSION

We conclude that the district court erred in ordering that LRC and LCCMHC share "joint legal custody" of Schinzel. We reverse the order and remand the cause to the district court to determine Schinzel's status and to enter an appropriate order consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

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# STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. PAUL M. MUIA, RESPONDENT.

711 N.W.2d 850

Filed March 24, 2006. Nos. S-04-1375, S-05-1115.

1. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
2. ____: ____. A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer disciplinary proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of the case.
5. ____. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by the Nebraska Supreme Court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

Original actions. Judgment of suspension and probation.

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

D.C. Bradford and Justin D. Eichmann, of Bradford & Coenen, for respondent.

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

PER CURIAM.

## INTRODUCTION

This opinion involves two separate attorney discipline proceedings filed against Paul M. Muia: cases Nos. S-04-1375 and S-05-1115. The cases have been consolidated for purposes of disposition. Muia was admitted to the practice of law in the State of Nebraska on September 14, 1990, and at all times relevant hereto was engaged in the private practice of law in Omaha, Nebraska.

In case No. S-04-1375, formal charges were filed on December 6, 2004, by the office of the Counsel for Discipline of the Nebraska Supreme Court. The formal charges set forth three counts alleging that Muia had violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1), (4), (5), and (6) (violating disciplinary rule); Canon 2, DR 2-110(A)(2) (failing to notify clients upon withdrawal from employment); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 9, DR 9-102(A)(1) and (2) (preserving identity of funds and property of client), and DR 9-102(B)(3) and (4) (maintaining records of funds and promptly paying funds to client). The Counsel for Discipline also claimed that Muia had violated his oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). Muia's answer admitted some allegations and denied others.

After a hearing, the referee filed a report on July 13, 2005, in which he concluded that Muia's conduct had violated DR 1-102(A)(1), DR 2-110(A)(2), DR 6-101(A)(3), DR 9-102(B)(3) and (4), and his oath of office as an attorney. The referee found that the Counsel for Discipline had not proved a violation of DR 9-102(A)(1) and (2). The referee noted that Muia's license had been suspended for 4 months beginning November 7, 2003, for an earlier violation of the disciplinary rules, see *State ex rel. Counsel for Dis. v. Muia*, 266 Neb. 970,

670 N.W.2d 635 (2003), and that Muia had not sought reinstatement of his license between March 8, 2004, and the time of the hearing before the referee on June 21, 2005. In recognition of these facts, the referee recommended that Muia receive a term of suspension from the practice of law beginning March 8, 2004, and extending through the date of the filing of this court's opinion in the current proceedings, with no additional period of suspension.

In No. S-05-1115, formal charges were filed on September 19, 2005, by the Counsel for Discipline. Amended formal charges were filed on December 27, alleging that Muia had violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), (5), and (6) (violating disciplinary rule), and Canon 5, DR 5-104(A) (entering into business transaction with client if attorney and client have differing interests). Muia consented to the motion for leave to file amended formal charges, and his answer admitted some allegations and denied others.

After a hearing, the referee filed a report finding that Muia had violated DR 1-102(A)(1), (5), and (6); DR 5-104(A); Neb. Ct. R. of Discipline 9(E) (rev. 2001); and his oath of office. The referee recommended that Muia be suspended from the practice of law from March 8, 2004, to the date of the filing of this court's opinion and that Muia be placed on probation and monitored by another licensed Nebraska attorney for not less than 2 years following his reinstatement. We impose discipline as indicated below.

## FORMAL CHARGES

### No. S-04-1375—Count I

The first count concerned Muia's representation of Steven P. Reed, who retained Muia on January 8, 2002, to represent him on a contingency fee basis in a personal injury case arising from an automobile collision. Muia settled Reed's case against the negligent party for that party's insurance policy limits of $25,000. When Muia received this amount on or about May 23, 2003, he deposited it into his trust account. Muia retained his attorney fee, as well as $10,897.88 to pay Reed's medical creditors. The remainder was paid to Reed. Between May 23 and

September 23, Muia worked to settle Reed's claim for underinsured motorist coverage against the insurance carrier for the car in which Reed was a passenger at the time of his accident. The claim was ultimately settled, and the proceeds were divided between Reed and Muia pursuant to their fee agreement.

After the insurance claim was settled, Muia negotiated settlement of a bill with an Omaha hospital on September 24, 2003. The $6,783.88 bill was settled for 90 percent, with Muia keeping the 10-percent savings as additional compensation pursuant to his agreement with Reed. Muia wrote a check to himself that day for $678.38. Payment was not made to the hospital at that time because Muia was planning to negotiate another bill with a different division of the hospital. When Muia settled the first claim with the hospital, six additional medical creditors had claims against Reed totaling $3,787.

On November 7, 2003, Muia's license to practice law was suspended. He then held $6,105.50 in his trust account to pay the hospital for Reed and $3,787 to pay Reed's other medical creditors.

Pursuant to Neb. Ct. R. of Discipline 16 (rev. 2001), Muia notified Reed that Muia's license had been suspended. However, Muia did not inform Reed that some of Reed's funds remained in Muia's trust account. Muia did not inform Reed that the medical creditors had not been paid; nor did Muia deliver Reed's funds to him. Muia did not make any payments on Reed's behalf between November 7, 2003, and June 7, 2004, due to Muia's belief that he could not make such payments while under suspension from the practice of law. Muia sent payment to Reed's medical creditors for the prior balances on June 7.

### No. S-04-1375—Count II

At the time Muia was suspended on November 7, 2003, the balance of his trust account was $29,168.11. The funds represented personal injury settlements for 15 clients in addition to Reed and were to be used to negotiate with and pay the clients' medical creditors. Muia notified only 1 of these 15 clients that his license had been suspended. He did not inform any of the 15 clients that their funds remained in his trust account or that the medical creditors had not been paid; nor did he deliver the funds

to the clients. Due to Muia's belief that he could not make any payments to the medical creditors while under suspension, he did not make any payments between November 7, 2003, and June 7, 2004. On June 7, Muia sent payment to the medical creditors of the 15 clients for their respective prior balances. None of the 15 clients made a complaint against Muia with the Counsel for Discipline or indicated that they suffered any harm.

### No. S-04-1375—Count III

On September 24, 2003, Christine Sutherland hired Muia to represent her in a child support collection matter. On November 18, 11 days after Muia's license to practice law was suspended, he contacted Sutherland to inform her that his license had been suspended. Although Sutherland was scheduled to appear in court in Washington County, Nebraska, on December 2, Muia did not inform her as to who would represent her in his place. Sutherland contacted the clerk of the court on the date of the scheduled hearing and was told that the case had not been settled.

Muia had apparently asked Maria Vera to represent Sutherland. On December 2, 2003, Vera contacted the opposing attorney in Sutherland's case to inform him that she was taking over Sutherland's representation, and the two attorneys agreed to continue the December 2 hearing.

On December 5, 2003, Sutherland filed a grievance against Muia with the Counsel for Discipline. Sutherland did not learn that Muia had turned over her file to Vera until around December 12, when she received a letter from Muia that was dated November 11, 2003, but not postmarked until December 10. Vera returned Sutherland's file to Muia in December 2003, but Muia did not deliver the file to Sutherland until November 23, 2004.

### No. S-05-1115

In this case, the formal charges alleged that Muia had violated the disciplinary rules in relation to a client, Dr. Charles Muiu. Muia represented Dr. Muiu on a variety of legal matters between 2001 and November 7, 2003.

On June 21, 2003, Muia borrowed $5,000 from Dr. Muiu for a business venture. Muia allegedly failed to provide full disclosure

and failed to advise Dr. Muiu to seek independent counsel before entering into the business relationship. Muia did not provide a written promissory note for the loan, and he failed and refused to pay off the loan. Dr. Muiu filed a grievance against Muia with the Counsel for Discipline on February 16, 2005, but Muia failed to file a timely response.

After a hearing, the referee filed a report in which he summarized the evidence. The primary issue in contention was whether Dr. Muiu expected to be repaid the $5,000 loan, as alleged by Dr. Muiu, or whether it represented an investment in Muia's business, as claimed by Muia. No written documentation proved either assertion. The referee noted that the money was ultimately invested by Muia, along with his own funds, in a dog-grooming business that eventually failed.

The evidence showed that Muia and Dr. Muiu are both natives of Kenya who come from the same tribe. They met in the United States and became friends. At the time of the loan/investment, Muia was Dr. Muiu's attorney. Muia claimed that he became interested in a dog-grooming business in Omaha and wanted to buy it. He asked Dr. Muiu to invest $5,000 in the business. Muia claimed that he advised Dr. Muiu about the special rules governing an attorney going into business with his client and encouraged Dr. Muiu to get advice from another lawyer. Muia and Dr. Muiu had shared office space, but had not previously been in business together.

Muia purchased the dog-grooming business with Dr. Muiu's money and $19,000 of his own funds. Dr. Muiu was not a signatory on the purchase agreement or the business property lease. The business closed before the end of 2003, and Dr. Muiu never received any return of his investment.

The referee stated that the recollection of the two parties differed. Muia claimed that he told Dr. Muiu about his plans for the money, while Dr. Muiu claimed that Muia did not tell him the purpose of the loan. Dr. Muiu claimed the loan was to be at no interest and was to be repaid in 3 weeks. Dr. Muiu presented the canceled check, on which he had written "PL" on the memorandum line. He testified that this indicated the money was a "personal loan."

The referee also addressed whether Muia failed to timely respond to inquiries from the Counsel for Discipline. The first letter was sent to Muia on February 16, 2005, and after he failed to respond, the Counsel for Discipline sent followup letters on March 16 and 21, and April 18. Muia did not respond to the complaint until June 3. The referee noted that this failure to respond occurred while Muia was already under suspension.

## ANALYSIS

### No. S-04-1375

[1] Following a hearing, the referee concluded that Muia's conduct had violated the following disciplinary rules:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> DR 2-110 Withdrawal from Employment.
> (A) In general.
> . . . .
> (2) In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.
> . . . .
> DR 6-101 Failing to Act Competently.
> (A) A lawyer shall not:
> . . . .
> (3) Neglect a legal matter entrusted to him or her.
> . . . .
> DR 9-102 Preserving Identity of Funds and Property of a Client.
> . . . .
> (B) A lawyer shall:
> . . . .
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession

of the lawyer and render appropriate accounts to the client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Based on the fact that Muia's license was suspended for 4 months on November 7, 2003, and that Muia had not sought reinstatement of his license at any time after the 4-month period ended on March 8, 2004, the referee recommended that Muia receive no additional suspension. Neither party filed exceptions to the referee's report. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive. *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005).

[2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee. *Id.* At the hearing before the referee, a joint stipulation of fact was received into evidence. Because the facts were not in dispute, we need only determine the appropriate sanction. In order to do so, we must consider whether Muia complied with rule 16 regarding notification of clients upon suspension. We must also consider the handling of his trust account while he was suspended.

Muia stated at the hearing before the referee that he did not believe he could continue to negotiate with his clients' medical creditors after his license was suspended because he was no longer representing the clients. He stated that the medical creditors had placed attorney liens on the funds, which prevented Muia from paying the funds to his clients, and that he was concerned that if he gave the money to his clients and they did not pay the medical creditors, the creditors could attempt to collect the funds from Muia. He said he did not believe he had the power either to send the money to his clients or to pay the medical creditors. Muia said he did not understand that the notification provision of rule 16 applied to clients for whom he was holding funds to pay medical creditors.

At the time the incidents in this case arose, rule 16(A) provided that whenever a member was disbarred or suspended from the practice of law, the member was required to:

> (1) Notify in writing all of the member's present clients of such fact, and
>
> (2) Assist each client in obtaining a member of the client's choice to complete all matters being handled by him or her, and
>
> (3) Notify in writing all members and nonresident attorneys involved in pending legal or other matters being handled by the member of his or her altered status, and
>
> (4) Return to the Clerk the member's Nebraska State Bar Association membership card.
>
> (5) Within thirty days from the date of said disbarment, suspension, or voluntary surrender, file an affidavit with the Court, stating full compliance with the requirements of this rule and . . . simultaneously submit evidence of full compliance.
>
> . . . .
>
> (7) The Clerk shall notify the Court, in writing, of the compliance or noncompliance of the Respondent with this Rule 16. Noncompliance shall be contempt of court.

Rule 16 was amended on November 10, 2004, to add a requirement that a disbarred or suspended member shall "[p]romptly refund all client funds and close all attorney trust accounts if the imposed sanction is greater than a 30-day suspension. A trust account may remain open if, after a reasonable search, the client or clients eligible to receive funds cannot be located . . . ." Neb. Ct. R. of Discipline 16(A)(3) (rev. 2004). We conclude that the treatment of trust account funds during an attorney's suspension has been addressed by the amendment of rule 16. Although this provision went into effect after the events in the present case, when Muia was suspended, the disciplinary rules provided that a lawyer who withdrew from employment was to give due notice to the client and deliver all papers and property to which the client was entitled. See DR 2-110(A)(2).

The referee found by clear and convincing evidence that Muia had violated DR 2-110(A)(2) (notice requirement) and DR 9-102(B)(3) and (4) (which requires recordkeeping and

payment of funds to clients). Because no exceptions were filed to the referee's report, we consider the referee's finding final and conclusive. The record supports a finding that Muia did not promptly notify all of his clients of his suspension or promptly pay to them the funds he retained in his trust account.

### No. S-05-1115

In this case, the referee found by clear and convincing evidence that Muia had violated the following disciplinary rules:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> . . . .
>
> DR 5-104 Limiting Business Relations with a Client.
>
> (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his or her professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

The referee found that Muia failed to timely and adequately respond to inquiries by the Counsel for Discipline and that Muia failed to fully and adequately advise Dr. Muiu in regard to the rules and considerations when a lawyer and his client go into business together. The referee found it impossible to determine from the evidence who was correct concerning the arrangement between Muia and Dr. Muiu, but the referee was persuaded that Muia did not advise Dr. Muiu properly and sufficiently as to the requirements under DR 5-104, addressing when a lawyer enters into a business relationship with a client. The record supports by clear and convincing evidence the finding of the referee that Muia violated DR 1-102(A)(1), (5), and (6) and DR 5-104(A).

### Appropriate Sanction

On February 10, 2006, Muia filed a motion to consolidate the two attorney discipline cases. The motion was sustained on

February 15, and this court ordered that case No. S-05-1115 be submitted without oral argument. The Counsel for Discipline filed a "Motion for Judgment" on February 28. On March 1, Muia entered a consent to the motion for judgment. We must now determine the appropriate sanction for Muia's actions.

[3,4] To determine whether and to what extent discipline should be imposed in a lawyer disciplinary proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Gilroy*, 270 Neb. 339, 701 N.W.2d 837 (2005). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of the case. *Id.*

At issue here is whether Muia should receive credit for the additional time he has, in effect, served on suspension voluntarily. He was initially suspended for 4 months beginning November 7, 2003, and could have sought reinstatement on March 8, 2004. At that time, the charges in case No. S-04-1375 were being investigated, and he did not seek reinstatement. As of March 24, 2006, he will have been suspended for a period of 28 months.

This court has previously entered orders of suspension that were retroactive to the date of a previously ordered suspension. In *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004), the attorney was temporarily suspended on December 30, 2002. After a hearing on the formal charges, the referee recommended suspension for 1 year, with credit given for the period of his " 'voluntary temporary suspension.' " *Id.* at 880, 678 N.W.2d at 109. This court noted that when the opinion was filed on April 23, 2004, the attorney had been suspended for a period of more than 15 months. We ordered the attorney suspended retroactively to December 30, 2002, with no possibility of readmission prior to December 30, 2004.

We also ordered a retroactive suspension in *State ex rel. Counsel for Dis. v. Monjarez*, 267 Neb. 980, 679 N.W.2d 226 (2004). The attorney was temporarily suspended on January 18,

2001. Amended formal charges were filed on January 29, 2002, which charges formed the basis of the second case. In an opinion filed on May 14, 2004, this court ordered that the attorney be suspended for a period of 40 months retroactive to the date of his temporary suspension on January 18, 2001. Thus, he was eligible for reinstatement almost immediately upon the filing of the opinion in the second case. See, also, *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000) (attorney temporarily suspended on September 15, 1999; on December 8, 2000, suspended for indefinite period retroactive to date of temporary suspension, with no possibility of reinstatement prior to September 15, 2001); *State ex rel. NSBA v. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999) (attorney temporarily suspended May 29, 1998; on May 21, 1999, suspended for indefinite period retroactive to date of temporary suspension, with no possibility of reinstatement prior to May 29, 2000).

However, we have distinguished cases in which the attorney voluntarily ceased the practice of law prior to the filing of formal charges. In *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002), the referee recommended that the attorney be suspended retroactively to the date he voluntarily ceased practicing law. This court noted that the case was distinguishable from *Jensen* and *Aupperle* because in those cases, the court had temporarily suspended the licenses to practice law during the pendency of the disciplinary proceedings. In *Apker*, no temporary suspension had been requested or entered by the court. We stated:

> To make a suspension from the practice of law retroactive under these circumstances would be to allow the respondent to choose the time and circumstances of his own suspension and would not serve the purposes of attorney discipline. . . . While we do not find that a retroactive suspension is appropriate where a temporary suspension has not been ordered by this court, we nonetheless consider Apker's voluntary cessation of the practice of law as a mitigating factor in determining what sanction should be imposed.

*Id.* at 750, 642 N.W.2d at 170.

The case at bar is slightly different from previous disciplinary cases. Muia was temporarily suspended from the practice of law for 4 months in a previous action. See *State ex rel. Counsel for Dis. v. Muia*, 266 Neb. 970, 670 N.W.2d 635 (2003). He chose not to seek reinstatement because the events in case No. S-04-1375 were under investigation at the time he could have sought reinstatement. Thus, it is not a case in which the temporary suspension was ordered while the investigation proceeded, as in *Wintroub* and *Monjarez*, among others. Nor is it precisely like *Apker*, in which the attorney voluntarily ceased practicing law prior to the filing of formal charges. We believe it is appropriate to consider Muia's voluntary continuation of his suspension as a mitigating factor in determining his sanction.

In case No. S-04-1375, Muia was found to have failed to notify his clients of his suspension from the practice of law as required by rule 16. We have held that failure to comply with rule 16 "places one in contempt of this court and constitutes an aggravating circumstance." *State ex rel. NSBA v. Mahlin*, 252 Neb. 985, 989, 568 N.W.2d 214, 216 (1997). See, also, *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997). However, the Counsel for Discipline did not file charges against Muia asserting that he violated rule 16.

The referee also found in case No. S-04-1375 that Muia had violated the disciplinary rules related to withdrawal from employment, neglecting a legal matter, and maintaining records of funds and delivering such funds or other property to the client. The facts, as stipulated, showed that Muia failed to timely pay settlement proceeds to Reed and his medical creditors, failed to inform Reed that Muia was under suspension, failed to notify other clients that he was under suspension or to refund money in his trust account to them, and failed to notify Sutherland of the replacement attorney or of the correct court date for her case. In case No. S-05-1115, the referee found that Muia had violated the disciplinary rules related to limiting business relations with a client and that he failed to timely and adequately respond to inquiries by the Counsel for Discipline. The evidence showed that Muia did not fully and adequately advise

Dr. Muiu concerning the necessary procedures to follow when a lawyer and his client go into business together.

The factors to be considered in determining a sanction include the nature of the offense. As the referee noted, Muia's failure to properly advise Dr. Muiu "continues a thread that goes through all of . . . Muia's disciplinary matters - namely, his botched relations with his clients and his failure to do what is proper in regard to client relations." In case No. S-04-1375, Muia neglected clients and failed to follow through in negotiating settlements for them. He failed to notify them of his suspension, and he failed to take any action related to the client funds in his trust account. Our cases show a wide range of sanctions for similar violations. In *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004), the attorney was suspended for 90 days after being found to have violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), and DR 9-102(B)(4) by neglecting a client's case and failing to turn over a client's file. However, in *State ex rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003), the attorney was disbarred after evidence was presented that the attorney failed to timely return a retainer, neglected a case, and failed to maintain records of client funds.

Another factor we may consider is the attitude of the offender generally. In case No. S-04-1375, Muia apparently was cooperative in working with the Counsel for Discipline. However, his testimony at the hearing indicates that he was not willing to accept full responsibility for failing to return funds to his clients during his suspension. Muia stated that he asked his attorney for advice about the matter and that the attorney recommended Muia wait before taking any action. Muia claimed that he did not know how to handle the funds while he was on suspension. In case No. S-05-1115, Muia failed to timely respond to letters from the Counsel for Discipline.

[5] Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. See *State ex rel. Counsel for Dis. v. Villarreal*, 267 Neb. 353, 673 N.W.2d 889 (2004). Rule 4(B) provides that this

court may, in its discretion, impose one or more of these disciplinary sanctions.

We conclude that the referee's reports support a finding that Muia should be suspended from the practice of law for a certain period of time. Muia's license was suspended for 4 months beginning November 7, 2003. See *State ex rel. Counsel for Dis. v. Muia*, 266 Neb. 970, 670 N.W.2d 635 (2003). However, he did not seek reinstatement of his license after the expiration of this 4-month period. In case No. S-04-1375, the referee recommended a term of suspension from the practice of law beginning March 8, 2004 (the date Muia could have requested reinstatement), and concluding upon the filing of this opinion. In case No. S-05-1115, the referee again recommended that Muia be placed on suspension, followed by a term of probation with monitoring by another licensed Nebraska attorney for not less than 2 years following reinstatement of Muia's license. We agree with these recommendations. In addition, to protect the public, we order that Muia receive additional assistance in running a law practice.

In *State ex rel. Counsel for Dis. v. Waggoner*, 267 Neb. 583, 675 N.W.2d 686 (2004), the respondent was publicly reprimanded after it was determined that she had unduly delayed completion of certain legal matters for two clients and had failed to deposit into her attorney trust account a retainer paid to her by a third client. In addition, we entered an order placing the respondent on probation with monitoring for 18 months. In a second matter, additional charges were filed concerning events that occurred during the same timeframe and before discipline had been imposed. *State ex rel. Counsel for Dis. v. Waggoner*, 268 Neb. 895, 689 N.W.2d 316 (2004). We entered an order continuing the probationary period with monitoring for an additional 12 months.

In case No. S-04-1375, the parties agreed at oral argument that Muia would benefit from the assistance of a monitor to help him learn techniques to operate and organize a law practice. In addition to the suspension Muia has served during the pendency of this matter, we find that he should be subject to probation with monitoring for a period of at least 24 months, subject to the following terms:

The probation shall include the monitoring of Muia by a lawyer that is agreed upon by the parties. Before Muia resumes the practice of law, the monitor shall be appointed as per agreement by the parties. The monitor shall not be compensated for his or her monitoring duties; however, the monitor shall be reimbursed by Muia for actual expenses incurred.

Each month during the probationary period, Muia shall provide the monitor with a list of all cases for which Muia is then responsible. Muia shall personally meet with the monitor each month to discuss the list of cases. The monitor shall also assist Muia in developing and implementing appropriate office procedures.

The names of Muia's clients shall be kept confidential between Muia and the monitor. The list of cases shall include the following for each case:

1. Name of client and date attorney-client relationship began.
2. General type of case (e.g., 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 (e.g., pleading, correspondence, document preparation, discovery, court hearing).
5. Next type of work to be done on case and date on which work should be completed.
6. Any applicable statute of limitations and its date.

The monitor shall have the right to contact Muia with any questions regarding the list. If at any time the monitor believes Muia has violated a disciplinary rule or has failed to comply with the terms of probation, the monitor shall report the same to the Counsel for Discipline. At the conclusion of the term of probation, the monitor shall notify this court whether Muia has successfully completed the probationary period. If Muia successfully completes the probation, it shall be terminated.

## CONCLUSION

Based on the recommendation of the Counsel for Discipline, the reports of the referee, and our independent review of the record, we find by clear and convincing evidence that Muia has violated DR 1-102(A)(1), (5), and (6); DR 2-110(A)(2);

DR 5-104(A); DR 6-101(A)(3); DR 9-102(B)(3) and (4); disciplinary rule 9(E); and his oath as an attorney. Muia should be and hereby is suspended from the practice of law in the State of Nebraska retroactive to March 8, 2004. Upon the appointment of a monitor as required above and upon notice to the court of such appointment, Muia may resume the practice of law in the State of Nebraska. It is further ordered that Muia be subject to probation with monitoring as outlined above for a period of at least 24 months and that Muia shall successfully comply with the terms of the probation. Muia is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION AND PROBATION.

WRIGHT, J., participating on briefs.

MCCORMACK, J., not participating.

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PERRY LUMBER COMPANY, INC., APPELLANT,
v. DURABLE SERVICES, INC., APPELLEE.

710 N.W.2d 854

Filed March 24, 2006. No. S-05-005.

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 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.
3. **Rules of Evidence: Expert Witnesses.** Four preliminary questions must be answered in order to determine whether testimony is admissible as expert testimony: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations.
4. **Expert Witnesses.** In determining whether a witness is qualified to testify as an expert, the court must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education.

5. **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.
6. **Trial: Juries: Expert Witnesses.** Determining the weight to be given expert testimony is uniquely within the province of the fact finder, and the jury, as the trier of fact, is entitled to determine the weight and credibility to be given to witnesses' testimony.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded for a new trial.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellant.

Jeffrey H. Jacobsen and William T. Wright, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Perry Lumber Company, Inc. (Perry), appeals from an order of the district court for Phelps County entering judgment based on a jury verdict in favor of the defendant, Durable Services, Inc. (Durable). Perry brought suit against Durable claiming that Durable was responsible for a fire that damaged facilities owned by Perry. On appeal, Perry asserts that the district court erred in connection with certain rulings with respect to expert testimony presented by both parties regarding the cause of the fire. We conclude that the district court erred in failing to admit the testimony offered by Perry's witness as expert testimony and in limiting the weight the jury could give to such testimony. Such error was prejudicial to Perry and constituted reversible error. We therefore reverse the judgment of the district court, and we remand the cause for a new trial.

## STATEMENT OF FACTS

Perry owned and operated a lumberyard and retail sales store in Holdrege, Nebraska. Perry's facilities were remodeled in the early 1990's. As part of the remodeling, Durable designed and installed improvements to the heating and air-conditioning units. Durable's work included installing several duct heaters.

On January 21, 1999, Perry's facilities were damaged by a fire. Perry filed the present action against Durable, claiming that the fire was caused by Durable's improper construction and installation of the duct heaters. Perry asserted theories of recovery based upon negligence, breach of implied warranty, and breach of contract. Perry sought damages of approximately $1.3 million. The action went to trial, and judgment was entered based on a jury verdict in favor of Perry in the amount of $960,840. Durable appealed to this court. We concluded that the trial court had committed reversible error by ruling that Durable's expert could not testify concerning the results of his test which Perry had previously placed in evidence through the testimony of its own expert. We reversed the judgment of the district court and remanded the cause for a new trial. *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003).

On remand, prior to trial, Perry filed a motion in limine seeking an order excluding any opinion evidence of Durable's expert, William Buxton, regarding the origin and cause of the fire and any opinion evidence of Buxton to the effect that no expert could determine the origin or cause of the fire. The court overruled Perry's motion in limine and other motions in limine by each party with regard to the anticipated testimonies of other experts. The court stated in its order that

> after reviewing the qualifications of the experts, and assuming proper foundation is laid at trial, the objections go primarily to the weight the jury should give the opinions rather than to their admissibility 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).

The court reserved ruling on admissibility until foundation had been provided at trial.

The second trial was held November 29 through December 3, 2004. Perry presented the testimony of various witnesses, including James Wagner, who was chief of the Holdrege Volunteer Fire Department at the time of trial and was acting chief at the time of the fire at issue in this case. Wagner's duties as fire chief included investigating the origin and cause of fires. Wagner had over 30 years' experience investigating fires. Wagner testified regarding

his education and training in fire investigation which included approximately 40 classes offered by the State of Nebraska and by other entities. In those classes, Wagner had studied, inter alia, the National Fire Protection Association's publication No. 921 (NFPA 921), which provides guidelines for a scientific method of fire investigation.

Wagner testified that he was on the scene of the fire on January 21, 1999. After taking part in fighting the fire, Wagner investigated the fire. Wagner testified without objection that in his opinion, the origin of the fire was above the south office and that a duct heater that was in that area had suffered more damage than duct heaters in other areas. Wagner also testified that he had investigated to determine the cause of the fire. When Wagner was asked his opinion regarding the cause of the fire, Durable objected on the basis that although Wagner was qualified to testify as an expert regarding origin, he was not qualified to testify as an expert regarding cause.

After argument and further foundation testimony, the court ruled:

> Okay. I'm going to rule [Wagner] can answer the question based on the following: Even if he does not qualify as an expert to provide scientific knowledge, he would qualify under Rule 701. Even if he's not an expert, his testimony in the form of opinions is limited to those opinions that are — which are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact at issue.
>
> So, I'm not necessarily, ladies and gentlemen of the jury, finding he is an expert, but he can testify based on his observations; and that's the weight you give this testimony. Objection overruled. The witness may answer the question.

Although the court did not read or summarize the text of "Rule 701" to the jury, we note that Nebraska Evidence Rule 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 1995). Following the court's ruling quoted above, Wagner testified that the fire was caused by some material that ignited inside the duct heater and that he had come to this conclusion by eliminating other ignition sources.

In addition to Wagner's testimony, Perry also presented testimony by Charles Hoffman, a deputy State Fire Marshal, and Lewis T. Strait, a fire investigator retained by Perry. Both Hoffman and Strait testified that they had investigated the fire pursuant to NFPA 921, and both testified that in their opinions, the origin of the fire was in the area above the south office. Hoffman testified that he could not give an opinion to a reasonable degree of certainty as to the cause of the fire, but he testified that possible ignition sources included elements found in the area of the point of origin. Strait testified that in his opinion, the cause of the fire was the buildup of material in the duct heater above the south office and that the material acted as fuel for the fire and was ignited by the coils of the duct heater.

In its defense, Durable presented, inter alia, the testimony of Buxton. Buxton was a fire investigator, and he testified regarding his training and experience in fire investigation. Buxton's training included sessions of various federal, state, and local training programs, and his experience included investigating between 3,500 and 4,000 fires over 30 years. Buxton also testified regarding his familiarity with NFPA 921 which he described as a "guide" and "an accepted practice for doing the origin and cause investigation of a fire." In discussing NFPA 921, Buxton stated that under its guidelines, if an investigator must assume evidence or information, then the investigator must conclude that the origin and cause of the fire are "undetermined."

Buxton had reviewed the testimony and reports of the experts who testified at the present trial and who had testified at the first trial in this case. Buxton testified that he considered the principles of NFPA 921 in reviewing such materials. When Durable asked Buxton whether he was able to form an opinion to a reasonable degree of certainty as to either the origin or the cause of the Perry fire, Perry objected on the basis of foundation and requested an opportunity to voir dire Buxton about his investigation. The court overruled Perry's objection and request to voir

dire and allowed Buxton to answer the question. Buxton testified that he "could not determine the origin of the fire because you would have to assume too many things." He also testified that in his opinion, the other experts who had testified regarding origin and cause of the fire had "assume[d] too many things . . . without having the evidence to back it up." Buxton then testified regarding specific assumptions that the other experts would have to have made. When Durable asked Buxton his opinion regarding whether any reasonable investigator following NFPA 921 would have been able to state to a reasonable degree of certainty an opinion as to the origin of the fire, Perry objected, and after argument outside the presence of the jury, the court sustained Perry's objection.

On cross-examination, Buxton acknowledged that he had not performed a site inspection or other procedures which were part of a fire investigation made pursuant to NFPA 921. He also testified that following an investigation pursuant to NFPA 921, an investigator can either make a determination as to the origin or cause or conclude that it is undetermined, but that an investigator must perform an investigation prior to making either conclusion. Following cross-examination, Perry moved the court to strike Buxton's testimony and his opinions on the basis that he had not performed a proper investigation pursuant to NFPA 921. The court denied Perry's motion to strike.

The case was submitted to the jury. The jury returned a unanimous verdict in favor of Durable, and, based on the verdict, the court entered judgment in Durable's favor. Perry appeals.

## ASSIGNMENTS OF ERROR

Perry asserts, restated, that the district court erred in (1) failing to perform its gatekeeping function 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), with respect to the testimonies of Wagner and Buxton; (2) refusing to allow Wagner to give expert testimony regarding the cause of the fire and in instructing the jury that it must consider Wagner's testimony as lay testimony rather than as expert testimony; and (3) permitting Buxton to testify regarding the origin and cause of the fire.

## STANDARD OF REVIEW

[1,2] 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. *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

## ANALYSIS

### *The Trial Court's Ruling Regarding Wagner's Testimony Was Reversible Error.*

With regard to Wagner's testimony, Perry argues that the district court erred in failing to perform its gatekeeping function, refusing to allow Wagner to give expert testimony regarding the cause of the fire, and instructing the jury that it must consider Wagner's testimony as lay testimony rather than as expert testimony. We agree with Perry that on the record in this case, the court should have found Wagner to be an expert. Because the court failed to declare Wagner an expert and thereupon effectively directed the jury to circumscribe the weight to be accorded to Wagner's testimony, the ruling unfairly prejudiced Perry and constituted reversible error.

We note first that Perry does not appear to assert that Wagner's opinion relating to the origin and cause of the fire was completely excluded in this case. Instead, Perry's argument is that although Wagner's testimony was admitted, because of the court's comments to the jury, Wagner's testimony was effectively admitted only as lay testimony and the jury instructed to minimize its weight. We therefore consider Perry's claim surrounding the determination that Wagner's testimony was not admitted as expert testimony and the consequence of that determination relative to the fairness of the trial.

[3] Four preliminary questions must be answered in order to determine whether testimony is admissible as expert testimony: (1) whether the witness qualifies as an expert pursuant to rule 702; (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4)

whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. *Realty Trust Group, supra.*

The court in the present case did not fully explain why it did not admit Wagner's testimony as expert testimony. However, because the court admitted the testimony as lay testimony, we can assume that the court found that the testimony was relevant, that it would assist the jury to understand the evidence or determine a controverted factual issue, and that its probative value was not substantially outweighed by the danger of unfair prejudice or other considerations. We would agree with these assessments. Looking at the context, it is apparent that the court found that Wagner did not qualify as an expert pursuant to rule 702. We disagree with this determination.

[4] We have stated that in determining whether a witness is qualified to testify as an expert, the court "must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education." *State v. Mason, ante* p. 16, 33, 709 N.W.2d 638, 653 (2006). In the present case, Wagner testified that he had over 30 years' experience investigating fires; that he had received education and training in fire investigation, which included approximately 40 classes offered by the State of Nebraska and by other entities; and that in those classes, he had studied, inter alia, fire investigation procedures pursuant to NFPA 921. Wagner's testimony also established that his investigation was based on NFPA 921, which he and other experts in this case recognized as an accepted approach to conducting fire investigations. We determine that the record reflects that Wagner had sufficient knowledge, skill, training, and experience to establish himself as an expert in fire investigation and was thus qualified to testify as an expert witness on issues regarding fire investigation. See, similarly, *Bayse v. Tri-County Feeds, Inc.*, 189 Neb. 458, 203 N.W.2d 171 (1973) (permitting fire chief to testify as expert regarding origin and cause of fire).

With respect to Perry's argument based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), we have stated: "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." *Mason, ante* at 33-34, 709 N.W.2d at 653. With respect to the underlying reasoning and methodology, Wagner testified that he followed NFPA 921. We note that Wagner and the other experts in this case generally recognized NFPA 921 as setting forth procedures by which a fire investigation is conducted. In this regard, we further note that NFPA 921 has been accepted as a methodology in other cases. See, *Fireman's Fund Ins. v. Canon U.S.A., Inc.*, 394 F.3d 1054 (8th Cir. 2005); *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 707 (W.D. Va. 2004); *Royal Ins. Co. of America v. Joseph Daniel Const.*, 208 F. Supp. 2d 423 (S.D.N.Y. 2002); *Travelers Property & Cas. Corp. v. General Elec.*, 150 F. Supp. 2d 360 (D. Conn. 2001). Durable does not appear to have challenged the scientific validity and reliability of the methodology set forth by NFPA 921, nor does anything in the record indicate that such methodology was the reason the court did not admit Wagner's testimony as expert testimony. We have recently observed that *Daubert* " ' "does not require that courts reinvent the wheel each time that evidence is adduced." ' " *Mason, ante* at 37, 709 N.W.2d at 656 (quoting *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001)). Based on the foregoing, a *Daubert* analysis of methodology was not necessary in this case and Perry's arguments to the contrary are unavailing. Instead of a *Daubert* issue, the issue before the court was whether Wagner was qualified as an expert in fire investigation. As noted above, the record demonstrates that Wagner was so qualified.

[5] Because Wagner's testimony was admissible as expert testimony, we conclude that the district court erred when it admitted Wagner's testimony only as lay witness opinion. The combination of this ruling and the court's comments to the jury relative to the admission of Wagner's testimony constituted reversible 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. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). Because

Wagner was allowed to give his opinion, Perry was not harmed in the sense that Wagner's testimony was completely excluded. However, when admitting Wagner's testimony, the court told the jury, "So, I'm not necessarily, ladies and gentlemen of the jury, finding he is an expert, but he can testify based on his observations; and that's the weight you give this testimony." By making this statement, the court limited the weight that the jury could give Wagner's testimony by stating that it should be given the weight of testimony based on personal observation but not the weight of expert testimony.

[6] We have stated that determining the weight to be given expert testimony is uniquely within the province of the fact finder, and the jury, as the trier of fact, is entitled to determine the weight and credibility to be given to witnesses' testimony. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999). In this case, Wagner was the first expert to arrive at and evaluate the scene of the fire. The jury, having heard Wagner's testimony regarding his qualifications and the techniques he used to form his opinions, was entitled to determine the weight and credibility it would give to Wagner's testimony. However, by its ruling in this case, the court effectively circumscribed the weight the jury could give Wagner's testimony, and such limitation unfairly prejudiced Perry. Inasmuch as the cause of the fire was a critical issue of fact in this case, such error affected a substantial right of Perry and necessitates a new trial. We therefore conclude that it is necessary to reverse the judgment of the district court and to remand the cause for a new trial.

*Buxton's Testimony Was Admissible.*

Although our resolution of Perry's assignments of error with regard to Wagner's testimony disposes of the appeal, we will consider Perry's assignment of error with regard to Buxton's testimony, because issues related to Buxton's testimony are likely to recur on remand for a new trial. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005).

Perry asserts that the court erred in permitting Buxton to testify regarding the cause of the fire after Buxton acknowledged

that he had not completed a proper investigation. Specifically, Perry argues on appeal that Buxton testified that the cause of the fire was "undetermined," which is a technical conclusion that one can come to only after having completed a proper investigation pursuant to NFPA 921. We find no merit to Perry's arguments with regard to Buxton's testimony.

Contrary to Perry's characterization of Buxton's testimony, our review of the record indicates that Buxton testified that he was not able to give an opinion as to cause. Buxton did not testify that he came to the technical conclusion that the cause was "undetermined." Buxton did testify that he had reviewed the other experts' testimony and that in his opinion, such experts did not have adequate information to form their opinions. Further, the court did not allow Buxton to answer Durable's question of whether he thought any investigator could have determined cause.

The thrust of Buxton's testimony therefore was not to give an opinion as to cause but to critique the investigations conducted and the opinions formed by Perry's experts. Testimony critiquing the procedures and opinions of another expert is an acceptable form of expert testimony. See *Lincoln Tel. & Tel. Co. v. County Board of Equalization*, 209 Neb. 465, 308 N.W.2d 515 (1981). Under the standards set forth above with regard to determining the existence of expert testimony, we determine that the record reflects that Buxton had sufficient knowledge, skill, training, and experience to establish himself as an expert in fire investigation and that Buxton was qualified to testify as an expert witness on issues regarding fire investigation. See *State v. Mason, ante* p. 16, 709 N.W.2d 638 (2006). Because Buxton was qualified to testify as an expert in fire investigation, he was qualified to critique the investigations conducted and the opinions offered by other witnesses in this case. We therefore conclude that the district court did not abuse its discretion in admitting Buxton's expert testimony, and Perry's assignment of error relative to Buxton's testimony is without merit.

## CONCLUSION

We conclude that the district court did not err in admitting Buxton's expert testimony. However, we conclude that the court

did err in failing to find that Wagner's testimony was admissible as expert testimony and by effectively directing the jury that it should not give Wagner's testimony the weight it would give to expert testimony. Such error unfairly prejudiced Perry and constitutes reversible error. We therefore reverse the judgment of the district court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLANT, V.
JAMES A. DUNLAP, APPELLEE.

710 N.W.2d 873

Filed March 24, 2006. No. S-05-578.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ___: ___. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Criminal Law: Final Orders: Appeal and Error.** The State's right to appeal in criminal cases is limited by Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), which provides that the State may appeal only after a final order has been filed in the case.
4. **Criminal Law: Final Orders.** A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending.
5. **Judgments: Final Orders: Appeal and Error.** The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment.
6. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Appeal dismissed.

Stuart J. Dornan, Douglas County Attorney, Jennifer Meckna, and Kevin J. Edwards, Senior Certified Law Student, for appellant.

Thomas C. Riley, Douglas County Public Defender, and Stephen P. Kraft for appellee.

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

WRIGHT, J.

## NATURE OF CASE

The State appeals from a district court order which disqualified the Douglas County Attorney's office from prosecuting James A. Dunlap due to an alleged conflict of interest involving one of the deputy county attorneys. See Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004) (specifying procedure by which prosecuting attorneys may appeal trial court rulings).

## SCOPE OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

## FACTS

Dunlap was charged by information on December 21, 2004, with attempted burglary and possession of burglar tools. The State filed an amended information on January 25, 2005, in order to deem Dunlap a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995). The State alleged that Dunlap had been convicted of two previous felonies. Based on the addition of the habitual criminal charge, Dunlap moved the district court to disqualify the entire Douglas County Attorney's office and to appoint a special prosecutor.

At a hearing on his disqualification motion, Dunlap asserted that Thomas McKenney, a deputy county attorney, had represented Dunlap on a prior felony conviction. Dunlap argued that because the State was charging him as a habitual criminal, the prior attorney-client relationship between Dunlap and McKenney created a conflict of interest for the county attorney's office.

The State asserted that McKenney did not represent Dunlap in the prior felony convictions set forth in the amended information. The State further argued that if the court found that a conflict of interest existed, the conflict should not be imputed to the entire county attorney's office.

The district court took judicial notice that Dunlap was being prosecuted as a habitual criminal and, despite the State's argument to the contrary, that one of the predicate prior convictions involved a case in which Dunlap was represented by a current

deputy county attorney. In reaching its decision to disqualify the county attorney's office, the court stated:

> The problem isn't that [Dunlap] was represented by a lawyer on a prior occasion, who is now in the prosecutor's office, the same office that is prosecuting the pending information, the problem is that with the charge involving an allegation that [Dunlap is] an habitual criminal . . . McKenney is essentially involved on both sides of the case.

The court found persuasive Nebraska civil cases in which entire law firms were disqualified when an attorney or employee experienced a conflict of interest. On March 11, 2005, the district court disqualified the Douglas County Attorney's office and appointed a special counsel to prosecute Dunlap.

The State timely applied to appeal the district court's order under § 29-2315.01.

## ASSIGNMENT OF ERROR

The State's assignments of error can be summarized as follows: The district court erred in disqualifying the Douglas County Attorney's office.

## ANALYSIS

Section 29-2315.01 grants to the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review. See *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997). The statute provides in pertinent part:

> 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. Such application shall contain a copy of the ruling or decision complained of, the basis and reasons for objection thereto, and a statement by the prosecuting attorney as to the part of the record he or she proposes to present to the appellate court. Such application shall be presented to the trial court within twenty days *after the final order is entered in the cause*, and upon presentation, if the trial court finds it is in conformity with the truth, the judge of the trial court shall

> sign the same and shall further indicate thereon whether in his or her opinion the part of the record which the prosecuting attorney proposes to present to the appellate court is adequate for a proper consideration of the matter. The prosecuting attorney shall then present such application to the appellate court within thirty days from the date of the final order.

(Emphasis supplied.) § 29-2315.01.

[2] As a preliminary matter, we must determine whether this court has jurisdiction over the present 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. *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997).

[3] The State's right to appeal in criminal cases is limited by § 29-2315.01, which provides that the State may appeal only after a final order has been filed in the case. *State v. Martinez*, 198 Neb. 347, 252 N.W.2d 630 (1977). Thus, to determine whether we have jurisdiction over this appeal, we confront the following questions: Is an order to disqualify an entire county attorney's office due to a conflict of interest a final order sufficient to create appellate jurisdiction? If not, is an exception to the final order rule applicable?

[4,5] A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending. See *State v. Wieczorek, supra*. The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment. *State v. Taylor*, 179 Neb. 42, 136 N.W.2d 179 (1965).

In *Wieczorek*, after both parties had rested in a jury trial, the trial court granted a directed verdict in favor of the defendant on three of the four counts charged against him. Between the date of the directed verdict and the date of sentencing, the State appealed the directed verdict. This court dismissed the appeal for lack of jurisdiction because the State's appeal was premature, having been filed "during a time in which further action, i.e., sentencing, was necessary to completely dispose of the cause pending in the trial court." *Id.* at 710, 565 N.W.2d at 484.

In the instant case, Dunlap's motion to disqualify the county attorney's office was made and ruled on prior to trial and prior to any conviction or sentencing. Further action was required before the cause could be terminated. Accordingly, the order to disqualify the county attorney's office was not a final, appealable order.

Having concluded that the disqualification order was not a final order, we must determine whether an exception to the final order rule applies that would give jurisdiction to this court to consider the State's appeal. In *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), we concluded that an order disqualifying counsel in a civil case was not a final order. Nevertheless, we adopted the following narrow exception to the final order requirement: If the appeal from an order of disqualification of counsel involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate. *Id.* This court has not yet entertained whether the *Richardson* exception should apply in a criminal case in which a county attorney's office has been disqualified.

We need not decide whether this appeal involves issues collateral to the basic controversy because the second requirement of the *Richardson* exception is not met in this case. The State's interest in prosecuting this criminal matter is protected notwithstanding that the order disqualifying the county attorney's office is not immediately appealable. The State's interest in prosecuting Dunlap was protected by the appointment of a special counsel to prosecute Dunlap on behalf of the State. As a result, we decline to apply the *Richardson* exception to the final order rule in this case and conclude that interlocutory review of the disqualification order is not appropriate.

## CONCLUSION

[6] The district court's order disqualifying the county attorney's office was not a final order, and an exception to the final order rule does not apply in this case. Because the State did not appeal from a final order as required by § 29-2315.01, we lack jurisdiction over this appeal. When an appellate court is without

jurisdiction to act, the appeal must be dismissed. *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005). Therefore, we dismiss this appeal.

APPEAL DISMISSED.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. ANTHONY C. COE, RESPONDENT.

710 N.W.2d 863

Filed March 24, 2006. No. S-05-744.

1. **Disciplinary Proceedings.** Regarding the imposition of attorney discipline, each case must be evaluated individually in the light of the particular facts and circumstances of that case.
2. ____. In determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
3. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any mitigating factors.
5. ____. A pattern of attorney neglect reveals a particular need for a strong sanction to deter others from similar misconduct, to maintain the reputation of the bar as a whole, and to protect the public.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court (the Counsel) brought this action against attorney Anthony C.

Coe. We sustained the Counsel's motion for judgment on the pleadings and reserved the issue of the appropriate sanction. We now order that Coe be disbarred.

## BACKGROUND

### Formal Charges

Coe was admitted to the practice of law in 1993. In June 2005, the Counsel filed formal charges alleging five counts of misconduct.

Count 1 alleges that in 2004, Coe was retained to prosecute a claim before the Nebraska Equal Opportunity Commission and failed to serve the defendant with summons. An order to show cause was issued, and Coe did not respond. The action was dismissed with prejudice and is believed to be time barred.

Count 2 alleges that in 2004, Coe failed to inform a client of hearings and failed to submit discovery responses in an action to recover lost wages. After a motion to compel was filed, Coe did not attend the hearing on the motion or advise his client of the hearing. The motion was granted, and Coe still did not submit the responses. He next failed to appear at a hearing on a motion for sanctions. The motion for sanctions was granted, and the case was dismissed, with an order requiring Coe's client to pay attorney fees. The client was never informed and learned of the status of his case from the Counsel.

Count 3 alleges that in 2004, Coe failed to serve a defendant with summons in another action before the Nebraska Equal Opportunity Commission and failed to respond to an order to show cause. The case was dismissed; the client did not learn of the dismissal until he retained a new attorney. The client requested that his files be returned to him, and as of the date of the filing of the formal charges, Coe had not returned the files.

Count 4 alleges that in 2003, Coe was paid for a consultation concerning a dispute with the Nebraska Department of Labor. The client later retained Coe to appeal a disqualification from receiving unemployment compensation. Coe assured the client the appeal would be filed on time but never filed it. After the appeal time had run, Coe discussed with the client the possibility of filing a wrongful termination action and agreed to do the work pro bono because he had missed the appeal deadline. Coe

sent a letter to the employer but took no further action on the case. The client did not learn until 2004 that Coe had left the private law practice.

Count 5 alleged that in 2003, Coe began representing a client on a pro bono basis in an employment action. Part of the case was dismissed, but certain parts were allowed to proceed. Coe did not take further action on the case after February 2004 and failed to inform the client of that fact.

### Previous Application for Temporary Suspension

Court files show that in January 2005, the Counsel filed an application for temporary suspension. An affidavit in support of the application stated that Coe had failed to respond to grievances. After a member of the Counsel left a business card at Coe's home in November 2004, Coe responded that he was suffering from psychological stress, had been hospitalized twice, and was probably going to leave the practice of law. He stated that he would file responses to the grievances as soon as possible. The possibility of disability status was also discussed.

A month later, Coe called and stated that he was receiving treatment and that he had obtained employment with a private agency that required he keep his license to practice law. He stated that he would respond to the grievances. As of January 2005, Coe had not responded. The application for temporary suspension was withdrawn in February because Coe responded to the grievances and appeared to be cooperating in the investigations. See *State ex rel. Counsel for Dis. v. Coe*, 269 Neb. xxii (No. S-05-061, Feb. 9, 2005).

The formal charges were filed in June 2005, and alleged violations of Canon 1, DR 1-102; Canon 2, DR 2-110; Canon 6, DR 6-101; and Canon 7, DR 7-101, of the Code of Professional Responsibility. Coe entered a voluntary appearance but did not respond to the formal charges. We granted the Counsel's motion for judgment on the pleading. Coe has not filed a brief to this court.

## ANALYSIS

Having granted judgment on the pleadings, the sole issue before us is the appropriate discipline. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by

this court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

[1,2] Regarding the imposition of attorney discipline, each case must be evaluated individually in the light of the particular facts and circumstances of that case. *State ex rel. Counsel for Dis. v. Watts*, 270 Neb. 749, 708 N.W.2d 231 (2005). See *State ex rel. Counsel for Dis. v. Lechner*, 266 Neb. 948, 670 N.W.2d 457 (2003). In determining the proper discipline of an attorney, we consider the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.*

[3,4] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. Id. In addition, the determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any mitigating factors. *Id.*

[5] Here, Coe violated several disciplinary rules and his oath of office as an attorney, to his clients' detriment. Although the record contains some evidence concerning mental illness, Coe has ultimately failed to respond to the formal charges. We have previously disbarred attorneys who, like Coe, neglected their clients' cases and failed to cooperate with the Counsel during the disciplinary proceedings. See, e.g., *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005). In particular, a pattern of neglect reveals a particular need for a strong sanction to deter others from similar misconduct, to maintain the reputation of the bar as a whole, and to protect the public. See *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997). The record shows that Coe is either unable or unwilling to respond to the charges and that through a pattern of neglect, he is not fit to practice law.

We have considered the undisputed allegations of the formal charges and the applicable law. Upon consideration, we find that

Coe should be disbarred from the practice of law in the State of Nebraska.

## CONCLUSION

We order that Coe be disbarred from the practice of law in the State of Nebraska, effective immediately. Coe is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Coe is further directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

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# IN RE COMPLAINT AGAINST JACK B. LINDNER, COUNTY COURT JUDGE OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF NEBRASKA.
# STATE OF NEBRASKA EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, RELATOR, V. JACK B. LINDNER, RESPONDENT.

710 N.W.2d 866

Filed March 24, 2006. No. S-35-050002.

1. **Judges: Disciplinary Proceedings: Appeal and Error.** In a review of the findings and recommendations of the Commission on Judicial Qualifications, the Nebraska Supreme Court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the commission.
2. **Judges: Disciplinary Proceedings.** Pursuant to Neb. Rev. Stat. § 24-722(6) (Reissue 1995), a judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed 6 months, or removed from office for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Original action. Judgment of public reprimand.

Anne E. Winner, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for relator.

James E. Gordon, of DeMars, Gordon, Olson & Zalewski, for respondent.

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

PER CURIAM.

## BACKGROUND

This original action is before the court following a complaint filed on February 7, 2005, by the Nebraska Commission on Judicial Qualifications (Commission). The complaint charged the respondent, Jack B. Lindner, a county court judge for the Third Judicial District, with misconduct in violation of the Nebraska Code of Judicial Conduct; Neb. Const. art. V, § 30; and Neb. Rev. Stat. § 24-722(6) (Reissue 1995).

A hearing on the complaint was held on April 21, 2005, before the Honorable Gerald E. Moran, a district court judge who was appointed to serve as special master. The special master concluded that the allegations of the complaint were supported by clear and convincing evidence, that Lindner's conduct violated the Nebraska Code of Judicial Conduct, and that the conduct brought the judicial office into disrepute, as prohibited by § 24-722(6).

The Commission adopted the findings of the special master and found by clear and convincing evidence that Lindner had violated the Nebraska Code of Judicial Conduct. The Commission recommended a public reprimand. On August 3, 2005, Lindner and special counsel for the Commission stipulated that this court may accept the findings and recommendation of the Commission, and Lindner consented to an order of reprimand. On October 13, we entered an order directing the parties to brief whether the proposed disposition is just, proper, and consistent with prior dispositions involving similar conduct in violation of the Nebraska Code of Judicial Conduct.

## FACTS

The complaint filed by the Commission alleged that during the processing of a misdemeanor criminal matter in Lancaster County Court on June 24, 2004, Lindner addressed the defendant with a "harsh and angry tone and demeanor." As the defendant was leaving the courtroom, Lindner made a derogatory remark in an apparent reference to the defendant or persons with him. The

complaint alleged that the statement was directed toward court personnel working in their official capacity. The complaint also asserted that Lindner's conduct was prejudicial to the administration of justice and brought the judicial office into disrepute in violation of article V, § 30, and § 24-722(6).

The complaint alleged that the conduct violated the following provisions of the Nebraska Code of Judicial Conduct:

> CANON 1
> A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY
>
> A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code shall be construed and applied to further that objective.
>
> . . . .
>
> CANON 3
> A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY
>
> . . . .
>
> B. Adjudicative Responsibilities.
>
> . . . .
>
> 4. A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . .
>
> 5. A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race [or] national origin . . . and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

In his answer, Lindner admitted that he was "stern and insistent in his intention" to continue the defendant's case over his objections. Lindner stated that he used this approach to maintain order, "not out of anger or hostility," and that the remark was

made to himself, although it was overheard by a witness because of the witness' proximity to the judge.

After a hearing, the special master determined that the two main issues to be decided were whether Lindner made the remark to court personnel working in their official capacity and whether the defendant had left the courtroom by the time the remark was made.

The special master reviewed and summarized the testimony offered at the hearing as follows: Paul A. Johnson, a former Lancaster County Court bailiff who was on duty in Lindner's courtroom at the time the remark was made, testified that the defendant required the assistance of an interpreter, although the defendant appeared to understand some English. When the defendant's case was called, he was told by Lindner that the case would be continued due to a lack of time. The defendant tried to explain that a continuance would impose a hardship on him because of his frequent travels to Europe. The special master found that Lindner "rather harshly informed" the defendant that he would be required to appear or would face arrest for failure to appear. The special master stated: "[Lindner's] tone may have been somewhat angry because he misunderstood the defendant in that he thought the defendant said his case could not be continued because he was an 'important businessman' both in the United States and in Europe. The defendant never made such a statement." The special master found that the defendant appeared frustrated by the continuance and Lindner's admonition.

According to the special master, the defendant and his interpreter walked away, apparently intending to leave the courtroom. Lindner then ordered the defendant to return to the bench and told him that he could not leave until Lindner excused him. The special master stated that Lindner appeared "rather harsh and angry." The defendant's paperwork was completed and handed to Johnson, who then handed it to the interpreter. The interpreter and the defendant turned to leave the courtroom.

The special master found that when the defendant was approximately 30 feet away from the bench, Lindner looked at Johnson and the deputy sheriff and stated: " 'Son of a bitch. Fucking Bosnian.' " Johnson testified that the statement was

made in a conversational tone of voice and that he feared the comment would be picked up and amplified by the courtroom sound system. The special master stated that neither the defendant nor the interpreter appeared to react to the comment, and they exited the courtroom. When the defendant went to the court clerk's window to be assigned a new trial date, he asked for a different judge. Upon learning of the defendant's request, Johnson reported Lindner's remark to the county court's presiding judge. Lindner subsequently recused himself from the defendant's case, and it was reassigned to the presiding judge.

The special master found that Johnson's recollection of the events was accurate and was corroborated by the transcript and a tape recording and that the remark was said in a normal tone of voice, not mumbled or muttered. The special master found that the remark was "obviously said to someone" and that Lindner looked directly at Johnson and at the deputy when he made the remark.

Johnson testified that he had not previously heard Lindner make a racist or discriminatory remark. The special master found that Lindner's only disagreement with Johnson's testimony was whether the remark was directed at or spoken to anyone. The special master found by clear and convincing evidence that Lindner made the offensive remark to court personnel working in their official capacity and that the defendant had not left the courtroom before the remark was made.

The special master found that the defendant did not hear the offensive remark when it was made. His request for a different judge appeared to be based on the exchange between Lindner and the defendant concerning continuation of his case. A letter from the defendant dated July 19, 2004, requesting a new judge referred only to the court proceeding itself and made no mention of any improper remark.

The special master found by clear and convincing evidence that the allegations contained in the complaint were true, and he concluded that Lindner's conduct violated Canons 1, 1A, 3, and 3B(4) and (5) of the Nebraska Code of Judicial Conduct and was conduct prejudicial to the administration of justice that brought the judicial office into disrepute in violation of article V, § 30, and § 24-722(6).

The Commission considered the entire record before the special master and received into evidence an additional exhibit containing testimonial letters from members of the Nebraska State Bar Association who had practiced before Lindner. The Commission independently reviewed the proceedings before the special master and adopted his findings.

The Commission found by clear and convincing evidence that the comment violated Canons 1A and 3B(4) of the Nebraska Code of Judicial Conduct; article V, § 30; and § 24-722(6). The Commission concluded that the statement, on its face, manifested bias based on national origin and thus compelled a determination that Lindner had also violated Canon 3B(5). It found that the statement was not intended as a generalized ethnic slur, "but was made out of personal irritation and frustration."

The Commission noted that Lindner had served as a judge for 22 years and had not previously been disciplined. It was uncontroverted that Lindner had been "remorseful, apologetic and genuinely contrite during these proceedings, admitting from the outset that the statement was a mistake on his part." The Commission recommended that this court publicly reprimand Lindner.

## STANDARD OF REVIEW

[1] In a review of the findings and recommendations of the Commission, this court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the Commission. *In re Complaint Against White*, 264 Neb. 740, 651 N.W.2d 551 (2002). See, also, Neb. Const. art. V, § 30(2); Neb. Rev. Stat. § 24-723 (Reissue 1995); Neb. Comm. on Jud. Qual. R. of Proc. 18 (rev. 2001); *In re Complaint Against Krepela*, 262 Neb. 85, 628 N.W.2d 262 (2001).

## ANALYSIS

We must first determine whether the charges against Lindner are supported by clear and convincing evidence and whether the Nebraska Code of Judicial Conduct and § 24-722 have been violated. See *In re Complaint Against White, supra*.

There is no dispute that the statement was made. From our review of the record, we conclude that the allegations in the complaint were supported by clear and convincing evidence, that Lindner's conduct violated Canons 1A and 3B(4) and (5) of the Nebraska Code of Judicial Conduct, and that the conduct brought the judicial office into disrepute, as prohibited by § 24-722(6). Thus, the Commission was correct in adopting the findings of the special master and in finding by clear and convincing evidence that Lindner had violated the Nebraska Code of Judicial Conduct.

We next determine the appropriate sanction. In doing so, we consider previous Nebraska cases involving judicial misconduct.

*In re Complaint Against Coady*, No. S-35-920001 (Neb. Comm. on Jud. Qual. Apr. 1, 1992), was filed after Judge Orville L. Coady made racially derogatory remarks to a litigant appearing before him. The complaint alleged that the statements violated Canons 2A and 3A(3) of the Nebraska Code of Judicial Conduct and brought the judicial office into disrepute, as prohibited by § 24-722(6).

In recommending to this court that Judge Coady receive a 3-month suspension, the Commission noted that his statements were not justified by his frustration with the litigant before him. The Commission stated that the comments had "undermine[d] the perception of the impartiality of the judiciary" and "marred the image of a justice system blind to prejudice." This court suspended Judge Coady from the performance of any judicial duties for 1 month without pay. We also ordered Judge Coady to enroll in and successfully complete a course or seminar on sensitivity to racial and cultural bias.

In another case, Judge Stephen M. Swartz was publicly reprimanded by the Commission for shouting and behaving in a hostile, excessively angry, and demeaning manner toward a defendant during sentencing. See *In re Complaint Against Swartz*, No. S-35-000003 (Neb. Comm. on Jud. Qual. Sept. 8, 2000). The Commission found that the incident in question was not an isolated incident and that Judge Swartz' "extreme tone of voice, demeanor, and language . . . were representative of courtroom behavior at certain sentencings, for a period of years preceding 1999, when he routinely hollered and berated defendants well

beyond any bounds of acceptable decorum and judicial temperament." The reprimand noted that Judge Swartz' hostile courtroom behavior and disrespectful language led to the judge's reputation for having a hostile and unreasonable disposition during criminal proceedings. The Commission found mitigating circumstances in that Judge Swartz had not been subject to prior discipline, he had acknowledged the impropriety of his behavior, and he had taken affirmative steps to remedy and control his courtroom behavior.

Judge John E. Huber was reprimanded by the Commission for demonstrating impatience, rudeness, and inappropriate judicial demeanor. See *In re Complaint Against Huber*, No. S-35-050003 (Neb. Comm. on Jud. Qual. Aug. 11, 2005). His behavior caused one of the litigants to cry, and after the case had been resolved, Judge Huber berated the litigant for crying. He stated: " 'Stop it. Grow up. That doesn't make me feel bad for you in any way.' " The Commission found that Judge Huber had cooperated fully, taken steps to correct his conduct, demonstrated improvement in his disposition, and expressed remorse.

In discussing sanctions imposed in judicial misconduct cases, we have stated:

> The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice. The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future. Thus, we discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned.

*In re Complaint Against Kneifl*, 217 Neb. 472, 485-86, 351 N.W.2d 693, 700 (1984).

[2] Pursuant to § 24-722(6), a judge of any court of this state may be reprimanded, disciplined, censured, suspended without

pay for a definite period of time not to exceed 6 months, or removed from office for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998). See, also, Neb. Const. art. V, § 30(1). Therefore, a clear violation of the Nebraska Code of Judicial Conduct constitutes, at a minimum, a violation of § 24-722(6). *In re Complaint Against Jones, supra*.

The Commission adopted the findings and recommendation of the special master that the appropriate sanction for Lindner is a public reprimand. The Commission has suggested that Lindner's comment was made out of frustration and was not an expression of racial bias. Nonetheless, such an insensitive and inappropriate comment is not to be condoned or tolerated under any circumstance.

Lindner has asserted that he did not intend his remark to be overheard by anyone, and his comment was not made directly to the defendant. Lindner has acknowledged that the remark was insensitive and inappropriate, and he has offered apologies. Lindner has served on the bench for 22 years, and this is the first disciplinary action taken against him. Evidence was received that Lindner ordinarily treats individuals equally and demonstrates no bias from the bench. There was no evidence of a pattern of unacceptable behavior on his part.

## CONCLUSION

It is this court's responsibility to dispense judicial discipline in a manner that preserves the integrity and independence of the judiciary and restores and reaffirms public confidence in the administration of justice. The sanction must serve to discourage others from engaging in similar conduct in the future. Discipline is imposed to assure the public that we will neither permit nor condone judicial misconduct.

In the case at bar, the Commission has recommended that Lindner be publicly reprimanded, and we adopt this recommendation.

JUDGMENT OF PUBLIC REPRIMAND.

HENDRY, C.J., not participating.

# MATTHEW CURRAN AND EMILY CURRAN, HUSBAND AND WIFE, APPELLANTS, V. KERREY B. BUSER, APPELLEE.

711 N.W.2d 562

Filed March 31, 2006. No. S-04-1303.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
2. **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.
3. ____: ____. 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.
4. ____: ____. Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
5. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
6. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
7. **Statutes: Appeal and Error.** An appellate court will, if possible, try to avoid a statutory construction which would lead to an absurd result.
8. **Health Care Providers: Negligence: Informed Consent: Proof: Proximate Cause.** Under Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 2004), the professional theory governs the standard of care and the evidence required to prove the standard of care, but causation is determined through a two-prong test: The first prong uses an objective standard to evaluate the plaintiff's decision to forgo the surgery, while the second requires proof that the lack of informed consent proximately caused the injury and damages.
9. **Physician and Patient: Informed Consent.** Under Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 2004), consent is informed when a doctor advises a patient of the risks in the same manner as doctors in similar localities and under similar circumstances ordinarily would.
10. **Health Care Providers: Negligence: Informed Consent: Proof: Proximate Cause.** In a medical negligence action, before a plaintiff may recover any damages sustained, the plaintiff must prove by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment if he or she were "properly informed" under Neb. Rev. Stat. § 44-2816 (Reissue 2004) and that his or her injuries were proximately caused by the lack of informed consent.
11. **Physician and Patient: Informed Consent.** A doctor's personal standard regarding information for a patient's consent is irrelevant.
12. **Health Care Providers: Informed Consent: Statutes.** Neb. Rev. Stat. § 44-2816 (Reissue 2004) does not distinguish between treatment risks and doctor-related risks; it asks only whether similarly situated doctors would ordinarily provide the information.

13. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
14. **Health Care Providers: Negligence.** Under Neb. Rev. Stat. § 44-2816 (Reissue 2004), a doctor's disciplinary history, like other doctor-related risks, is required only when mandated by the standard of care.
15. **Rules of Evidence: Words and Phrases.** Under Neb. Rev. Stat. § 27-401 (Reissue 1995), relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
16. **Rules of Evidence.** Under Neb. Rev. Stat. § 27-402 (Reissue 1995), evidence which is not relevant is not admissible.
17. ____. Under Neb. Rev. Stat. § 27-403 (Reissue 1995), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
18. **Witnesses: Impeachment.** Witnesses can only be impeached as to matters that are not collateral—matters that are independently provable.
19. ____: ____. Facts which would have been independently provable regardless of a contradiction are not collateral. It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed.

E. Terry Sibbernsen and Andrew D. Sibbernsen, of Sibbernsen & Strigenz, P.C., for appellants.

Joseph S. Daly and Michael G. Monday, of Sodoro, Daly & Sodoro, P.C., for appellee.

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

CONNOLLY, J.

Appellants, Matthew Curran and Emily Curran, sued Matthew's surgeon, appellee, Kerrey B. Buser, for medical malpractice, because of complications arising after Buser removed Matthew's gallbladder. Before Matthew's surgery, the Department of Health and Human Services Regulation and Licensure disciplined Buser for "unprofessional conduct" and restricted his surgical privileges for 1 year. Nine days after the year had passed, Buser operated on Matthew. The Currans sued Buser, alleging both negligence and lack of informed consent. The Currans wanted to introduce evidence of Buser's disciplinary history. Buser filed a

motion in limine, prohibiting mention of his disciplinary issues, which the trial court granted. The jury found for Buser on the negligence issue, and the Currans appeal only the court's ruling on the motion in limine.

The Currans ask us to apply a different standard of care to informed consent cases involving a doctor's disciplinary history. Because the Legislature adopted the professional theory as governing the standard of care in all informed consent cases, we affirm the trial court's decision.

## BACKGROUND

In February 2001, after suffering abdominal pains, Matthew sought assistance from general practitioner Gregory Kloch. After an ultrasound revealed abnormalities in Matthew's gallbladder, Kloch referred Matthew to Buser. On February 13, Buser diagnosed Matthew as having an inflamed gallbladder. Buser told Matthew he needed to remove the gallbladder as soon as possible, using a procedure called laparoscopic cholecystectomy. Later on that date, Buser performed the surgery.

After the surgery, Matthew experienced complications, and Buser performed another surgery on him 6 days later. Buser discovered that a suture from the earlier surgery had come loose, so he inserted a "T-tube." When Matthew complained of bile drainage at the site of the "T-tube," Kloch recommended that Matthew go to a hospital in Omaha, Nebraska, for further treatment. While there, Matthew had numerous corrective surgeries and experienced prolonged pain, fatigue, nausea, and depression, although these conditions have gradually improved.

After the surgery, the Currans sued Buser for negligence. During discovery, the Currans obtained photocopies of the Department of Health and Human Services Regulation and Licensure disciplinary order that restricted Buser's surgical privileges. The Currans alleged that Buser negligently performed the surgeries and failed to obtain informed consent.

Before trial, Buser moved in limine to prevent the Currans from mentioning the disciplinary action. Buser claimed that the disciplinary proceedings were irrelevant and that any probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

On the motion in limine, the court admitted the following evidence: The day of Matthew's first surgery, Buser sent a letter to Kloch, stating: "The patient is aware of the [State Board of Health] issue and declines referral to another surgeon." In Buser's deposition, he explained the disclosure as follows:

> A. You know, I don't know if I went into the details of the exact restrictions of [the disciplinary order]. What I more than likely told him was that I was the doctor that was accused of being a bad doctor in the newspapers and was sanctioned by the medical board.
>
> The other thing that I said was that if any of that bothers you or anything that you've read or heard, if you want to talk about it or if you want to go to another surgeon, that's fine, we'll be happy to arrange that.

Buser also testified in his deposition that he thought he told Matthew that the State Board of Health wanted to "pull" his license. Buser said that he believed his own standard of care required that he tell Matthew about the disciplinary action, but that he was not sure that the majority of surgeons feel obligated to do so. He said he explained to Matthew "the gist" of what he thought Matthew would want to know.

By contrast, the Currans, in their depositions, refute Buser's recollection, claiming that they learned of the disciplinary issues after the surgery and that Buser never indicated they could get a second opinion. The trial court sustained Buser's motion in limine.

At the beginning of the trial, the Currans made an offer of proof regarding Buser's disclosure of his disciplinary actions. In the offer of proof, the Currans sought to admit photocopies of disciplinary actions against Buser from both Minnesota and Nebraska. The Minnesota action restricted Buser's surgical practice, finding a "clustering of major laparoscopic complications," arising from "inappropriate" practices in the treatment of 13 different patients between 1992 and 1994. In the Nebraska disciplinary action, the chief medical officer recognized the Minnesota action and found clear and convincing evidence of "unprofessional," but not negligent, conduct in four new cases.

The court denied the offer of proof, citing *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004), as requiring expert

testimony about the standard of care in informed consent cases. The court stated that the Currans' evidence could still be admitted if an expert testified that the standard of care required disclosure of disciplinary proceedings. No such expert testified, and the jury never heard the disciplinary evidence. The jury returned a verdict for Buser on the negligence issue. The Currans appeal only the trial court's order sustaining Buser's motion in limine.

## ASSIGNMENT OF ERROR

The Currans assign that the trial court erred by sustaining Buser's motion in limine, disallowing them to introduce evidence of Buser's disciplinary action and his failure to inform Matthew of that action.

## STANDARD OF REVIEW

[1] When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court. *In re Grand Jury of Lancaster Cty.*, 269 Neb. 436, 693 N.W.2d 285 (2005).

[2,3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. 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. See *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

[4,5] Also, because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005). An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000).

## ANALYSIS

The Currans do not contend that Matthew was not made aware of all the risks of the procedure. The thrust of the Currans' argument is that Buser operated on Matthew without informed consent because Buser failed to inform him of his disciplinary history. The Currans urge this court to apply the material risk theory to informed consent cases when the omitted information relates to the doctor's disciplinary history. They (1) argue that the statute embraces material risk principles; (2) in the alternative, ask us to carve out a special exception; and (3) contend that the trial court improperly excluded their evidence because it was relevant, not unduly prejudicial, and admissible for impeachment purposes.

*Difference Between Professional Theory and Material Risk Theory.*

Informed consent concerns a doctor's duty to inform his or her patient of the risks involved in treatment or surgery. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 (5th ed. 1984). Although initially treated as a battery action, modern courts recognize it as a negligence action hinging on the standard of professional conduct. See *id*. Regarding the sufficiency of the information, we have stated:

> "Surgeons and other doctors are . . . required to provide their patients with sufficient information to permit the patient himself to make an informed and intelligent decision on whether to submit to a proposed course of treatment or surgical procedure. Such a disclosure should include the nature of the pertinent ailment or condition, the risks of the proposed treatment or procedure, and the risks of any alternative methods of treatment, including the risks of failing to undergo any treatment at all. Thus, although the procedure be skillfully performed, the doctor may nevertheless be liable for an adverse consequence about which the patient was not adequately informed."

*Eccleston v. Chait*, 241 Neb. 961, 967, 492 N.W.2d 860, 864 (1992) (quoting Keeton et al., *supra*). When determining what information a patient needs to make an informed decision, jurisdictions have generally split between two different theories: the

professional theory and the material risk theory. We have explained the difference between the theories as follows:

> The "professional" theory holds that the duty is measured by the standard of the reasonable medical practitioner under the same or similar circumstances, and must be determined by expert medical testimony establishing the prevailing standard and the defendant practitioner's departure therefrom. On the other hand, the "material risk" theory holds the duty to disclose is measured by the patient's need for information to balance the probable risks against the probable benefits in making the decision to either undergo or forgo the treatment proposed. Although under this theory expert medical testimony may be necessary to establish the undisclosed risk as a known danger of the procedure, expert testimony is not required to establish the physician's duty to disclose, and the fact finder can decide, without the aid of a medical expert, whether a reasonable person in the patient's position would have considered the risk significant in making his or her decision.

*Smith v. Weaver*, 225 Neb. 569, 573-74, 407 N.W.2d 174, 178 (1987).

*Nebraska Legislature Codified Informed Consent Doctrine, Adopting Professional Theory to Govern Standard of Care.*

The professional theory is firmly entrenched in Nebraska law; we have both statutory provisions and case law adopting the doctrine. First, Neb. Rev. Stat. § 44-2816 (Reissue 2004) defines informed consent:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

Moreover, Neb. Rev. Stat. § 44-2820 (Reissue 2004) provides the burden of proof in an action based on failure to obtain informed consent. It states:

> Before the plaintiff may recover any damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.

This court has routinely determined that "notwithstanding voluminous criticism of the professional theory of informed consent, [we are] bound by § 44-2816 as a statutory standard and prescription for an informed consent." *Eccleston v. Chait*, 241 Neb. 961, 968, 492 N.W.2d 860, 864 (1992). See, also, *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997), *disapproved on other grounds, Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004); *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987); *Smith v. Weaver, supra*.

Nonetheless, the Currans point to the dissent in *Smith v. Weaver, supra*, which argued that § 44-2820 committed this state to the material risk theory. In doing so, the Currans argue that the statutory language does not support our adherence to the professional theory, but embraces material risk principles.

[6,7] But statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision. See *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005). And an appellate court will, if possible, try to avoid a statutory construction which would lead to an absurd result. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). The approach urged here would lead to an absurd result insofar as the Currans argue that § 44-2816 adopts the professional theory, while § 44-2820 adopts the material risk theory. If this were the case, we would have two mutually exclusive standards governing a doctor's duty to inform his or her patient.

[8] Instead, we read §§ 44-2816 and 44-2820 together. Doing so demonstrates that the Nebraska Legislature adopted the professional theory for its standard of care and the evidence

required to prove the standard of care and that it adopted a two-prong test for causation. The first prong uses an objective standard to evaluate the plaintiff's decision to forgo the surgery, while the second requires proof that the lack of informed consent proximately caused the injury and damages. Although our statutory framework is somewhat unique, we note that other professional theory jurisdictions also use objective standards for causation. See, e.g., *Funke v. Fieldman*, 212 Kan. 524, 512 P.2d 539 (1973).

[9,10] Under §§ 44-2816 and 44-2820, consent is informed when a doctor advises a patient of the risks in the same manner as doctors in similar localities and under similar circumstances ordinarily would. However, before a plaintiff may recover any damages sustained, the plaintiff must prove by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment if he or she were "properly informed" and that his or her injuries were proximately caused by the lack of informed consent. Although § 44-2820 does not define proper information, when read in conjunction with § 44-2816, a patient must be properly informed under § 44-2816.

Under this framework, the Currans must first prove by expert testimony that doctors in similar locations and situations would ordinarily disclose their disciplinary history. After establishing the standard of care, the Currans must next prove that Buser deviated from that standard. To prove causation, the Currans must prove both that a reasonable person in their situation would have refused the surgery if Buser had properly informed them under the standard and that the lack of information proximately caused the injury sustained and damages alleged. The statute's requirements are cumulative; thus, in order to proceed to the next step, the plaintiff must prove the one before it.

Here, Buser was the only doctor to testify about the standard of care in the locality. He said that although it was his personal practice to inform his patients of the recent disciplinary action, "I don't know if the majority feel that they are obligated to do that." Although Buser's testimony does not decisively state that most doctors would not feel obligated to disclose their disciplinary

history, it is the plaintiff's burden to prove the standard of care. Thus, the Currans failed to prove that the standard of care required Buser to disclose his disciplinary history.

*Under Professional Theory, Doctor's Personal Standard of Care Does Not Establish Standard of Care.*

[11] Nonetheless, the Currans point out that Buser said his personal standard of care required him to disclose his disciplinary history. They ask us to hold Buser to his own standard of care. But as we said in *Eccleston v. Chait*, 241 Neb. 961, 969, 492 N.W.2d 860, 865 (1992), a doctor's "personal standard regarding information for a patient's consent is irrelevant." Under the professional theory, the standard of care in medical malpractice cases for informed consent is not determined by the doctor's personal or customary routine, but on the information doctors ordinarily supply to patients in similar circumstances and locations. Here, Buser was the only doctor to testify about the standard of care for informed consent. He explained that although it was his practice to inform his clients about the disciplinary action, he was not sure that most doctors would do so.

However, if a doctor chooses to provide more information than similarly situated practitioners ordinarily would—adopting a higher standard of care—the doctor should not be penalized for straying from that higher standard as long as the doctor does not drop below the community's standard of care. Holding doctors to their personal standard of care when that personal standard exceeds the community standard would discourage doctors from exceeding the community standard and encourage blind conformity.

Although the Legislature bound the state to the professional theory, we have frequently reiterated that the professional theory " 'paternalistically leaves the right of choice to the medical community, in derogation of the patient's right to self-determination.' " *Eccleston v. Chait*, 241 Neb. at 968, 492 N.W.2d at 864 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 (5th ed. 1984)). Thus, we do not wish to discourage doctors from providing a patient more information than the community standard requires and we refuse to do so here.

*We Decline to Carve Out Material Risk Exception for Cases When Omitted Information Relates to Doctor's Disciplinary History.*

Although the Currans acknowledge that in Nebraska, the professional theory governs informed consent, they argue that their case is distinguishable from the "typical claim for failure to obtain informed consent," brief for appellants at 16, and that thus, the material risk theory should govern. They contend their case warrants an exception because Matthew was insufficiently informed about the doctor's disciplinary history, not about the operation itself. And when the unwarned risk relates to a doctor's disciplinary history, we should apply the material risk theory—asking whether a reasonable person would consider that information material, not whether ordinary doctors would disclose that information. Although enticing, we decline the invitation.

Our research could not uncover precedent for defining the standard of care differently depending on the kind of risks involved. Although other jurisdictions have questioned what role a doctor's experience should play in the context of informed consent, they are unsurprisingly split on the issue. Some courts adopt a bright-line rule requiring disclosure of treatment risks, but not of a doctor's experience. See, *Duttry v. Patterson*, 565 Pa. 130, 771 A.2d 1255 (2001); *Whiteside v. Lukson*, 89 Wash. App. 109, 947 P.2d 1263 (1997). Others require doctor-related disclosures only when mandated by the standard of care. See, *Duffy v. Flagg*, 88 Conn. App. 484, 869 A.2d 1270 (2005); *Tashman v. Gibbs*, 263 Va. 65, 556 S.E.2d 772 (2002); *Johnson v. Kokemoor*, 199 Wis. 2d 615, 545 N.W.2d 495 (1996); *Arato v. Avedon*, 5 Cal. 4th 1172, 858 P.2d 598, 23 Cal. Rptr. 2d 131 (1993).

The evidence proffered here would not be required under either approach. The Currans plainly limit their claim to warnings about Buser's disciplinary history, not the operation. The Currans never established that the standard of care required such disclosures. Rather, they ask us to adopt a different standard of care for a narrow class of plaintiffs. Not only is their approach unprecedented, it contravenes the Legislature's adoption of the professional theory by supplanting, in a single narrow context, the Legislature's judgment.

[12] Instead, our statutes comport with an approach that requires doctor-related disclosures only when mandated by the standard of care. Under § 44-2816, informed consent means "consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities." While the Currans ask us to distinguish treatment risks from doctor-related risks, § 44-2816 does not make this distinction. It asks only whether similarly situated doctors would ordinarily provide the information.

[13,14] We give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See *McCray v. Nebraska State Patrol, ante* p. 1, 710 N.W.2d 300 (2006). The language of the statute is unambiguous, and we are bound by it. Under § 44-2816, a doctor's disciplinary history, like other doctor-related risks, is required only when mandated by the standard of care.

As in the past, we recognize that the professional theory "places a patient, who more than likely lacks a medical background or training, in the precarious position of exploring and inquiring about adverse consequences of a surgical procedure." *Eccleston v. Chait*, 241 Neb. 961, 969, 492 N.W.2d 860, 865 (1992). Nonetheless, we do not write on a blank slate; the Legislature adopted the professional theory in § 44-2816, and its language binds this court to that theory.

*The Currans' Evidence Was Properly Excluded Because Trial Court Did Not Abuse Its Discretion When Finding It Inadmissible.*

[15-17] The Currans next argue that the excluded evidence is admissible under the Nebraska rules of evidence because it is relevant, not unduly prejudicial, and admissible for impeachment purposes. Under § 27-401, relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Under Neb. Rev. Stat. § 27-402 (Reissue 1995), evidence which is not relevant is not admissible. *Holden v. Wal-Mart Stores*, 259

Neb. 78, 608 N.W.2d 187 (2000). Moreover, under § 27-403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Because we continue to adhere to the professional theory, the question is, What is the standard of care—what information do doctors in similar localities ordinarily give patients under similar circumstances? Here, the Currans failed to prove that the standard of care required Buser to disclose his disciplinary history. Thus, any evidence about Buser's disciplinary history is irrelevant to their informed consent claim.

Although the Currans argue that the evidence excluded is relevant to whether Matthew "would have allowed Buser to perform the recommended surgical operation," brief for appellants at 22, this misreads the statute. The Currans argue that the information is relevant to the first prong of the causation analysis required by § 44-2820. But § 44-2820 asks whether "a reasonably prudent person in the plaintiff's position would . . . have undergone the treatment *had he or she been properly informed*." (Emphasis supplied.) As discussed above, §§ 44-2816 and 44-2820, when read together, suggest that proper information means properly informed under the professional theory which asks, What information do doctors in similar localities ordinarily give patients under similar circumstances? Because the record lacks expert testimony that the standard of care required disciplinary disclosures, the proffered evidence is also irrelevant to causation.

[18] Finally, the Currans argue that the court should have admitted Buser's disciplinary history to impeach his credibility. But this court has said that witnesses can only be impeached as to matters that are not collateral—matters that are independently provable. *Jones v. Tranisi*, 212 Neb. 843, 326 N.W.2d 190 (1982). In *Jones*, this court upheld a jury verdict in a medical malpractice case. The plaintiff sued her doctor, claiming he negligently performed her thyroidectomy, impairing her vocal cords and leaving her permanently hoarse. On cross-examination, the doctor testified that no patient upon whom he had performed

a thyroidectomy complained of losing his or her voice after the operation.

[19] The plaintiff tried to introduce evidence that a former patient of the defendant experienced similar adverse consequences after the defendant performed the same surgery on her. We refused to admit rebuttal evidence proffered by the plaintiff, stating that if the plaintiff was offering the evidence to prove the doctor's negligence in performing the operation on the plaintiff, it was not relevant for that purpose because one cannot prove negligence by demonstrating merely that the defendant acted negligently in the past. We further stated that the evidence was inadmissible for impeachment because it related to a collateral matter. " '[F]acts which would have been independently provable regardless of the contradiction are not "collateral." . . . "It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment." . . .' " *Id.* at 846, 326 N.W.2d at 192.

Although Buser and the Currans dispute whether Buser warned them about his disciplinary record, the dispute involves evidence that is irrelevant under the professional theory. Moreover, the trial court recognized that the proffered evidence implicates both §§ 27-401 and 27-403. While the parties' dispute may be marginally relevant to credibility, its probative value is outweighed by the dangers described in § 27-403. We conclude that the trial court did not abuse its discretion when excluding the Currans' evidence.

## CONCLUSION

To carry out the Legislature's intent, we decline to distinguish doctor-related risks from other treatment risks. Moreover, the Currans failed to demonstrate that the standard of care in similar communities required Buser to disclose his disciplinary history; thus, the trial court did not abuse its discretion by sustaining the motion in limine. The trial court's decision is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

# JASON SCHWARTING, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

711 N.W.2d 556

Filed March 31, 2006. No. S-04-1440.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Liquor Licenses.** The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably.
4. ____: ____. As in the case of other administrative bodies, the Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised.
5. **Administrative Law: Liquor Licenses: Final Orders: Appeal and Error.** Proceedings for review of a final decision of the Nebraska Liquor Control Commission are to the district court, which shall conduct the review de novo on the record of the agency.
6. **Administrative Law: Appeal and Error.** In a review de novo on the record, the district court is not limited to a review subject to the narrow criteria found in Neb. Rev. Stat. § 84-917(6)(a) (Reissue 1999), but is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.
7. **Administrative Law: Liquor Licenses: Courts: Evidence: Appeal and Error.** A district court in its de novo review is not required to give deference to the findings of fact made by the Nebraska Liquor Control Commission, but it may consider the fact that the commission, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the commission's judgment as to credibility.
8. **Judgments: Appeal and Error.** 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.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

PER CURIAM.

Donald Schwarting, the former owner of the Arrowhead Inn, an off-sale, beer-only business, was convicted of a Class IV felony, thereby prohibiting him from holding a liquor license under Neb. Rev. Stat. § 53-125 (Reissue 2004). His son, Jason Schwarting, took steps to purchase the business. Jason applied for a liquor license with the Nebraska Liquor Control Commission (the Commission), but his application was denied due to Jason's two prior liquor license violations while employed by Donald and the Commission's belief that Donald maintained an ownership interest in the business. Jason appealed, and the district court reversed the order of the Commission. The Commission appeals.

## FACTUAL AND PROCEDURAL BACKGROUND

The Arrowhead Inn is an off-sale, beer-only business in Whiteclay, Nebraska, that was started by Jason's grandfather in 1980 or 1981. In 1996, Jason's father, Donald, purchased the business, and in 1998, Jason began working as a clerk at the store. Jason was cited for two liquor license violations while working as a clerk: selling to an intoxicated person in June 1998 and selling on credit in August 2001. The Arrowhead Inn was penalized accordingly.

In 2003, Donald was convicted of a Class IV felony for selling more than eight used vehicles without a dealer's license and was fined $1,000. Subsequently, Jason began operating the Arrowhead Inn under a temporary agency agreement. In addition, Jason purchased the land, building, inventory, and equity composing the business. Jason purchased the real estate from Donald and assumed a promissory note previously owed by Donald to Jason's grandfather. After Donald filed a chapter 13 bankruptcy proceeding, Jason petitioned for and was granted permission to purchase the assets of the Arrowhead Inn.

Jason filed an application for a class B liquor license with the Commission on February 3, 2004. The Commission issued an

order to show cause why the application should be approved and a license issued, stating that Jason had

> previously as an employee sold alcohol to an intoxicated person 6/23/98, and sold alcohol on credit 8/27/01 which may reflect upon his willingness to abide by the rules and regulations of the Liquor Control Act; and further, to determine what if any involvement or financial interest the previous owner, Donald Schwarting, convicted of a Class IV Felony, will have.

During a hearing before the Commission, Jason testified that Donald was working part time as a clerk at the Arrowhead Inn, selling beer, pop, and cigarettes, and was paid an hourly wage of $5.25. However, Jason explained that Donald did not perform any managerial duties, including bill paying, ordering, and hiring and firing, and did not share in the profits or losses of the business. Furthermore, Jason testified that if the Commission was concerned about Donald's position as a clerk at the Arrowhead Inn, Jason would be willing to terminate Donald's employment.

After the hearing, the Commission voted to deny the application, finding that Jason was unable to conform to the provisions of the Nebraska Liquor Control Act (the Act). See Neb. Rev. Stat. § 53-101 et seq. (Reissue 2004 & Supp. 2005). In making its determination, the Commission considered, as stated in its order:

> a) That [Jason] is not of good character and reputation in the community.
>
> b) That his previous actions where he was an employee who violated aspects of [the Act] show that he is unable to conform to all provisions of [the Act].
>
> c) That the Commission is unconvinced that Donald Schwarting does not continue to have an ownership interest in the Arrowhead Inn.

On appeal, the district court reversed the determination of the Commission, finding no evidence in the record of a hidden ownership arrangement between Jason and Donald and determining that the evidence of Jason's two prior violations did not support a finding that Jason is not of good character or reputation. The Commission appeals the judgment of the district court.

## ASSIGNMENTS OF ERROR

The Commission assigns that the district court erred in finding that the evidence did not support the Commission's conclusion that Jason was unable to conform to all provisions of the Act.

In its appellate brief, the Commission also assigned that the court erred in finding that the evidence did not support the Commission's conclusion that Donald continued to have an ownership interest in the business. However, at oral argument, the Commission withdrew this assignment of error; thus, we will not consider it.

## STANDARD OF REVIEW

[1,2] 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. Neb. Rev. Stat. § 84-918 (Reissue 1999); *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005). 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.*

## ANALYSIS

In its order, the Commission determined that Jason was "not fit, willing, and able to properly provide the service proposed within the community where the premises described in the application are located" and that he "can not [sic] conform to all provisions and requirements of and rules and regulations adopted pursuant to [the Act]." The Commission stated that it based those conclusions on additional findings that Jason is not of good character and reputation in the community and that his prior license violations show his inability to conform to the provisions of the Act. In addition, the Commission stated that it was unconvinced that Donald no longer held an ownership interest in the business.

We note that the order to show cause issued by the Commission prior to the hearing listed just two matters of concern: Donald's involvement and interest in the business, and Jason's two previous violations and their relevance to his willingness to abide by the

provisions of the Act. The order to show cause did not mention the issue of Jason's character and reputation, and the hearing was not directed at that issue. In fact, neither party presented evidence regarding Jason's reputation in the community. However, at the conclusion of the hearing, one of the commissioners stated, "I vote to deny it based on character and reputation also." The hearing officer then stated, "Just to make sure the rationale for the record is — you're voting — you believe that there is a hidden ownership and that the applicant is not fit and willing and able to conform . . . [t]o the rules and regulations." The commissioner agreed, stating, "Right, that's correct. . . . That would be the reason." Nevertheless, the Commission's order included among its findings that Jason was not of good character and reputation.

On appeal, the district court found no evidence to support the Commission's belief that Donald maintained an ownership interest in the business. In addition, the district court found Jason's two prior license violations to be insufficient to support the Commission's determination that Jason is not of good character or reputation. The district court couched its analysis of Jason's two previous violations in the context of their reflection on his character and reputation. However, we conclude that implicit in the court's judgment to reverse the order of the Commission is a determination that Jason's two previous violations were also insufficient to support the Commission's finding that Jason was unable to abide by the provisions of the Act.

We agree that the record presents insufficient evidence to conclude that Jason is not of good character and reputation in his community; as stated above, no such evidence was presented at the hearing by either party. In addition, during oral argument, the State withdrew its assignment of error regarding any alleged interest that Donald may have in the business. Thus, the only issue remaining for our consideration is whether the district court's conclusion that there was insufficient evidence to support the Commission's findings that Jason was unable to abide by the provisions of the Act is supported by competent evidence.

The Commission assigns that the district court erred in finding insufficient evidence to support the Commission's conclusion regarding Jason's inability to abide by the Act. The Commission asserts that the two license violations attributable to Jason during

his employment at the Arrowhead Inn reflect his inability to conform to the provisions of the Act. In contrast, Jason argues that the district court correctly determined that two "stale" license violations do not indicate an unwillingness to abide by the provisions of the Act.

[3,4] The Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. As in the case of other administrative bodies, the Commission, after an administrative hearing, must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. *J K & J, Inc. v. Nebraska Liquor Control Commission*, 194 Neb. 413, 231 N.W.2d 694 (1975), *overruled in part on other grounds, 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission*, 199 Neb. 729, 261 N.W.2d 614 (1978).

[5-7] Proceedings for review of a final decision of the Commission are to the district court, which shall conduct the review de novo on the record of the agency. See *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). In a review de novo on the record, the district court is not limited to a review subject to the narrow criteria found in Neb. Rev. Stat. § 84-917(6)(a) (Reissue 1999), but is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. See *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995). The district court is not required to give deference to the findings of fact made by the Commission, but it may consider the fact that the Commission, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the Commission's judgment as to credibility. See *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

[8] Upon appeal from the district court, our review is limited to error on the record, in which our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693

N.W.2d 539 (2005). 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. See *id*. Based on the record before the district court and our narrow standard of review, we conclude that the district court's order following its de novo review, reversing the judgment of the Commission, is supported by competent evidence.

Jason testified at the hearing that he was willing to abide by the rules and regulations of the Commission and of the State, and he introduced evidence that he had completed a course offered by the Commission and the Nebraska State Patrol regarding alcohol server training. Evidence was presented of Jason's two violations in the form of administrative citations. In addition, a report completed by an investigator with the State Patrol was presented, detailing the events of the violation concerning the sale of alcohol on credit. In its order, the district court emphasized the fact that the violations occurred 3 and 6 years prior to Jason's application. The district court also evidently was influenced by the fact that the Commission had made findings on other issues, such as Donald's ownership interest in the business and Jason's character and reputation, that were so unsupported by evidence as to be unsustainable.

Although different decisionmakers might reach an opposite result in reviewing the record, we simply cannot say that the district court's judgment, following its de novo review, is unsupported by any competent evidence, nor can we say that the judgment is arbitrary, capricious, or unreasonable. Given the statutory standard of review, we conclude that the district court committed no reversible error based on this record.

## CONCLUSION

For the foregoing reasons, we conclude that the district court's judgment reversing the order of the Commission is supported by competent evidence; we affirm.

AFFIRMED.

WRIGHT, J., not participating.

# HOME BUILDERS ASSOCIATION OF LINCOLN, A NEBRASKA NOT-FOR-PROFIT CORPORATION, AND HARTLAND HOMES, INC., A NEBRASKA CORPORATION, APPELLANTS AND CROSS-APPELLEES, v. THE CITY OF LINCOLN, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

711 N.W.2d 871

Filed April 7, 2006. No. S-04-782.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
2. **Municipal Corporations.** There is a distinction between a legislative charter, which emanates from the sovereign legislature and grants power to a municipality, and a home rule charter, which has as its basis a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs.
3. ____. The purpose of a home rule charter is to render the city as nearly independent as possible from state interference.
4. ____. There is a distinction between a home rule charter that operates as a grant of powers, which expresses the specifically enumerated functions of the municipality and is strictly construed, and a limitation of powers charter, which empowers a municipality to exercise every power connected with the proper and efficient government of the municipality which might be lawfully delegated to it by the Legislature, without waiting for such delegation.
5. ____. A rule of strict construction of a municipality's express powers, also known as Dillon's rule, does not apply to a city operating under a limitation of powers home rule charter.
6. **Constitutional Law: Municipal Corporations.** Under a home rule charter, a city's power must be consistent with and subject to the constitution and laws of this state, except as to local matters of strictly municipal concern.
7. **Municipal Corporations: Statutes.** The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state means that on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation; but until the superior authority of the state has been asserted by a general statutory enactment, the municipality may properly act under its charter.
8. **Constitutional Law: Municipal Corporations: Legislature: Taxation.** Neb. Const. art. VIII, §§ 1 and 6, provides that the Legislature can empower a city to tax, and Neb. Const. art. XI authorizes a city with a limitation of powers home rule charter to exercise that power to tax without first waiting for express delegation.
9. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.

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

William G. Blake, Mark A. Hunzeker, and Jason L. Scott, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellants.

Dana W. Roper, Lincoln City Attorney, and Ernest R. Peo III for appellee.

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

GERRARD, J.

The plaintiffs in this action have challenged the legal authority of the City of Lincoln (the City) to enact an ordinance conditioning the issuance of a building permit for new residential development on the payment of "impact fees," intended to offset the expenses associated with providing municipal services to the new development. For the reasons that follow, we conclude that the City's home rule charter permits it to impose such impact fees. Therefore, we affirm the judgment of the district court dismissing the plaintiffs' petition.

## BACKGROUND

In 2003, the City enacted an "Impact Fee Ordinance" (the Ordinance), providing that

> any person who applies for a building permit for a development or who applies for any other permit for a development where a building permit is not required, or who seeks to engage in a development for which no permit is required, shall pay a water system impact fee, water distribution impact fee, wastewater impact fee, arterial street impact fee, and neighborhood park and trail impact fee unless the type of development described in the permit or to be engaged in is specifically exempted, waived or subsidized by this ordinance, or unless the type of development described in the permit or to be engaged in is not located in an impact fee benefit district for the above-described impact fees.

Lincoln Mun. Code § 27.82.050 (2003). The Ordinance set forth the findings of the Lincoln City Council that new development in the City was creating additional demand for public facilities such as water treatment and wastewater systems, arterial streets, and neighborhood parks and trails. See Lincoln Mun. Code

§ 27.82.020 (2003). The city council further found that protection of the citizens of the City required expansion of new development for public facilities and that the City's revenue structure did not generate sufficient funds to serve the new development. See *id*. The city council found that "[t]he creation of an equitable impact fee system would enable the City to impose a more proportionate share of the costs of required improvements to the water and wastewater systems, arterial streets, and neighborhood parks and trails on those developments that create the need for them." § 27.82.020(f).

In the Ordinance's statement of intent, it was explained that the intent of the Ordinance was not to collect moneys from new development in excess of the actual amount necessary to offset demands generated by new development, or for moneys collected from the impact fee to be commingled with moneys from a different impact fee account, or to be used for a type of facility different from that for which the fee was paid. See Lincoln Mun. Code § 27.82.030 (2003). Rather,

> [t]he intent of this ordinance is to ensure that adequate water and wastewater systems, arterial streets, and parks and trails are available to serve new growth and development in the City of Lincoln and to regulate the use and development of land so as to ensure that new growth and development bears its proportionate share of the cost of improvements to the City's water and wastewater systems, arterial streets, and neighborhood parks and trails needed to serve such new growth and development; to ensure that the proportionate share for each type of public facility does not exceed the cost of providing that type of public facility to the new development that paid the fee; and to ensure that funds collected from new developments are actually used to construct pub[l]ic facilities that benefit such new developments.

*Id*.

The plaintiffs, the Home Builders Association of Lincoln and Hartland Homes, Inc., filed a complaint against the City in district court, seeking declaratory and injunctive relief declaring the Ordinance invalid and unenforceable. On cross-motions for summary judgment, the court concluded that the Ordinance was

within the power granted to the City and did not violate any constitutional provisions; thus, the court granted the City's motion for summary judgment.

The court first concluded that contrary to the City's argument, the Ordinance was not a regulatory measure; rather, relying on the city council's findings, the court concluded that the Ordinance was a tax intended to collect revenue for municipal purposes. The court found that the Ordinance was not an occupation tax, because payment of the impact fee is a condition precedent to obtaining a building permit. Thus, the City's imposition of the tax was not specifically authorized by the City's statutory power to collect occupation taxes.

However, the court concluded that under the City's home rule charter, it had the implicit authority to collect the impact fee. Relying on *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), the court determined that the City's home rule charter was a limitation of powers charter, giving the City the power to take certain actions without explicit, authorizing language from the Legislature. Because the court found no express statutory limitation on the City's power to tax, the court found the City had the authority to enact and impose the Ordinance as a tax. The court rejected the plaintiffs' contentions that the Ordinance violated the Equal Protection Clauses of the federal and state Constitutions, or the uniformity requirements of the state Constitution.

## ASSIGNMENTS OF ERROR

The plaintiffs assign that the court erred (1) in finding that the City's home rule charter vested the City with the power to assess and collect taxes without authorization from the Legislature, (2) in failing to recognize that the home rule charter is subject to the state Constitution and that the constitution vests plenary power over taxation to the Legislature, (3) in finding that occupation taxes and excise taxes are in effect one and the same, and (4) in failing to find that the impact fees must be ruled to be license fees when analyzed under the authority conferred by the home rule charter.

The plaintiffs also assign that the court erred in finding that the dissimilar taxation of persons and properties similarly situated is

lawful under the constitution. While some discussion of this issue appears in the plaintiffs' reply brief, no argument in support of this assignment of error is found in their appellants' brief. Thus, we do not consider it. See, *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001). The plaintiffs also argue that the constitution requires the City to pay the impact fee revenues to the county for the benefit of school districts, but this was not assigned as error. Similarly, we do not consider this argument. See *Demerath v. Knights of Columbus*, 268 Neb. 132, 680 N.W.2d 200 (2004).

On cross-appeal, the City assigns that the court erred in finding that the Ordinance was the enactment of a tax rather than an exaction, regulatory fee, or service charge and that, even if the impact fee is a tax, the court erred in concluding that the impact fee was not a valid occupation tax.

## STANDARD OF REVIEW

[1] This appeal presents questions of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *City of Columbus v. Swanson*, 270 Neb. 713, 708 N.W.2d 225 (2005).

## ANALYSIS

The plaintiffs' first two assignments of error address the dispositive conclusion of the district court that pursuant to its home rule charter, the City had the legal authority to enact the Ordinance in the absence of express statutory authorization to that effect. The plaintiffs argue that this understanding of the home rule charter is incorrect and that in matters of taxation, the City can act only pursuant to an express grant of authority from the Legislature.

[2] As noted by the district court, our most recent discussion of the City's authority under its home rule charter was *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), in which the issue was whether the City had the legal authority to provide for-hire telecommunications services. We noted the distinction between a legislative charter, which emanates from the sovereign legislature and grants power to a municipality, and a home rule charter, which has as its basis

a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs. See *id.*

[3,4] The purpose of a home rule charter "is to render the city as nearly independent as possible from state interference." *Id.* at 81, 655 N.W.2d at 372-73. Pursuant to the language of the Nebraska Constitution authorizing home rule charters, Neb. Const. art. XI,

> "the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, *until* it speaks."

(Emphasis in original.) *In re Application of Lincoln Electric System*, 265 Neb. at 82, 655 N.W.2d at 373, quoting *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922). We further noted the distinction between a home rule charter that operates as a grant of powers, which expresses the specifically enumerated functions of the municipality and is strictly construed, and a limitation of powers charter, which empowers a municipality to exercise every power connected with the proper and efficient government of the municipality which might be lawfully delegated to it by the Legislature, without waiting for such delegation. See *id.*

After examining the City's 1992 home rule charter, the pertinent language of which is unchanged, we concluded that the City's home rule charter is a limitation of powers charter. See *In re Application of Lincoln Electric System, supra.* Thus, we concluded that the relevant question in that appeal, which we answered in the affirmative, was whether the City's broad authorization to engage in municipal powers and functions encompassed the provision of for-hire telecommunications services. See *id.*

The scope of that broad municipal authority is again before us in this case. The plaintiffs do not take issue with the district

court's conclusion that the Ordinance was connected with the proper and efficient government of the City, within the meaning of its limitation of powers charter. Rather, the plaintiffs contend that with respect to the specific matter of taxation, the broad authority afforded a municipality under a limitation of powers charter nonetheless requires the express delegation by the Legislature of the power to tax.

The plaintiffs first turn to *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980), in which we reversed the district court's determination that the City was authorized to impose the costs of paving arterial streets on the developer of a proposed subdivision. We stated that a municipal corporation could exercise only such powers as were expressly granted to it, or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of a municipality. *Id.* We further stated that "[s]tatutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant." *Id.* at 176, 291 N.W.2d at 732. We found no authority for the imposition of paving costs in the Nebraska statutes, or even in the City's ordinances. See *id.*

[5] However, our decision in *Briar West, Inc.*, was made in the context of a substantially different legal framework. As explained by *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), the City did not adopt a limitation of powers home rule charter until 1992. Our decision in *Briar West, Inc., supra*, as noted above, rested on a rule of strict construction of a municipality's express powers, also known as Dillon's rule. In 1980, when *Briar West, Inc.* was decided, that was the applicable law. But Dillon's rule does not apply to a city operating under a limitation of powers charter such as that adopted by the City in 1992. See *In re Application of Lincoln Electric System, supra*. Unlike the City's home rule charter at the time *Briar West, Inc., supra*, was decided, the City's current home rule charter does not merely enumerate specified powers, but grants all powers possible to the City. Consequently, our decision in *Briar West, Inc.* does not apply to the City's current home rule charter.

The plaintiffs also contend that in matters of taxation, express delegation of authority to a municipality is required. The

plaintiffs rely on Neb. Const. art. VIII, § 1, which provides in part that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." Similarly, the plaintiffs direct us to Neb. Const. art. VIII, § 6, which provides that "[t]he Legislature may vest" municipal corporations with the power to make assessments for local improvements, and that municipal corporations "may be vested" with authority to assess and collect taxes. The plaintiffs argue that these constitutional provisions reserve the Legislature's "plenary power" over taxation to the Legislature in the absence of express delegation.

[6,7] It is well established that under a home rule charter, a city's power must be consistent with and subject to the constitution and laws of this state, except as to local matters of strictly municipal concern. See *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960). See, also, *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982). But the plaintiffs are incorrect in contending that the City's assertion of authority to enact the Ordinance is inconsistent with the Nebraska Constitution. The question here is not whether the Legislature could assert its plenary power over taxation to preclude the City from imposing impact fees—rather, the question is whether, in the absence of an express provision, the City may exercise that power. The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state simply means that on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation. *State, ex rel. Fischer, v. City of Lincoln*, 137 Neb. 97, 288 N.W. 499 (1939). But until the superior authority of the state has been asserted by a general statutory enactment, the municipality may properly act under its charter. *Id.*

[8] The constitutional language relied upon by the plaintiffs does not act as a restriction of the authority a municipality may exercise under a home rule charter. Had this purpose been intended, it could have been expressed in article XI in no uncertain terms. Instead, when read together, article VIII, §§ 1 and 6, and article XI support the City's position in this case. The very purpose of a home rule charter is to permit municipalities to

exercise " 'every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation.' " *In re Application of Lincoln Electric System*, 265 Neb. 70, 82, 655 N.W.2d 363, 373 (2003), quoting *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922). Article VIII, §§ 1 and 6, simply establishes the Legislature's power to tax, and its authority to delegate that power to governmental subdivisions. In short, article VIII, §§ 1 and 6, provides that the Legislature can empower a city to tax, and article XI authorizes a city with a limitation of powers home rule charter to exercise that power to tax without first waiting for express delegation.

[9] A constitution represents the supreme written will of the people regarding the framework for their government. *Pony Lake Sch. Dist. v. State Committee for Reorg., ante* p. 173, 710 N.W.2d 609 (2006). As we stated in *In re Application of Lincoln Electric System, supra*, a home rule charter is just another method of empowering a municipality to govern its own affairs, in which the sovereign people authorize the electorate to empower municipalities with the authority to govern their own affairs. The plaintiffs' reading of the constitution would frustrate the will of the sovereign people in that regard, as it would limit the sovereignty acquired by the adoption of a home rule charter, and contravene the intent of article XI.

The plaintiffs also rely on cases in which this court has referred to the Legislature's "plenary power" over taxation, and required municipalities to rely on an express grant of the power to tax. See, e.g., *Consumers Public Power Dist. v. City of Lincoln*, 168 Neb. 183, 95 N.W.2d 357 (1959). But the plaintiffs do not identify, nor has our research revealed, any case in which we have concluded that a municipality governed by a limitation of powers charter was nonetheless without the power to tax in the absence of express delegation from the Legislature. It would be utterly inconsistent with the nature of a limitation of powers home rule charter, and the presumptions associated with such a charter, to conclude that a municipality operating under a limitation of powers charter was still dependent on express authority from the Legislature for the exercise of municipal powers.

## CONCLUSION

We conclude that the district court correctly determined that the City was empowered, under its home rule charter, to enact the Ordinance. Having so determined, we need not address the plaintiffs' remaining assignments of error, as they would have been relevant only if express statutory authority for the Ordinance was required. Similarly, we decline to address the City's cross-appeal, as the issues it presents are unnecessary to our disposition of this appeal. The judgment of the district court is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

CONNOLLY, J., not participating in the decision.

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# CITY OF ASHLAND, A NEBRASKA MUNICIPAL CORPORATION, APPELLEE, V. ASHLAND SALVAGE, INC., A NEBRASKA CORPORATION, AND ARLO REMMEN, APPELLANTS.

711 N.W.2d 861

Filed April 7, 2006. No. S-04-1365.

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. **Injunction: Equity.** An action for injunction sounds in equity.
3. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that when credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a judgment, decree, or final order entered by the court from which the appeal is timely taken.
6. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.
7. **Pleadings: Evidence.** Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.

8. **Pleadings: Intent.** A judicial admission does not extend beyond the intendment of the admission as clearly disclosed by its context.
9. **Pretrial Procedure: Evidence.** A party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Terry K. Barber for appellants.

Glen Th. Parks and Mark A. Fahleson, of Rembolt Ludtke, L.L.P., for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Plaintiff-appellee, the City of Ashland, Nebraska, brought this declaratory judgment action in the district court for Saunders County against defendants-appellants, Ashland Salvage, Inc., and Arlo Remmen, seeking a declaration as to the existence and lawful boundaries of certain public rights-of-way claimed by the city and further seeking an injunction against appellants' improper use of the public rights-of-way. Following a bench trial, the district court ruled in favor of the city, declaring the boundaries with regard to appellants' property and the city's public rights-of-way and enjoining appellants from any inappropriate use of the rights-of-way. We affirm.

## STATEMENT OF FACTS

This case involves the city's claim to two public rights-of-way (sometimes hereinafter referred to as "the disputed property") originally dedicated to the city in 1871. The disputed property forms a backward "L" and borders on the southern and eastern boundaries of a salvage yard operated by Ashland Salvage. The salvage yard is located south of U.S. Highway 6 in Ashland. Remmen is the president and sole shareholder of Ashland Salvage. The record reflects that in 1994, Remmen purchased the property that forms the southeast corner of the salvage yard

and, by a quitclaim deed dated October 5, 1994, transferred the property to Ashland Salvage.

At issue in this case are the existence and boundaries of two rights-of-way claimed by the city. The first right-of-way runs in an east-west direction along Fir Street (formerly known as Prairie Street) as it runs along the southern edge of the salvage yard, and the second right-of-way runs in a north-south direction along 9th Street, or Dennis Dean Road (formerly known as Cherry Street), as it runs along the eastern edge of the salvage yard. These claimed rights-of-way intersect at the southeast corner of the salvage yard to form a backward "L." Appellants dispute the existence of these rights-of-way and assert an ownership interest over the disputed property.

In May 2002, the city notified appellants that materials belonging to the salvage yard were being stored on portions of the Fir Street and Dennis Dean Road public rights-of-way. The city requested that appellants remove these materials. At some point, the city removed materials from the disputed property. Thereafter, the city imposed a special assessment against appellants for the cleanup costs.

In 2002, appellants filed suit in the district court for Saunders County against the city, challenging the special assessment. On July 25, 2003, the city filed in the district court a declaratory judgment action against appellants, seeking a declaratory judgment with regard to the existence and the boundaries of the Fir Street and Dennis Dean Road public rights-of-way as they abutted the southeast corner of appellants' property and requesting, in effect, an injunction enjoining appellants' storage of materials on the disputed property. Prior to trial, the district court consolidated the city's declaratory judgment action with appellants' action challenging the city's special assessment.

As part of the pretrial proceedings, the city served its "First Set of Requests for Admissions" upon appellants, which requests sought appellants' admissions or denials with regard to the boundaries for the southeast corner of appellants' salvage yard property and the Fir Street and Dennis Dean Road rights-of-way. Specifically, attached to the requests for admissions was a copy of a 2003 survey ordered by the city, which survey included the boundaries of the southeast corner of the salvage yard. The

survey identified the borders of the Fir Street and Dennis Dean Road public rights-of-way as they met to form the backward "L" abutting the southeast corner of appellants' property. Moreover, the survey identified certain markers that established the original boundaries of the city's claimed public rights-of-way, including a pipe, marking the northwest corner of the intersection between Fir Street and Dennis Dean Road, and a bolt, marking the northern boundary of the Fir Street right-of-way. The survey noted that these markers were located under salvage items on property claimed by appellants. (The 2003 survey was later admitted into evidence during the trial in this case as Exhibit 14, and will hereinafter be referred to as "Exhibit 14.") In summary, the requests for admissions sought appellants' admission or denial with regard to the accuracy of the property boundaries and public rights-of-way identified in Exhibit 14.

Appellants failed to respond to the city's "First Set of Requests for Admissions" within 30 days, as required by Neb. Ct. R. of Discovery 36 (rev. 2000). Appellants later moved for leave to serve responses out of time, and following a hearing, the district court denied appellants' motion.

On June 22, 2004, the consolidated cases came on for a bench trial. The city and appellants offered various evidence. During the trial, the city offered and the court received into evidence a copy of the city's "First Set of Requests for Admissions." The city also introduced into evidence the affidavit of one of the city's attorneys that sets forth the date on which the city served its requests for admissions upon appellants and that also, in effect, noted appellants had failed to provide timely responses to these requests for admissions.

Following the trial, in a file-stamped journal entry dated November 22, 2004, the district court ruled in favor of the city in the declaratory judgment action, declaring the boundaries of appellants' property and the existence of the city's public rights-of-way. Specifically, in its journal entry, the district court stated that "a public right-of-way exists and its legal boundaries are as set forth in Exhibit 14." In its journal entry, the district court "enjoined [appellants] from any use of [the disputed] property inconsistent with its use as a public right-of-way." The journal entry also directed the city to prepare an "injunction," and an

"Order of Permanent Injunction" was subsequently filed on December 6. On November 30, appellants filed their notice of appeal from the November 22 adverse ruling in the declaratory judgment case. The declaratory judgment action is the subject of the present appeal.

In the special assessment case, the trial court ruled in favor of appellants, determining that the cleanup costs could not be charged against appellants as a special assessment, and no appeal was taken by the city in that case.

## ASSIGNMENT OF ERROR

Appellants assign numerous errors, which in summary assert that the district court erred in determining that the city's evidence relating to its claimed public rights-of-way was sufficient to establish the existence and boundaries of the rights-of-way.

## STANDARDS OF REVIEW

[1-3] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). An action for injunction sounds in equity. *Denny Wiekhorst Equip. v. Tri-State Outdoor Media*, 269 Neb. 354, 693 N.W.2d 506 (2005). In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that when credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003).

## ANALYSIS

*Appellate Jurisdiction Exists.*

[4] In their briefs filed on appeal, the parties note that the Order of Permanent Injunction was entered after the November 30, 2004, notice of appeal that challenged the November 22 ruling. Given the December 6 entry of the Order of Permanent Injunction, the parties question the timeliness of appellants'

notice of appeal and thus challenge this court's appellate 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. *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006). We conclude we have appellate jurisdiction.

[5] Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004) controls our analysis and provides:

> (1) A judgment is the final determination of the rights of the parties in an action.
>
> (2) Rendition of a judgment is the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
>
> (3) The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. For purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.
>
> (4) The clerk shall prepare and maintain the records of judgments, decrees, and final orders that are required by statute and rule of the Supreme Court.

For an appellate court to acquire jurisdiction of an appeal, there must be a judgment, decree, or final order entered by the court from which the appeal is timely taken. In the present case, we conclude that the file-stamped November 22, 2004, journal entry is a judgment under § 25-1301 and that the November 30 notice of appeal challenging this judgment constitutes a timely appeal. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004) (providing for 30 days to file notice of appeal from district court judgment, decree, or final order).

As noted above, the district court's file-stamped journal entry of November 22, 2004, found in favor of the city, declared the boundaries of the rights-of-way, and enjoined appellants from any use of the disputed property inconsistent with the city's rights-of-way. This ruling resolved all issues raised in the city's declaratory action. Although the November 22 journal entry also directed the city to prepare an injunction, the November 22 ruling nevertheless disposed of the whole merits of the case, and the November 22 file-stamped journal entry was a judgment

from which the November 30 appeal was timely taken. See § 25-1301. Although the Order of Permanent Injunction complicates the jurisdictional analysis, its entry on December 6 does not defeat the finality of the November 22 ruling from which the notice of appeal was explicitly taken and which forms the substance of our consideration on appeal. We take this opportunity to again disapprove of the practice of a trial court's filing of a journal entry that describes an order that is to be entered at a subsequent date. As we stated in *Hosack v. Hosack*, 267 Neb. 934, 940, 678 N.W.2d 746, 752-53 (2004) (quoting *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986)),

> "the confusion presented by this case can be avoided if trial courts will, as they should, limit themselves to entering but one final determination of the rights of the parties in a case." The filing of both a journal entry and a subsequent order creates the potential for confusion. Instead, the trial court should notify the parties of its findings and intentions as to the matter before the court by an appropriate method of communication without filing a journal entry. The trial court may thereby direct the prevailing party to prepare an order subject to approval as to form by the opposing party. See commentary to Canon 3(B)(7) of the Nebraska Code of Judicial Conduct. Only the signed [judgment, decree, or] final order should be filed with the clerk of the court.

In contrast to the journal entry in *Hosack v. Hosack* that left certain matters unresolved, in the instant case, the district court's file-stamped journal entry of November 22, 2004, disposed of all claims and constituted a judgment for purposes of § 25-1301, and the appeal was timely taken. Accordingly, we have jurisdiction to consider this appeal.

*The City's Allegation in Paragraph 3 of Its Complaint Did Not Constitute a Judicial Admission.*

Appellants assert that certain allegations in the city's complaint constitute a judicial admission with regard to the legal description of appellants' property and that the district court erred in entering judgment establishing the existence and boundaries of

the city's claimed public rights-of-way that are inconsistent with the purported admission. Appellants claim that as a result of such admission, the city has waived any controversy with regard to the disputed boundaries. We find no merit to appellants' assertion of a judicial admission on the part of the city.

Appellants focus on paragraph 3 in the city's complaint. In paragraph 3, the city alleged as follows: "[Ashland Salvage] is the owner of record of property generally described as 602 Dennis Dean Road, Ashland, Nebraska ('Property'). The Quit Claim Deed providing the legal description for the Property is attached hereto as Exhibit 'A' and incorporated herein by this reference." Attached to the complaint is a copy of the October 5, 1994, quitclaim deed by which Remmen transferred ownership of the salvage yard property at issue in this case to Ashland Salvage. The deed contains a description of the property that includes portions of the rights-of-way at issue. The deed was recorded. Appellants argue that by including paragraph 3 within its complaint, the city has judicially admitted that appellants are the owners of the disputed property. We do not agree.

[6-8] This court has recognized that

> an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.

(Emphasis omitted.) *Saberzadeh v. Shaw*, 266 Neb. 196, 199, 663 N.W.2d 612, 615 (2003). We have also stated that "[j]udicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence." *U S West Communications v. Taborski*, 253 Neb. 770, 784, 572 N.W.2d 81, 91 (1998). This court has further recognized that an admission "does not extend beyond the intendment of the admission as clearly disclosed by its context." (Emphasis omitted.) *Robison v. Madsen*, 246 Neb. 22, 29, 516 N.W.2d 594, 599 (1994).

We read paragraph 3 of the complaint as merely reciting the historical fact that the quitclaim deed transferred whatever ownership interest Remmen had to Ashland Salvage and that such deed is attached to the complaint as "Exhibit A." Paragraph 3 also recites the historical fact that such quitclaim deed has been

recorded. We do not read paragraph 3 to be an acknowledgment that the text or other description contained in Exhibit A is accurate.

More importantly, the context in which the purported admission occurs makes it readily apparent that the city was not admitting that appellants owned the disputed property. Paragraph 3 is but one paragraph of a seven-paragraph complaint, the thrust of which was that the city disputed appellants' entitlement to certain property that the city claimed as rights-of-way. In paragraph 1 of the complaint, the city states that "[t]his action is being brought pursuant to the Uniform Declaratory Judgments Act . . . requesting the Court to declare the rights and obligations of the parties relating to certain public rights-of-way adjacent to or running through real property owned and/or occupied by [appellants]." Paragraph 5 of the complaint alleges that "[t]he City possesses certain rights and title to streets, roads, alleys and rights-of-way (collectively 'Public Roads and Rights-of-Way') that are adjacent or run directly through the Property." In paragraph 6, the city alleges that "[appellants] have disputed the City's ownership of such Public Roads and Rights-of-Way, and have repeatedly challenged the City as to the lawful placement and location of such Public Roads and Rights-of-Way." Additionally, in paragraph 7, the city alleges that appellants have refused to remove personal property items from the disputed property and that appellants are likely to continue to refuse "until an Order is entered declaring the proper boundaries of the Property and Public Roads and Rights-of-Way and ownership thereto."

Reviewing the allegations contained within paragraph 3 of the complaint in the context in which the allegations occurred, we conclude there is no merit to appellants' argument that the city judicially admitted appellants' ownership of the disputed property. Compare *First Nat. Bank v. Avondale Mills Bevelle Emp.*, 967 F.2d 556 (11th Cir. 1992) (determining under federal notice pleading that motion allegation which was amenable to more than one interpretation did not constitute judicial admission, given remaining allegations in motion). On the contrary, paragraph 3, along with the remaining allegations in the complaint, combine to put the boundaries of appellants' property at issue, and paragraph 3 did not constitute a judicial admission.

*Appellants Have Admitted the Essential Facts Relative to the Allegations in the City's Complaint, and the Evidence Is Sufficient to Support the Trial Court's Decision Declaring the City's Entitlement to the Rights-of-Way and Enjoining Appellants Relative Thereto.*

As noted above, during the discovery phase of these proceedings, the city served certain requests for admissions upon appellants that appellants failed to answer. The requests pertained to the boundaries of the disputed property, and the requests were admitted into evidence at trial.

On appeal, appellants challenge the sufficiency of the evidence. In its brief in response, the city argues that appellants' failure to answer the requests for admissions resulted in admitted facts that, along with other evidence, are sufficient to support the district court's decision in this case. We agree with the city.

[9] We have held that a party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission. *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000); *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988). We have recognized that rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. *Id.*; *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). We have noted, however, that rule 36 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. *Schwarz v. Platte Valley Exterminating, supra*; *Wibbels v. Unick, supra*. If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of rule 36. *Schwarz v. Platte Valley Exterminating, supra*. The city followed the indicated procedures in this case.

The record reflects that the city's "First Set of Requests for Admissions" to appellants was served on April 12, 2004, and that appellants failed to respond within the time period specified in rule 36. Appellants' failure to make a timely and appropriate response to the requests for admissions constituted an admission of the subject matter of the requests. See *Schwarz v. Platte Valley Exterminating, supra*. Appellants sought leave to withdraw their admissions or file responses; but the district court denied their motion, and appellants make no assignment of error relative to this ruling.

The record reflects that at trial, the city offered into evidence a copy of the requests for admissions and also offered evidence of service of the requests upon appellants and appellants' failure to respond. This evidence was received. Accordingly, the city is entitled to claim appellants' admission of the requests included within the "First Set of Requests for Admissions" as a result of appellants' failure to respond to those requests. See *id*.

Given the content of the requests for admissions, appellants admitted, inter alia, that Exhibit 14 accurately describes the boundary lines for appellants' property and accurately describes the boundary lines for Fir Street and Dennis Dean Road. Other evidence in the record showed that the rights-of-way claimed by the city had been acquired by the city in 1871. This evidence and the admissions resolved the facts in controversy in the city's declaratory judgment case. Relying in part upon Exhibit 14, the accuracy of which was admitted by appellants, the district court declared the existence of the Fir Street and Dennis Dean Road rights-of-way as they abutted the southeast corner of appellants' property, declared the boundaries of appellants' property and those of the city's rights-of-way, and enjoined appellants from any inappropriate use of the rights-of-way. We have reviewed the record de novo, see *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003), and we determine the district court did not err in entering judgment in favor of the city on the evidence before it. The district court's decision is affirmed.

## CONCLUSION

For the reasons stated above, we affirm the district court's decision declaring the existence and boundaries of the city's

public rights-of-way at issue in this case and enjoining appellants from any use inconsistent with the city's rights-of-way.

AFFIRMED.

WRIGHT, J., not participating.

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REBECCA WENDELN, APPELLEE, V.
THE BEATRICE MANOR, INC., APPELLANT.

712 N.W.2d 226

Filed April 7, 2006. No. S-05-188.

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. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law.
3. **Limitations of Actions: Legislature: Intent.** A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.
4. **Limitations of Actions: Pleadings.** The essential nature of a proceeding may not be changed, thereby lengthening the statute of limitations, merely by denominating it as something other than what it actually is.
5. **Actions: Pleadings.** To determine the nature of an action, a court must examine and construe a complaint's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the complaint or the form of a pleading.
6. **Actions.** Just because there may be some overlap between relevant facts, it does not change the conclusion that various causes of action are stated based on separate and distinct factual occurrences.
7. **Fair Employment Practices: Limitations of Actions.** Neb. Rev. Stat. § 48-1118(2) (Reissue 1998) provides the applicable statute of limitations (i.e., within 300 days after the occurrence of the alleged unlawful employment practice) for Nebraska Fair Employment Practice Act claims brought pursuant to Neb. Rev. Stat. § 20-148 (Reissue 1997).
8. **Statutes: Constitutional Law.** Neb. Rev. Stat. § 20-148 (Reissue 1997) is a procedural statute which does not create any new substantive rights.
9. **Termination of Employment: Public Policy: Torts.** A public policy-based retaliatory discharge claim is based in tort.
10. **Termination of Employment: Public Policy: Limitations of Actions.** A public policy-based retaliatory discharge claim is governed by the 4-year statute of limitations period found in Neb. Rev. Stat. § 25-207 (Reissue 1995).

11. **Termination of Employment: Public Policy.** The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated.
12. **Employer and Employee: Health Care Providers.** The purpose of the Adult Protective Services Act, Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004), would be circumvented if employees mandated by the act to report suspected patient abuse could be threatened with discharge for making such a report.
13. **Criminal Law: Legislature: Public Policy.** The Legislature articulates public policy when it declares certain conduct to be in violation of the criminal law.
14. **Employer and Employee: Health Care Providers: Public Policy.** The Adult Protective Services Act, Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004), makes a clear public policy statement by utilizing the threat of criminal sanction to ensure the implementation of the reporting provisions set forth to protect the vulnerable adults with which the act is concerned.
15. **Actions: Termination of Employment: Health Care Providers: Public Policy.** A public policy exception to the employment-at-will doctrine applies to allow a cause of action for retaliatory discharge when an employee is fired for making a report of abuse as mandated by the Adult Protective Services Act, Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004).
16. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
17. **Termination of Employment: Health Care Providers.** In order for a retaliatory discharge action to lie against an employer for discharging an employee in retaliation for the mandatory filing of a report of patient abuse pursuant to Neb. Rev. Stat. § 28-372 (Reissue 1995), such report must be based upon reasonable cause.
18. **Actions: Termination of Employment: Health Care Providers: Public Policy.** Good faith is not required to state a cause of action for retaliatory discharge in contravention of the public policy expressed by the mandatory reporting provisions of the Adult Protective Services Act, Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004).
19. **Termination of Employment: Damages: Mental Distress: Public Policy.** Damages for mental suffering are recoverable in a retaliatory discharge action brought by a former at-will employee alleging that the discharge violated a clear mandate of public policy.
20. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.
21. **Actions: Mental Distress: Proof.** There is a distinction between proof requirements in an action for negligent or intentional infliction of emotional distress and damages for mental suffering sought where other interests have been invaded and tort liability has arisen apart from the emotional distress.
22. **Termination of Employment: Damages: Mental Distress: Torts: Public Policy.** Severe emotional distress is not an element of the tort of retaliatory discharge in contravention of public policy. Accordingly, there is no threshold limitation based upon the degree of severity of the mental suffering, nor is it necessary to show that the

plaintiff sought medical treatment or counseling for the mental suffering in order for it to be recoverable as past and present damages.

23. **Damages: Mental Distress.** In awarding damages for mental suffering, the fact finder must rely upon the totality of the circumstances surrounding the incident; the credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the discretion of the fact finder.
24. **Judgments: Damages: Mental Distress: Appeal and Error.** An appellate court is reluctant to interfere with the judgment of the fact finder in awarding damages for mental anguish, where the law provides no precise measurement.
25. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed.

Michaela Skogerboe and Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellant.

Carole McMahon-Boies for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

The primary issue presented in this appeal is whether we should recognize a public policy-based cause of action for retaliatory discharge when an employer discharges an employee for making a report to the Nebraska Department of Health and Human Services (DHHS) as mandated by the Adult Protective Services Act (APSA), Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004).

## FACTUAL BACKGROUND

Rebecca Wendeln, a certified nursing assistant, began working at The Beatrice Manor, Inc. (Beatrice Manor), in May 2000 as a staffing coordinator. A particular patient at Beatrice Manor was wheelchair-bound, and it was Wendeln's understanding that any time the patient was lifted or transferred, such transfer needed to be done by two persons and with a gait belt (an ambulatory aid used to transfer or mobilize patients). In December 2001, a "very upset" medical aide approached Wendeln, describing that

approximately 2 weeks prior, this patient had been improperly moved and had fallen and bruised herself. The aide reported that she had offered to assist another aide in the transfer of the patient, but that the other aide had refused to let her help. The next thing the aide observed was the patient on the floor with no gait belt in sight. The aide told Wendeln that she had informed the administrator and the acting director of nursing about the incident, but that the aide did not believe that it had been properly reported to DHHS or was otherwise being taken care of.

That same day, a licensed practical nurse at Beatrice Manor also approached Wendeln about the incident, expressing concern that nothing was being done about it. The nurse did not witness the incident, but was a relative of the patient. In response to these reports, Wendeln approached another aide who was working the day of the incident to confirm that it had actually occurred. That aide had been called to help the patient off of the floor and told Wendeln that pain medication had been given to the patient as a result of the fall.

Wendeln then called DHHS to make sure that it had been reported. When DHHS indicated that no incident had been reported, Wendeln made a report.

A few days after her report to DHHS, Wendeln was called into her supervisor's office. Wendeln said that her supervisor was very angry with her after having learned that Wendeln had made a report with DHHS without having first spoken to her. Wendeln testified that her supervisor was "very aggressive" and made her feel scared and intimidated. Wendeln, who was 21 years old at the time, asked for some time off work because she "didn't know how [she] was going to face [her supervisor] after the way she had aggressively approached [her]." Her supervisor granted her the time off. Wendeln testified that during this time, she felt very nervous and upset. She explained that she had never before been "attacked" in such a manner by either a peer or a supervisor.

Upon Wendeln's return to work on her next scheduled workday, Wendeln found that the locks to her office had been changed. Eventually, her supervisor appeared and told Wendeln to follow her to her office. There, Wendeln was asked to resign, and when she refused, she was told she was fired. Her official termination date was January 2, 2002.

Wendeln testified that after her discharge from employment, even though she had a close family friend as a patient at Beatrice Manor, she never felt comfortable enough to be able to return to visit. She explained that on the one occasion she had returned to the facility to pick up her W-2 form, her former supervisor had come out of the building and stood watching her park her car. Thereafter, the supervisor stood by the nurses' station as Wendeln picked up the W-2 form, making Wendeln feel uncomfortable.

After her discharge from employment at Beatrice Manor, Wendeln was unable to find other employment in Beatrice, where she lived near her mother. She eventually found work in Lincoln.

## PROCEDURAL HISTORY

On January 27, 2003, Wendeln filed this action against Beatrice Manor. Her original action sought declaratory, injunctive, and monetary relief under the whistleblower provisions of the Nebraska Fair Employment Practice Act (NFEPA), Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1998), as actionable under Neb. Rev. Stat. § 20-148 (Reissue 1997). However, she was allowed to amend her complaint to add the allegation that she suffered from wrongful termination in contravention of the public policy of the State of Nebraska, as articulated in the APSA. On April 5, 2004, Beatrice Manor, pursuant to leave granted by the court, filed an amended answer alleging for the first time that Wendeln's claims were barred by the 300-day statute of limitations period set forth in § 48-1118(2).

The court granted a motion by Wendeln to dismiss her first cause of action which alleged relief under the NFEPA and § 20-148, reasoning that essentially the same cause of action was pending before the Nebraska Equal Opportunity Commission. The court overruled respective motions for summary judgment by Wendeln and Beatrice Manor, and the case went to trial before a jury on Wendeln's second cause of action alleging retaliatory discharge in contravention of the public policy mandate expressed by the reporting provisions of the APSA.

Prior to trial, the court overruled Beatrice Manor's motion in limine for an order precluding Wendeln from making any reference to damages in the form of pain and suffering, loss of enjoyment of life, or humiliation. Beatrice Manor's motion was

based on its argument that Wendeln's claim sounded in contract and that noneconomic damages were not recoverable as a matter of law. The jury was eventually instructed that it "must determine the amount of any *noneconomic damages* sustained by [Wendeln] such as mental suffering, emotional distress and humiliation." (Emphasis in original.) Beatrice Manor objected to the instruction on the ground that Wendeln's cause of action sounded in contract and on the alternative ground that "there has been no evidence that [Wendeln] did sustain the mental suffering, emotional distress and humiliation as a result of this incident, as required by law."

The court also refused Beatrice Manor's proposed jury instruction that Wendeln had the burden to prove that she "acted in good faith and upon reasonable cause in reporting the suspected abuse." Over Beatrice Manor's objection, the jury was instructed only that it must find that Wendeln "acted upon reasonable cause in reporting the suspected abuse."

The jury returned a verdict in favor of Wendeln, finding actual damages in the amount of $4,000 and noneconomic damages in the amount of $75,000, for a total of $79,000. Beatrice Manor moved for a new trial and remittitur, which alleged that the noneconomic damages granted Wendeln were clearly excessive and made under the influence of passion or prejudice.

## ASSIGNMENTS OF ERROR

Beatrice Manor argues, summarized and restated, that the trial court erred in (1) failing to find that the applicable statute of limitations was the 300-day period set forth in § 48-1118(2), rather than the general 4-year limitation period found in Neb. Rev. Stat. § 25-207 (Reissue 1995); (2) failing to find as a matter of law that Wendeln's public policy retaliatory discharge claim sounded in contract and, therefore, noneconomic damages were not recoverable; (3) instructing the jury that it was Wendeln's burden to prove that her report to DHHS was made upon reasonable cause, without also instructing the jury that she must prove the report was made in "good faith"; (4) instructing the jury on noneconomic damages when the evidence was insufficient to show that Wendeln suffered "severe" emotional distress as a result of her discharge; and (5) failing to set aside the jury's verdict of noneconomic damages as excessive.

Beatrice Manor also assigns as error the trial court's failure to grant Beatrice Manor summary judgment on the ground that no material issue of fact existed as to Wendeln's lack of good faith and reasonable cause in reporting the alleged abuse to DHHS. However, the issue of whether a denial of summary judgment should have been granted generally becomes moot after a full trial on the merits. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003). Moreover, Beatrice Manor did not preserve any issue as to the sufficiency of the evidence regarding whether Wendeln acted upon reasonable cause because it failed to make a motion for directed verdict at the close of the evidence, or any other motion questioning the sufficiency of the evidence in that respect. We do not, therefore, consider this issue. As to good faith, we determine in this opinion that "good faith" is not a requirement in reporting under the APSA.

## 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. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

[2] A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Id.*

Whether the jury instructions given by a trial court are correct is a question of law. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002).

## ANALYSIS

### STATUTE OF LIMITATIONS

We first address Beatrice Manor's assertion that Wendeln's claim is barred by the applicable statute of limitations, which it asserts is the 300-day period stated in the NFEPA. The trial court

determined that Wendeln's action was governed by the general 4-year statute of limitations set forth by § 25-207.

[3-6] In determining which statute of limitations applies to any given cause of action, we bear in mind that a special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject. *Andres v. McNeil Co., supra*. Moreover, the essential nature of a proceeding may not be changed, thereby lengthening the statute of limitations, merely by denominating it as something other than what it actually is. *ABC Radio Network v. State of N.Y. Dept.*, 294 A.D.2d 213, 742 N.Y.S.2d 261 (2002). To determine the nature of an action, a court must examine and construe a complaint's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the complaint or the form of a pleading. See *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). However, just because there may be some overlap between relevant facts, it does not change the conclusion that various causes of action are stated based on separate and distinct factual occurrences. See *Larson v. Demuth*, 252 Neb. 668, 564 N.W.2d 606 (1997).

Beatrice Manor asserts that although Wendeln denominates her cause of action as a retaliatory discharge action in contravention of public policy, it remains in essence an employment discrimination case under the NFEPA brought directly for judicial relief against the former employer pursuant to § 20-148. In *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000), we stated that NFEPA actions brought pursuant to § 20-148 were governed by the 300-day statute of limitations period found in § 48-1118(2) of the NFEPA.

Wendeln asserts that her amended complaint states only a cause of action for retaliatory discharge in violation of public policy, which constitutes a cause of action separate and distinct from a claim based on the NFEPA. Indeed, Wendeln argues that in her case, a careful examination of the essential allegations of her complaint would reveal that she does not state a cause of action under the NFEPA at all.

In *Adkins*, the plaintiff alleged that the decision of his employer not to hire him for a specific position was substantially

motivated by racial or retaliatory animus and that these actions constituted illegal discrimination in violation of the NFEPA. His claims under the NFEPA, however, were not brought pursuant to the NFEPA, which provides administrative relief from employment discrimination. Rather, they were brought pursuant to § 20-148, which authorizes judicial relief for a deprivation of rights, privileges, or immunities secured by the U.S. Constitution or the Constitution and laws of the State of Nebraska.

[7] We ultimately rejected the plaintiff's argument that since § 20-148 contained no statute of limitations, his claim was governed by the 4-year catchall limitations period set forth in Neb. Rev. Stat. § 25-212 (Reissue 1995). Instead, we held that "§ 48-1118(2) provides the applicable statute of limitations (i.e., within 300 days after the occurrence of the alleged unlawful employment practice) for [N]FEPA claims brought pursuant to § 20-148." *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. at 163, 615 N.W.2d at 473.

[8] We noted that by determining the 300-day statute of limitations under § 48-1118(2) to be controlling, we avoided "using § 20-148 to inadvertently create expanded rights (other than an alternative civil avenue of recovery) not present in an administrative [N]FEPA claim." 260 Neb. at 163, 615 N.W.2d at 474. This was important because we had previously held that § 20-148 was " 'a procedural statute which does not create any new substantive rights.' " 260 Neb. at 163, 615 N.W.2d at 474 (quoting *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996)).

Under the NFEPA, § 48-1114 states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his or her employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he or she (1) has opposed any practice made an unlawful employment practice by the Nebraska Fair Employment Practice Act, (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the act, or (3) has opposed any practice or refused to carry out any action unlawful under federal law or the laws of this state.

Section 48-1102(15) defines "[u]nlawful under federal law or the laws of this state shall mean acting contrary to or in defiance of the law or disobeying or disregarding the law." Wendeln explains that she does not state a claim under the NFEPA insofar as she fails to allege that her discharge from employment was related either to (1) her opposition to any practice made unlawful by the NFEPA; (2) making a charge, testifying, assisting, or participating in any charge, investigation, proceeding, or hearing under the NFEPA; or (3) opposing any practice or refusing to carry out any unlawful action.

Instead, Wendeln asserts that she was discharged in retaliation for reporting a negligent act which was not unlawful. Specifically, she asserts that she was discharged in retaliation for filing a complaint as required by the APSA. Section 28-384 makes it a Class III misdemeanor for any person to willfully fail to make any report required by the APSA. Section 28-372(1) provides in part:

> When any physician, psychologist, physician assistant, nurse, nursing assistant, other medical, developmental disability, or mental health professional, law enforcement personnel, caregiver or employee of a caregiver, operator or employee of a sheltered workshop, owner, operator, or employee of any facility licensed by the Department of Health and Human Services Regulation and Licensure, or human services professional or paraprofessional not including a member of the clergy has reasonable cause to believe that a vulnerable adult has been subjected to abuse or observes such adult being subjected to conditions or circumstances which reasonably would result in abuse, he or she shall report the incident or cause a report to be made to the appropriate law enforcement agency or to the department.

"Abuse" is defined in § 28-351 as "any knowing, intentional, or negligent act or omission on the part of a caregiver, a vulnerable adult, or any other person which results in physical injury, unreasonable confinement, cruel punishment, sexual abuse, exploitation, or denial of essential services to a vulnerable adult." "Physical injury" is defined in § 28-363 as "damage to bodily tissue caused by nontherapeutic conduct, including, but not limited to, fractures, bruises, lacerations, internal injuries, or

dislocations, and shall include, but not be limited to, physical pain, illness, or impairment of physical function."

We agree with the trial court's determination that the essential nature of Wendeln's stated cause of action does not lie in the NFEPA, but, rather, lies in the public policy mandate that she alleges is expressed by the APSA. Without making any determination as to the hypothetical complaint which simultaneously states a cause of action under both the civil rights provisions of the NFEPA and under a public policy exception allowing a retaliatory discharge action for an at-will employee, it is clear in this case that not only does the denomination of Wendeln's cause of action accurately reflect its true nature, but that the facts alleged simply do not state a cause of action for a claim under the NFEPA. Wendeln did not allege that she was discharged for opposing any unlawful employment practice, participating in a proceeding under the NFEPA, or opposing or refusing to carry out an unlawful act. Rather, she claimed that her employment was terminated because she did what the law affirmatively required her to do.

As such, *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000), has no bearing to the case at bar. In *Adkins*, there was no dispute that the employer's conduct violated the NFEPA. The employee in *Adkins* merely elected the alternative judicial remedy for that conduct claimed to be found in § 20-148, rather than the administrative remedy found in the NFEPA. Our holding in *Adkins* narrowly focused on the applicability of the 300-day limitations period *to claims under the NFEPA*, and nowhere stated that the 300-day limitations period should apply to any wrongful discharge claim or to any claim cognizable under § 20-148. *Adkins v. Burlington Northern Santa Fe RR. Co., supra*. See, also, *Hassler v. Alegent Health*, 198 F. Supp. 2d 1108 (D. Neb. 2002) (statute of limitations *for NFEPA claims* brought pursuant to § 20-148 is 300 days). Thus, while it may be argued that Wendeln's claim falls under the broad language of § 20-148, given the strictly procedural nature of the statute, such fact alone is of little significance. We conclude that the 300-day NFEPA statute of limitations is inapplicable to Wendeln's public policy retaliatory discharge claim currently before us.

Yet despite a line of cases allowing limited retaliatory discharge claims for discharge in contravention of a clear mandate of public policy, this court has never clearly expressed exactly what statute of limitations period is applicable to these claims. In *Poppert v. Brotherhood of R. R. Trainmen*, 187 Neb. 297, 189 N.W.2d 469 (1971), we held that an employee's wrongful discharge claim was governed by the statute of limitations on written contracts. However, the plaintiff's retaliatory discharge action in *Poppert* was based upon a collective bargaining agreement. An examination of authority from other jurisdictions reveals that generally, when a wrongful discharge claim is based on public policy, and not on an implied or actual employment contract, such claim sounds in tort.

Thus, for example, in *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981), the court found that a public policy retaliatory discharge claim arising out of the employee's filing for workers' compensation benefits sounded in tort and not in contract. The court noted that generally, a breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement. A tort, on the other hand, is a violation of a duty imposed by law, a wrong independent of contract. This is not to say, the court further explained, that a tort cannot be committed by parties to a contract. " 'The question to be determined . . . is whether the actions or omissions complained of constitute a violation of duties imposed by law, or of duties arising by virtue of the alleged expressed agreement between the parties.' " *Id.* at 492, 630 P.2d at 190.

The court in *Murphy* thus focused on the fact that the employee's retaliation claim was based upon the public policy implicit in the workers' compensation statute, and the employee did not claim the existence of a contract of employment. His termination of employment did not breach any express or implied contractual obligations, but, rather, it was recognized that he was an employee at will who could be terminated at any time with or without cause. Therefore, the court concluded that the employee's cause of action arose only from a violation of a duty imposed by law, that duty imposed by the public policy of the workers' compensation statute. Accordingly, such action clearly sounded in tort. *Id.* See, also, e.g., *Tameny v. Atlantic Richfield*

*Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); *Mackie v. Vaughan Chapter-Paralyzed Vets.*, 354 Ill. App. 3d 731, 820 N.E.2d 1042, 289 Ill. Dec. 967 (2004); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Nelson v. Productive Alternatives, Inc.*, 696 N.W.2d 841 (Minn. App. 2005); *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); *Porter v. City of Manchester*, 151 N.H. 30, 849 A.2d 103 (2004); *Potts v. Catholic Diocese of Youngstown*, 159 Ohio App. 3d 315, 823 N.E.2d 917 (2004); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Korslund v. Dyncorp Tri-Cities Services*, 156 Wash. 2d 168, 125 P.3d 119 (2005); *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). But see, e.g., *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

[9,10] We agree that a public policy-based retaliatory discharge claim is based in tort. Accordingly, such a claim is governed by the general 4-year statute of limitations period found in § 25-207. Wendeln's claim is not barred by the applicable statute of limitations.

## Public Policy Exception

The public policy upon which Wendeln relies for her retaliatory discharge claim has not yet been recognized by this court. Beatrice Manor asserts that unlike other retaliatory discharge cases decided by this court, "[t]here is no clear legislative enactment declaring an important public policy with such clarity as to provide a basis for [Wendeln's] civil action for wrongful discharge." Brief for appellant at 27-28.

[11] The clear rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003). We recognize, however, a public policy exception to the at-will employment doctrine. *Id.* Under the public policy exception, we will allow an employee to claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Id.* In *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 905, 416 N.W.2d 510, 515 (1987), we explained, however, that it was

important that abusive discharge claims of employees at will be limited to "manageable and clear standards." Thus, "[t]he right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated." *Id.*

In *Jackson v. Morris Communications Corp., supra*, we held that an employee could state a cause of action for retaliatory discharge based upon the allegation that the employee was terminated from her employment because she filed a workers' compensation claim. In so doing, we recognized that Nebraska law neither specifically prohibited an employer from discharging an employee for filing a workers' compensation claim, nor specifically made it a crime for an employer to do so. Nevertheless, we concluded that "the general purpose and unique nature of the Nebraska Workers' Compensation Act itself provides a mandate for public policy." *Jackson v. Morris Communications Corp.*, 265 Neb. at 431, 657 N.W.2d at 640. We explained that the Nebraska Workers' Compensation Act was meant to create substantive rights for employees and that such beneficent purpose would be undermined by failing to adopt a rule which allows a retaliatory discharge claim for employees discharged for filing a workers' compensation claim. This is because were we not to recognize such a public policy exception to the employment-at-will doctrine, the substantive rights granted by the Nebraska Workers' Compensation Act could simply be circumvented by the employer's threatening to discharge the employee if he or she exercised those rights.

In *Hausman v. St. Croix Care Center*, 214 Wis. 2d 655, 571 N.W.2d 393 (1997), the Wisconsin Supreme Court applied similar principles in determining whether nursing home employees could state a claim of retaliatory discharge for reporting the alleged inappropriate care of patients. The bureau in charge of investigating reports of abuse and neglect in nursing home care ultimately concluded the investigation without issuing any citations. The law provided that any person who failed to act through reporting or taking some other form of action with regard to abuse or neglect of a nursing home patient was subject to a punishment ranging from a Class B misdemeanor to a Class D

felony, but did not specifically provide for a right of action for discharge in retaliation for such reporting.

The court in *Hausman* concluded that where the law imposes an affirmative obligation upon an employee to prevent abuse or neglect of nursing home residents, and the employee fulfills that obligation by reporting the abuse, an employer's termination of employment for fulfillment of the legal obligation exposes the employer to a wrongful termination action under the "fundamental and well-defined public policy of protecting nursing home residents from abuse and neglect." 214 Wis. 2d at 665, 571 N.W.2d at 397. The court generally abided by the principle that it would not protect an employee from discharge for "merely engaging in praiseworthy conduct consistent with public policy." *Id.* at 666, 571 N.W.2d at 397. However, it concluded that the mandatory reporting in issue went well beyond " 'merely praiseworthy conduct.' " *Id.* at 669, 571 N.W.2d at 398. The court explained that "[b]y applying the public policy exception to the situation presented here, employees would be relieved of the onerous burden of choosing between equally destructive alternatives: report and be terminated, or fail to report and be prosecuted." *Id.* at 668-69, 571 N.W.2d at 398. See, also, *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799 (Mo. 2003); *McQuary v. Bel Air Convalescent Home, Inc.*, 69 Or. App. 107, 684 P.2d 21 (1984).

[12-15] We agree with the reasoning expressed above and find that the purpose of the APSA would be circumvented if employees mandated by the APSA to report suspected patient abuse could be threatened with discharge for making such a report. The Legislature articulates public policy when it declares certain conduct to be in violation of the criminal law. See, *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988); *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987); *Simonsen v. Hendricks Sodding & Landscaping*, 5 Neb. App. 263, 558 N.W.2d 825 (1997). The APSA makes a clear public policy statement by utilizing the threat of criminal sanction to ensure the implementation of the reporting provisions set forth to protect the vulnerable adults with which the APSA is concerned. Thus, we determine that a public policy exception to the employment-at-will doctrine applies to allow a

cause of action for retaliatory discharge when an employee is fired for making a report of abuse as mandated by the APSA. Having made such a determination, we examine Beatrice Manor's remaining assignments of error regarding "good faith" and noneconomic damages.

## Good Faith

Beatrice Manor asserts that pursuant to *Schriner v. Meginnis Ford Co., supra*, if we recognize a retaliatory discharge claim for reporting abuse under the APSA, then such reporting must be made in "good faith" in order to state a cause of action. In *Schriner*, we stated that an action for wrongful discharge for reporting an employer's suspected criminal activities will lie only when the employee acts in good faith and upon reasonable cause in reporting his employer's suspected violation of the criminal code. Beatrice Manor asserts that the trial court erred in failing to recognize the good faith requirement when it refused to give the jury Beatrice Manor's proferred instruction that Wendeln had the burden to prove, by the greater weight of the evidence, that she "acted in good faith and upon reasonable cause in reporting the suspected abuse." The jury was ultimately only charged that it must find that Wendeln "had reasonable cause to believe that a vulnerable adult had been subjected to abuse."

[16] Whether the jury instructions given by a trial court are correct is a question of law. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002). To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003).

[17] We agree with the trial court that in order for a retaliatory discharge action to lie against an employer for discharging an employee in retaliation for the mandatory filing of a report of patient abuse pursuant to § 28-372, such report must be based upon reasonable cause. Section 28-372 explicitly conditions its mandate to report upon the employee's having "*reasonable cause*

to believe that a vulnerable adult has been subjected to abuse or observes such adult being subjected to conditions or circumstances which reasonably would result in abuse." (Emphasis supplied.) It would follow that a discharge cannot be in violation of the public policy underlying the mandatory reporting of the APSA unless the APSA requires the reporting in question.

[18] However, in specifying the standard which the employee must meet in order for an employee to fall under the mandatory reporting provisions, the APSA makes no mention of "good faith." We find no reason to write such an additional requirement into the public policy expressed by the APSA. Rather, under the language of the APSA, the reporting itself is broadly encouraged with the only caveat being that it be based upon a reasonable cause to believe that a vulnerable adult has been subjected to abuse or subjected to conditions or circumstances which reasonably would result in abuse. Such broadly encouraged reporting simply begins a further investigatory process which may or may not ultimately result in a conclusion that the abuse actually occurred. We find that Beatrice Manor's assignment of error as to the failure to instruct the jury as to "good faith" is without merit.

## Noneconomic Damages

Finally, Beatrice Manor makes several assignments of error based upon its assertion that noneconomic damages are not recoverable as a matter of law in the type of retaliatory discharge action here presented or, alternatively, that there was insufficient evidence to support any finding of such damages. We first address whether, as a matter of law, noneconomic damages are recoverable in a public policy-based retaliatory discharge claim.

The issue of whether noneconomic damages are recoverable in a public policy-based retaliatory discharge claim presents a question of law, which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. See *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004). Beatrice Manor's argument that as a matter of law, noneconomic damages are not recoverable in Wendeln's retaliatory discharge action is predicated on its assertion that "[a]n action for wrongful discharge is in reality an action for

breach of contract." Brief for appellant at 33. Having already resolved this issue to the contrary conclusion that this action is an action in tort, we find Beatrice Manor's argument to be without merit.

In Nebraska, we have allowed plaintiffs in other types of tort actions to attempt to recover damages for mental suffering. See, e.g., *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984); *Bishop v. Bockoven, Inc.*, 199 Neb. 613, 260 N.W.2d 488 (1977); *Crouter v. Rogers*, 193 Neb. 497, 227 N.W.2d 845 (1975); *Sabrina W. v. Willman*, 4 Neb. App. 149, 540 N.W.2d 364 (1995). We have not specifically addressed whether such damages are recoverable in actions claiming the tort of retaliatory discharge in contravention of public policy. However, it appears that the majority of other jurisdictions addressing this issue have explicitly recognized that an employee may recover damages for mental suffering in a wrongful discharge case, so long as the action lies in a public policy tort action, and not upon a contract of employment. See, *Travis v. Gary Community Mental Health Center*, 921 F.2d 108 (7th Cir. 1990); *Wiskotoni v. Michigan Nat. Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981); *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982); *Halbasch v. Med-Data, Inc.*, 192 F.R.D. 641 (D. Or. 2000); *Montgomery Coca-Cola Bottling v. Golson*, 725 So. 2d 996 (Ala. Civ. App. 1998); *Stivers v. Stevens*, 581 N.E.2d 1253 (Ind. App. 1991); *Hamer v. Iowa Civil Rights Com'n*, 472 N.W.2d 259 (Iowa 1991); *Harless v. First Nat'l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982). Compare, e.g., *Brewster v Martin Marietta*, 145 Mich. App. 641, 378 N.W.2d 558 (1985); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Chavez v. Manville Products Corp.*, 108 N.M. 643, 777 P.2d 371 (1989); *Cagle v. Burns and Roe*, 106 Wash. 2d 911, 726 P.2d 434 (1986); *Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999).

The court in *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 355 (Iowa 1989), explained that it could think of "no logical reason why a wrongfully discharged employee's damages should be limited to out-of-pocket loss of income, when the employee also suffers causally connected emotional harm." The court noted

that it would not be unusual for a wrongful discharge to not only cause monetary loss, but also mental suffering, elaborating that " '[h]umiliation, wounded pride, and the like may cause very acute mental anguish.' " *Id.* The court thus concluded that the same public policy that justified the underlying retaliatory discharge claim also justified a recovery for the employee's complete injury and that "fairness alone justifies the allowance of a full recovery in this type of a tort." *Id.*

[19] We hold that, as a matter of law, damages for mental suffering are recoverable in a retaliatory discharge action brought by a former at-will employee alleging that the discharge violated a clear mandate of public policy. We next consider whether the evidence was sufficient to support the jury's apportionment of such damages in this case.

[20] Beatrice Manor argues that Wendeln failed to sustain her burden of proof of any such damages. Therefore, the trial court erred in submitting the issue of noneconomic damages to the jury and in failing to set aside the jury's verdict either by remittitur or by granting Beatrice Manor's motion for new trial. The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

The crux of Beatrice Manor's argument that there was insufficient evidence of noneconomic damages lies in its legal assumption that in order to be recoverable, Wendeln's mental distress must be " 'so severe that no reasonable person could have been expected to endure it' " and that " 'the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically diagnosable.' " Brief for appellant at 38 (quoting *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003)). Beatrice Manor thus emphasizes that Wendeln failed to present evidence of "severe emotional distress," stating as follows:

> For example, she offered no evidence of a change in personality as a result of her termination, erosion of her relationship with her parents or friends, inability to work, inability to obtain employment, inability to participate in activities

> she previously enjoyed, difficulty sleeping or eating, continuous crying, nightmare, nausea, medical attention or psychological counseling as the result of her alleged mental suffering or emotional distress, etc.

Brief for appellant at 39.

The cases upon which Beatrice Manor relies for its assertion that Wendeln was required to show that her mental suffering was medically diagnosable and severe are inapposite to the case at bar because they involve actions for intentional or negligent infliction of emotional distress. Wendeln's action is for retaliatory discharge, and while she claims emotional distress as an element of her damages, she does not attempt to set forth a separate cause of action for negligent or intentional infliction of emotional distress.

[21] In *Kant v. Altayar*, 270 Neb. 501, 506, 704 N.W.2d 537, 541 (2005), we recently explained that there is a distinction between proof requirements in an action for negligent or intentional infliction of emotional distress and damages for mental suffering sought " 'where other interests have been invaded, and tort liability has arisen apart from the emotional distress.' " (Quoting Restatement (Second) of Torts § 46, comment *b*. (1965).) We thus held that a person suing on a theory of battery need not prove severe emotional distress in order to recover compensatory damages for such an injury, reasoning that " 'severe emotional distress' is not an element of the tort of battery." 270 Neb. at 507, 704 N.W.2d at 541. Instead, we concluded that the evidence was sufficient to submit damages for mental suffering to the jury where the plaintiff testified that she was ill for 2 days, continued to suffer emotionally, and had a lingering fear resulting from the battery, despite the fact that she had never sought medical treatment or counseling. See, also, *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982); *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351 (Iowa 1989).

[22] As in the tort of battery considered in *Kant v. Altayar, supra*, and unlike the torts of negligent or intentional emotional distress, severe emotional distress is not an element of the tort of retaliatory discharge in contravention of public policy. Accordingly, there is no threshold limitation based upon the degree of severity of the mental suffering, nor is it necessary to

show that the plaintiff sought medical treatment or counseling for the mental suffering in order for it to be recoverable as past and present damages. We find that mental suffering is simply an aspect of providing full recovery for the wrong, where present, and there is no rational reason to confine such full recovery to those former employees whose mental suffering has been severe.

[23,24] That having been determined, we consider whether the evidence was sufficient to support the damages for mental suffering granted to Wendeln by the jury. In awarding damages for mental suffering, the fact finder must rely upon the totality of the circumstances surrounding the incident; the credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the discretion of the fact finder. See *Woitalewicz v. Wyatt*, 229 Neb. 626, 428 N.W.2d 216 (1988). Accordingly, an appellate court is reluctant to interfere with the judgment of the fact finder in awarding damages for mental anguish, where the law provides no precise measurement. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

In considering whether the trial court erred in failing to grant Beatrice Manor's motions for remittitur and for new trial, we first note that Beatrice Manor asks us to consider the fact that Wendeln's closing argument asked the jury to assess an amount of damages that "sends a message" to Beatrice Manor. Specifically, Wendeln's attorney argued that the jury "must assess the amount of damages that makes [Wendeln] whole, that makes up for the humiliation, the mental suffering, loss of enjoyment of life, the things that went along with this horrible experience." Counsel then proceeded to state:

> I encourage you to pick a figure that sends a message to Beatrice Manor that if you do this, we'll make sure [Wendeln] gets made whole. And that figure's up to you. This is a — Beatrice Manor is a corporation, and to make a corporation know that you have to pay what's right and what makes somebody whole, it's a little bit different. Pick a range, and it's your range, but I'd suggest a range somewhere between $25,000 and $125,000. Pick a figure that you think lets this corporation know that this was not right and it cannot be done.

Beatrice Manor acknowledges that it made no objection to these statements, but asks this court to consider them simply as "further evidence that the jury relied on passion and prejudice in support of its verdict." Brief for appellant at 43.

[25] In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument. *Steele v. Sedlacek*, 267 Neb. 1, 673 N.W.2d 1 (2003); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). One may not waive an error, gamble on a favorable verdict, and, upon obtaining an unfavorable result, assert the previously waived error. *Wolfe v. Abraham, supra*. Beatrice Manor, although attempting to innocently frame this claim into its argument that the jury's verdict was excessive, is still attempting to press consideration of the alleged impropriety and prejudicial nature of statements made during closing argument. Since such statements were not properly objected to, we do not consider them in this review.

In arguing that the jury's verdict was excessive, Beatrice Manor also relies on this court's opinion in *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001), wherein we affirmed the trial court's grant of a new trial on the basis that the damages awarded were so excessive as to indicate that they were the result of passion or prejudice. The underlying claims were for assault and battery and for false imprisonment. The plaintiff was awarded $250,000 and $50,000, respectively, for the two causes of action, despite the fact that there was no evidence of medical bills or evidence of permanent injury or inability to work, and little evidence of emotional distress.

Beatrice Manor specifically focuses on our statement in *Holmes* as to the false imprisonment action that "[t]he record reflects that [the plaintiff] experienced a demeaning, humiliating, and anxiety-inducing incident and aftermath. However, there was no medical testimony by a physician or any other health professional regarding [the plaintiff's] asserted mental distress." 262 Neb. at 115, 629 N.W.2d at 525. *Holmes*, however, is clearly inapplicable to the case at bar. Most importantly, *Holmes* involved the review of a trial court's granting of a new trial, which, as we took pains to point out, involves a different

analytical framework than that for the review of a jury verdict where no new trial was granted. Here, we give deference to the fact finder in its assessment of these inherently imprecise damages. See, *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005); *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

Wendeln presented evidence of the manner in which she was reprimanded and later fired and how she felt extremely upset, scared, and intimidated as a result. She reported that these feelings lasted not only through her time off before her official discharge, but for a long period of time thereafter. In light of all the evidence presented, we cannot say that the jury's findings were unsupported or bore no reasonable relationship to the evidence. See, e.g., *Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999) (award of $75,000 in noneconomic damages to former employee, in action for retaliatory discharge, was supported by evidence that employee suffered from embarrassment, depression, and periods of marital discord over financial pressures due to his unemployment). We thus find this assignment of error to likewise be without merit.

## CONCLUSION

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

AFFIRMED.

WRIGHT, J., not participating.

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## IN RE INTEREST OF SEAN H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. SEAN H., APPELLEE.

711 N.W.2d 879

Filed April 7, 2006. No. S-05-894.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional issues not involving factual disputes as a matter of law, which requires the appellate court to reach independent conclusions.
2. **Homicide.** Under Neb. Rev. Stat. § 28-305 (Reissue 1995), a person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
5. **Statutes: Appeal and Error.** Appeals under specific statutory provisions require strict adherence to the statute's procedures.
6. **Prosecuting Attorneys: Judgments: Notice: Appeal and Error.** Under Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 1995 & Cum. Supp. 2004), prosecuting attorneys can take exception to any ruling or decision of the county court by presenting to the court a notice of intent to take an appeal to the district court.
7. **Courts: Juvenile Courts.** In counties without a separate juvenile court, the county court sits as the juvenile court.
8. **Appeal and Error.** Under Neb. Rev. Stat. § 43-2,106.01(2)(d) (Reissue 2004), the State must file its exception proceeding according to Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 1995 & Cum. Supp. 2004).

Appeal from the Separate Juvenile Court of Sarpy County: LAWRENCE D. GENDLER, Judge. Exception dismissed.

L. Kenneth Polikov, Sarpy County Attorney, and Carolyn A. Rothery, and Michael E. Brzica and Adam Kent, Senior Certified Law Students.

Thomas P. Strigenz, Sarpy County Public Defender, Dennis Marks, and Patrick J. Boylan, and Tina Kula, Senior Certified Law Student.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

CONNOLLY, J.

While handling a revolver, 15-year-old Sean H. shot his 22-year-old friend, Jared Naughton. The State charged Sean with unlawful act manslaughter and deporting himself so as to injure another by being a minor in possession of a revolver. The juvenile court dismissed the manslaughter charge, finding that the State had failed to meet its burden of proof, but found that Sean did commit the predicate offense of unlawfully possessing a revolver. The State appeals the dismissal of the manslaughter charge under Neb. Rev. Stat. §§ 43-2,106.01 (Reissue 2004) and 29-2317 to 29-2319 (Reissue 1995 & Cum. Supp. 2004), which

allow the State to take exception to trial court decisions. Because the State did not strictly adhere to the statutory procedure for appeals, we dismiss the State's exception for lack of jurisdiction.

## BACKGROUND

On November 14, 2004, Sean and his 18-year-old friend, Joshua B., were watching a movie at Sean's home when Naughton invited them to "hang out" at his home. When Joshua and Sean arrived, they found Naughton upstairs in his bedroom. The three talked while Naughton smoked marijuana. The conversation turned to guns, and Naughton showed them his handgun, pointing out the new grips. Naughton then handed the gun to Sean for inspection. When Sean asked if it was loaded, Naughton said, "[N]o, it's not loaded, you can point it at me and shoot it and it won't go off."

Joshua said he warned Sean not to "trust it," but Sean said later that he did not hear Joshua's warning. According to Sean, Naughton then told him to go ahead and "do it." Joshua recalled Sean pausing to think before pulling the trigger. After Sean squeezed the trigger, Naughton grabbed his chest and said, "Oh my God, you shot me." Thinking that Naughton was playing a trick on him, Sean fired the gun into the floor. As he did so, Sean felt air rush past his leg, saw Naughton fall to the floor with blood on him, and realized the gun was loaded. Sean began to panic and called the 911 emergency dispatch service.

The court made the following factual findings: that Sean persistently asked Naughton if the gun was loaded, that Naughton reassured Sean it was not, that Naughton told Sean to aim the gun at him and shoot, and that Sean paused to think before pulling the trigger, but acted unintentionally.

From this evidence, the court found that no assault occurred because Naughton was not in fear for his safety. The court opined that the salient issue was whether the State proved beyond a reasonable doubt that Sean intended to possess the revolver. The court concluded that Naughton remained in constructive possession of the revolver and in control of his surroundings. The court said that Sean's momentary thought before pulling the trigger could raise an issue whether Sean "thought independently of the victim's directive," but that the State did not meet its burden

of proving that he did. The court dismissed the manslaughter charge, but found that the State had met its burden on the allegation that he possessed a revolver.

## ASSIGNMENTS OF ERROR

The State assigns that (1) the court erred in ruling that the crime of unlawful possession of a revolver is not sufficient to support the crime of unlawful act manslaughter and (2) the court erred in ruling that the State did not prove beyond a reasonable doubt that Sean had committed the crime of manslaughter.

## STANDARD OF REVIEW

[1] An appellate court determines jurisdictional issues not involving factual disputes as a matter of law, which requires the appellate court to reach independent conclusions. See *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999).

## ANALYSIS

[2] Under Neb. Rev. Stat. § 28-305 (Reissue 1995), "[a] person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Here, the State charged Sean with unlawful act manslaughter; to supply the requisite unlawful act, the State cited unlawful possession of a revolver. The State argues that any unlawful act can serve as the underlying offense in unlawful act manslaughter and asks us to apply this rule to future cases. In response, the defense points out that unlawful possession of a revolver is a status offense and argues that status offenses should not support manslaughter convictions. We do not address these issues, however, because we lack jurisdiction.

[3,4] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005). Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. See, *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000); *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991).

Nonetheless, Nebraska statutes authorize the State to appeal criminal decisions in a few specific instances. Neb. Rev. Stat. §§ 29-2315.01 to 29-2316 (Reissue 1995 & Cum. Supp. 2004) allow the State to take exception to district court decisions. See *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989) (finding "trial court" synonymous with "district court" under § 29-2315.01). Similarly, §§ 29-2317 to 29-2319 allow the same with county court decisions. Under § 43-2,106.01(2)(d), the Legislature similarly limited the State's right to appeal delinquency issues in juvenile court when jeopardy has attached. These statutory provisions allow the State to seek limited review of adverse rulings and outline the procedure to obtain such review. See *State v. Johnson, supra*.

[5] However, appeals under specific statutory provisions require strict adherence to the statute's procedures. See, e.g., *State v. Johnson, supra* (dismissing State's exception for failure to comply with § 29-2315.01); *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990) (dismissing parents' appeals for failure to comply with the predecessor to § 43-2,106.01); *State v. Steinbach*, 11 Neb. App. 468, 652 N.W.2d 632 (2002) (directing lower court to dismiss appeal for State's failure to comply with § 29-2317).

The State appeals the juvenile court's order, claiming jurisdiction under § 43-2,106.01, which governs appellate jurisdiction for separate juvenile courts. See *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004). Section 43-2,106.01 provides:

> (1) Any final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals. The appellate court shall conduct its review within the same time and in the same manner prescribed by law for review of an order or judgment of the district court . . . .
>
> (2) An appeal may be taken by:
>
> . . . .
>
> (d) The county attorney or petitioner, ***except that*** in ***any case*** determining delinquency issues in which the juvenile has been placed legally in jeopardy, an appeal of such

> issues ***may only be taken*** *by exception proceedings pursuant to sections 29-2317 to 29-2319.*

(Emphasis supplied.)

As is clear from § 43-2,106.01(1), most cases arising under that statute are governed by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004), which sets forth the requirements for appealing district court decisions. See *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996). But the plain language of § 43-2,106.01(2)(d) carves out an exception for delinquency cases in which jeopardy has attached. In such cases, appeal may be taken only under the procedures of §§ 29-2317 to 29-2319.

[6] Sections 29-2317 to 29-2319 outline exception proceedings, which allow prosecuting attorneys to "take exception to any ruling or *decision of the county court* . . . by presenting to the court a notice of intent to take an *appeal to the district court*." § 29-2317(1). The language of § 29-2317 requires the appeal of a county court judgment to the district court sitting as an appellate court. Specifically, the pertinent portions of § 29-2317 provide:

> (1) A prosecuting attorney may take exception to any *ruling or* ***decision of the county court*** made during the prosecution of a cause *by presenting to the court a notice of intent to take an* ***appeal to the district court*** with reference to the rulings or decisions of which complaint is made.
>
> . . . .
>
> (3) The prosecuting attorney shall then ***file the notice in the district court*** within thirty days from the date of final order and within thirty days from the date of filing the notice shall file a bill of exceptions covering the part of the record referred to in the notice. Such appeal shall be on the record.

(Emphasis supplied.)

After the separate juvenile court of Sarpy County filed its order dismissing the manslaughter charge, the State filed notice of its intent to appeal with the separate juvenile court. But contrary to the language of § 29-2317, the State chose to file the appeal not with the district court, but with the Nebraska Court of Appeals, explaining that in Sarpy County, the "[s]eparate [j]uvenile [c]ourt sits in the same stead as the [d]istrict [c]ourt" and "it

would be unreasonable to expect our exception proceedings to go to an equal court for ruling."

Section 43-2,106.01(2)(d), however, plainly states that the procedure outlined in § 29-2317 governs delinquency appeals by county attorneys when jeopardy has attached and that under § 29-2317, the appeal must be to the district court. Indeed, the State alleges jurisdiction under §§ 29-2317 to 29-2319. Had the Legislature intended that appeals under § 43-2,106.01(2)(d) be made to the Court of Appeals, § 43-2,106.01(2)(d) would have referred to §§ 29-2315.01 to 29-2316 instead of §§ 29-2317 to 29-2319. When the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. See *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000).

[7] Further, reference to the county court in §§ 29-2317 to 29-2319 also applies to the separate juvenile court. In counties without a separate juvenile court, the county court sits as the juvenile court. See Neb. Rev. Stat. §§ 43-245(5) and 43-2,113(2) (Reissue 2004). This court recognized in *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004), that both separate juvenile courts and county courts sitting as juvenile courts serve the same function. Thus, we treat separate juvenile courts as county courts under §§ 29-2317 to 29-2319.

[8] The plain language of § 43-2,106.01(2)(d) requires the State to file its exception proceeding according to §§ 29-2317 to 29-2319. Because the State failed to fully comply with the statutory procedures outlined in § 29-2317, as incorporated by § 43-2,106.01, we lack jurisdiction to consider the State's exception.

## CONCLUSION

Because this case is not properly before this court, we dismiss the exception proceeding for lack of jurisdiction.

EXCEPTION DISMISSED.

WRIGHT, J., not participating.

# Bridget L. Kenley, appellee, v. Beverly J. Neth, director, State of Nebraska, Department of Motor Vehicles, appellant.

# Marc F. Shiels, appellee, v. State of Nebraska, Department of Motor Vehicles, appellant.

712 N.W.2d 251

Filed April 14, 2006. Nos. S-04-1186, S-05-230.

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. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **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.
5. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
6. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
7. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
8. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
9. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the U.S. Constitution.
10. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
11. **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 board.
12. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.

13. **Equal Protection.** The Equal Protection Clause requires the government to treat similarly situated people alike.
14. **Equal Protection: Statutes: Presumptions.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid.
15. **Equal Protection.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action.
16. ____. The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
17. **Equal Protection: Statutes.** If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end.
18. **Drunk Driving: Public Health and Welfare: Implied Consent: Blood, Breath, and Urine Tests.** In addition to the interest of protecting the public by removing drunk drivers from the roadways, in the refusal-to-submit context, the State has an interest in enforcing its implied consent law so as to facilitate the gathering of evidence necessary to identify those motorists who are under the influence and thus pose a risk to public health and safety.

Appeals from the District Court for Clay County: VICKY L. JOHNSON, Judge. Cause in No. S-04-1186 remanded with directions. Cause in No. S-05-230 remanded for further proceedings.

Jon Bruning, Attorney General, Laura L. Neesen, and Milissa Johnson-Wiles for appellant.

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

No appearance for appellee Shiels.

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

WRIGHT, J.

## NATURE OF CASE

Motorists in two cases appealed the decisions of the Department of Motor Vehicles (DMV) revoking their driver's licenses for refusing to submit to chemical testing for the unlawful presence of alcohol or drugs. The Clay County District Court reversed the license revocation in each case and declared Neb. Rev. Stat. § 60-498.01 (Reissue 2004) facially unconstitutional on due process and equal protection grounds. The State timely

appealed the district court's rulings. The cases were consolidated for oral argument, and we address both cases in this opinion.

## SCOPE OF REVIEW

[1,2] 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. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). 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] 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.*

[4] 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. *Id.*

## FACTS

### BACKGROUND IN *SHIELS*

On October 26, 2001, a vehicle driven by Marc F. Shiels was stopped in Clay County. Shiels was investigated for driving while under the influence of alcohol (DUI), and he refused a preliminary breath test. After being arrested and transported to the sheriff's office, he again refused to submit to a breath test.

The investigating law enforcement officer completed a "Notice/Sworn Report/Temporary License" form. This form notified Shiels that his driver's license would be revoked in 30 days because reasonable grounds existed to believe he had been driving while under the influence of alcoholic liquor or drugs; because he had been validly arrested pursuant to the DUI statutes; and because he had refused to submit to a chemical test of his blood, breath, or urine. Shiels filed a timely petition requesting a hearing before the DMV to contest the revocation of his driver's license.

An administrative license revocation (ALR) hearing was conducted, and on November 21, 2001, the director of the DMV revoked Shiels' driver's license for 1 year. Shiels appealed this determination to the district court. For some reason not apparent from the record, the matter was not decided until January 20, 2005.

### Background in *Kenley*

On February 17, 2004, Bridget L. Kenley was arrested on suspicion of DUI. After Kenley refused to submit to a blood test, she was given a "Notice/Sworn Report/Temporary License" form, which informed Kenley that her driver's license would be revoked in 30 days. She timely filed a petition for an ALR hearing to contest the revocation.

An ALR hearing was conducted, and on March 24, 2004, the director of the DMV ordered Kenley's driver's license revoked for 1 year. Kenley appealed this determination to the district court. The district court entered its order on September 30.

### District Court Rulings

The district court ruled in each of these cases that the ALR provisions in § 60-498.01 pertaining to motorists who refuse to submit to chemical testing were facially unconstitutional on due process and equal protection grounds. The court held that the statute was constitutionally impaired because it lacked a procedure whereby a motorist could obtain a reinstatement of his or her driver's license that had been administratively revoked if the motorist was subsequently acquitted of the criminal refusal charge. The court noted that the ALR statutes provide such a remedy for a motorist whose license is revoked for failing a chemical test, if that person is not subsequently convicted of the criminal DUI charge. See Neb. Rev. Stat. § 60-498.02(4) (Reissue 2004).

For the sake of clarity, we point out that the statute in effect at the time of Shiels' arrest and ALR hearing was Neb. Rev. Stat. § 60-6,205 (Reissue 1998). That statute number was changed as a result of 2003 Neb. Laws, L.B. 209, § 4. Also, the statute in effect at the time of Kenley's arrest and ALR hearing was § 60-498.01 (Supp. 2003). For purposes relevant to the issues in the appeals before us, the refusal-to-submit provisions were the

same. Thus, all references hereinafter will be to § 60-498.01 (Reissue 2004), unless otherwise specified.

## ASSIGNMENTS OF ERROR

The State asserts the following assignments of error in both cases: The district court erred in reversing the ALR order by ruling that § 60-498.01 was unconstitutional on its face because it (1) violated the motorist's due process rights and (2) violated the motorist's equal protection rights.

In the Shiels case, the State also claims the district court erred in considering the constitutionality of § 60-498.01 because Shiels did not plead that issue in his petition on appeal.

## ANALYSIS

[5-7] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.* The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Id.*

### Due Process

In the instant cases, the district court concluded that, on its face, § 60-498.01 violated the due process rights of motorists who refuse to submit to chemical testing because the statute lacks a process whereby a motorist who is acquitted of the criminal refusal charge may obtain a reinstatement of his or her driver's license which has been administratively revoked. We consider this issue below, and for the reasons set forth, we determine that the district court's conclusion was erroneous.

[8,9] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and 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); *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The due process requirements of Nebraska's Constitution are similar to those of the U.S. Constitution. *Hass, supra*; *Marshall, supra*.

The first step in analyzing whether an ALR provision satisfies due process concerns is to identify a property or liberty interest entitled to due process protections. See, *Chase, supra*; *Hass, supra*. The property interests at stake are the motorists' interests in retaining their driving privileges. Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. *Chase, supra*; *Hass, supra*. In such cases, the licenses are not to be taken away without the procedural due process required by the 14th Amendment. *Chase, supra*; *Hass, supra*.

[10,11] Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Chase, supra*. 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 board. *Id*.

In *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005), we concluded that the ALR refusal-to-submit provisions afforded motorists meaningful notice and an opportunity to be heard. We concluded that the absence of a statutory procedure for challenging the validity of the traffic stop on Fourth Amendment grounds did not render the ALR statutes unconstitutional as applied to motorists who refuse to submit to chemical testing. *Chase* did not address the exact question presented in this appeal, but the analysis and principles set forth therein are relevant.

In *Chase*, we applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). A *Mathews* analysis is undertaken when determining whether an administrative procedure comports with due process. First, a court must consider the private interest that will be affected by some official action. We concluded that a "driver's interest in his or her driving privileges is significant in today's society, as the loss of a driver's license may entail economic hardship and personal inconvenience." *Chase*, 269 Neb. at 894, 697 N.W.2d at 685.

Under *Mathews*, a court next considers the risk of an erroneous deprivation of such interest through the procedures used and the

probable value, if any, of additional or substitute procedural safeguards. We concluded in *Chase* that the risk that a motorist would be erroneously deprived of his or her driving privileges was only slight in ALR refusal-to-submit proceedings. We arrived at this conclusion in the following manner: "Because the current [ALR] statutory scheme gives the [refusal] motorist a reasonable time and opportunity to present evidence regarding the accusations and any potential statutory defense, we conclude that this risk is slight, if it exists at all." *Id.* at 894, 697 N.W.2d at 685-86.

The third and final factor to be considered in a *Mathews* analysis is the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. This court has found two substantial governmental interests advanced by the ALR provisions pertaining to refusal to submit. One interest is " 'in protecting public health and safety by removing drunken drivers from the highways.' " *Chase*, 269 Neb. at 894, 697 N.W.2d at 686 (quoting *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003)). The State has an additional interest in enforcing "its implied consent law so as to facilitate the gathering of evidence necessary to identify those motorists who are under the influence and thus pose a risk to public health and safety." *Chase*, 269 Neb. at 894, 697 N.W.2d at 686. After considering the above factors, we concluded in *Chase* that the ALR refusal-to-submit provisions fully comported with due process.

In the instant cases, the district court found the ALR scheme unsatisfactory under the second prong of the *Mathews* balancing test. The court was troubled that a motorist could be administratively deprived of his or her license despite an eventual acquittal on a refusal-to-submit criminal charge. The court erred in two respects.

First, the district court failed to recognize the distinction between ALR proceedings and criminal proceedings. This court has consistently opined that civil ALR proceedings are separate and distinct from a criminal prosecution arising from the same incident. For example, in *State v. Boyd*, 242 Neb. 144, 493 N.W.2d 344 (1992), a defendant in a criminal refusal case relied on the ALR statutes to support his contention that his license could not be revoked in a criminal proceeding if his refusal to

submit to a chemical test was reasonable. This court rejected that argument and reasoned as follows:

> "The same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. . . ."

*Id.* at 148, 493 N.W.2d at 347 (quoting *Neil v. Peterson*, 210 Neb. 378, 314 N.W.2d 275 (1982)).

In *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996), the defendant had successfully shown at the ALR proceeding that he had not operated his vehicle when he was intoxicated, and thus, the DMV restored his driver's license. In criminal DUI proceedings stemming from the same incident, the defendant moved to dismiss the charge, arguing that the Double Jeopardy Clauses of the federal and state Constitutions prevented him from being prosecuted for DUI following his exoneration at the ALR hearing. The trial court overruled the defendant's dismissal motion, and this court upheld the trial court's ruling.

We found the primary purpose of ALR's to be remedial in nature; that is, the purpose of ALR's is to protect the public from the health and safety hazards of drunk driving by quickly getting DUI offenders off the road. We found that criminal DUI charges, on the other hand, serve the general purpose of deterrence. We concluded that although the "ALR statutes also further a purpose of deterring other Nebraskans from driving drunk . . . [t]he fact that a statute designed primarily to serve remedial purposes secondarily serves the exemplary purpose of general deterrence does not require a conclusion that the statute results in punishment for double jeopardy purposes." (Citation omitted.) *Id.* at 542, 544 N.W.2d at 811.

The defendant in *Young* also argued that his criminal trial constituted relitigation of a settled claim, and he asserted that the doctrine of collateral estoppel barred such relitigation by the State. We rejected this argument as well. We stated that granting the defendant's plea for preclusion "would violate not only our own precedent of collateral estoppel, but also sound policy

reasons for leaving a degree of separation between the civil ALR hearing and criminal DUI prosecutions." *Id.* at 544, 544 N.W.2d at 812. We explained:

> Were this court to force the State to litigate thoroughly every element of DUI at an ALR hearing, such a holding would seriously undermine the Legislature's goal of providing an informal and prompt review of the decision to suspend a driver's license. . . . ALR hearings would quickly evolve into full-blown trials at which the State must fully litigate every possible issue regarding a motorist's actions, thereby losing their effectiveness in removing potentially dangerous drivers from the Nebraska highways within 1 month of their offense.

(Citation omitted.) *Id.* at 544, 544 N.W.2d at 812-13.

Our precedents make it clear that civil ALR proceedings are distinct from parallel criminal prosecutions for DUI or refusal to submit to chemical testing. See, *Young, supra*; *State v. Boyd*, 242 Neb. 144, 493 N.W.2d 344 (1992). See, also, *Hass v. Neth*, 265 Neb. 321, 329, 657 N.W.2d 11, 21 (2003) (noting " 'degree of separation' " between civil ALR hearings and criminal DUI prosecutions); *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998) (concluding that ALR is civil sanction and that ALR for failure to submit to chemical test does not violate Double Jeopardy Clauses of federal or state Constitutions because it does not constitute multiple punishment for same offense). Accordingly, although a motorist who refuses to submit to testing could subsequently be acquitted of the corresponding criminal charge, this fact is irrelevant to the ALR process.

Second, the district court failed to effectively distinguish between an ALR based on a motorist's failed chemical test and an ALR based on a motorist's refusal to submit to chemical testing. We discussed this distinction in *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). We recognized that when a motorist submits to a chemical test which discloses an alcohol concentration greater than the lawful limit,

> the relevant statutes . . . provide for dismissal of the ALR proceeding or reinstatement of a license administratively revoked if there is no criminal prosecution for DUI or if such charges are dismissed or the defendant found not guilty after

> trial. § 60-498.02(4)(a). Thus, administrative revocation for DUI is contingent upon a successful prosecution of the motorist in a criminal DUI proceeding in which Fourth Amendment issues may be raised.

*Chase*, 269 Neb. at 887, 697 N.W.2d at 681. On the other hand, we recognized that "[t]here is no similar statutory linkage between an ALR and a criminal proceeding based upon a motorist's refusal to submit to chemical testing. The statutes permit an ALR in this circumstance regardless of whether criminal charges are filed or successfully prosecuted." *Id.* at 888, 697 N.W.2d at 681.

Furthermore, in an ALR case based on refusal to submit, a court should give more weight to the governmental interest factor of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), than it would in an ALR case involving a failed chemical test. Here, the district court considered only the government's interest in protecting the public by removing drunk drivers from the highway.

ALR is a civil remedy with a nonpunitive purpose. *Chase, supra*. ALR serves different purposes when it is imposed for refusal to submit to a chemical test than when it is imposed for failing a similar test. See *id*. In the context of failing a chemical test, the purpose of ALR is limited to protecting public health and safety. *Id*. In the context of refusal to submit to a chemical test, ALR both protects public health and safety and facilitates the gathering of evidence, which is yet another nonpunitive purpose. *Id*.; *Howell, supra*.

Therefore, we hold that the due process rights of a motorist who refuses to submit to chemical testing are not violated by § 60-498.01 even though the statutory scheme does not operate to reinstate the motorist's administratively revoked driver's license if he or she is acquitted of the criminal refusal charge. The district court erred in finding otherwise.

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 board. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). The arresting officers in the instant cases completed

"Notice/Sworn Report/Temporary License" forms. Shiels and Kenley were each given a copy of this form, which included notification that their driver's licenses would be revoked in 30 days because reasonable grounds existed to believe they were driving while under the influence of alcoholic liquor or drugs and because they had refused to submit to a chemical test of blood, breath, or urine. The form also provided instruction on how to request a hearing before the DMV. Each motorist was informed that the issues at the hearing would be (1) whether the law enforcement officer had probable cause to believe the motorist was operating or in the physical control of a motor vehicle while under the influence of alcohol or drugs and (2) whether the motorist refused or failed to complete a chemical test. Once Shiels and Kenley requested hearings before the DMV, they were notified of their scheduled administrative hearings. Hearings were then held at which they had the opportunity to present evidence concerning the above-noted issues. Thus, the constitutional requirements of due process were met in these cases.

### Equal Protection

The district court ruled that the ALR provisions pertaining to motorists who refuse to submit to chemical testing violated the equal protection rights of such motorists. Employing language from *Hass*, the court found the ALR scheme unconstitutional because the distinction between motorists who submit to, but fail, a chemical test and motorists who refuse to submit was " 'wholly irrelevant to the achievement of the government's objective.' " We conclude the district court's ruling as to equal protection was erroneous.

[12-14] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges. *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). The Equal Protection Clause requires the government to treat similarly situated people alike. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid. *Hass, supra*. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Id.*

[15] The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. *Id.* Absent this threshold showing, one lacks a viable equal protection claim. *Id.* Kenley asserts that motorists "who refuse to submit to a chemical test are similarly situated to those with a blood alcohol concentration of over .08" (i.e., motorists who submit to, but fail, a chemical test). See brief for appellee at 26. She argues that both types of motorists "are subject to ALR proceedings, but are subject to drastically different remedial schemes." *Id.*

[16] The question presented is whether Shiels and Kenley, who refused to submit to chemical testing, have sufficiently met the threshold requirement of showing that they are similarly situated to motorists who take, but fail, a chemical test. We conclude that these two groups of motorists are not similarly situated. One group refuses a test; the other submits. With respect to a motorist who refuses testing, law enforcement cannot determine the motorist's blood-alcohol level. With respect to a motorist who submits to testing, law enforcement can determine whether the motorist's blood-alcohol level exceeds the legal limit. Based on these distinctions, the two types of motorists are treated differently by the ALR statutory scheme. The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights. *Atkins, supra.*

[17] Even assuming for the purpose of argument that these two groups of motorists may be considered as being similarly situated, we note that in *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999), we held that the ALR refusal-to-submit provisions do not violate the equal protection rights of motorists. The ALR scheme is analyzed through the lens of the rational relationship standard of review. If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. *Id.* Upon a showing that such a rational relationship exists, courts will uphold the legislation. *Id.* We have previously declared that driving is not a fundamental right and that drunk

drivers are not a suspect class. See, *id.*; *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985).

In *Schindler*, a driver appealed the administrative revocation of his driving privileges resulting from his refusal to submit to chemical testing. The driver argued that differences in treatment between persons who refused to submit to a chemical test and persons who submitted to and failed the test violated equal protection. This court held that the ALR statutes did not violate equal protection because they bore a rational relationship to legitimate state interests. We noted:

> [I]n the context of failing a chemical test, the purpose of administrative license revocation is limited to protecting public health and safety. However, in the context of refusal to submit to a chemical test, administrative license revocation serves the additional purpose of facilitating the gathering of evidence. Accordingly . . . the remedial scheme imposed upon those who refuse to submit to a chemical test, although harsher than that imposed on those who take and fail the test, is not excessive and is therefore rational in relation to its purpose.

*Id.* at 786, 593 N.W.2d at 298 (citing *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998)).

[18] In the instant cases, the district court emphasized the distinct classifications in its equal protection analysis, but the court did not discuss the government's objectives in implementing the ALR provisions at issue. As a result, the court failed to consider that the ALR provisions governing refusal-to-submit cases advance different objectives than the provisions governing cases involving motorists who submit to and fail a chemical test. See, *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Schindler, supra*; *Howell, supra*. In addition to the interest of protecting the public by removing drunk drivers from our roadways, in the refusal-to-submit context, the State has an interest in enforcing "its implied consent law so as to facilitate the gathering of evidence necessary to identify those motorists who are under the influence and thus pose a risk to public health and safety." *Chase*, 269 Neb. at 894, 697 N.W.2d at 686.

Nebraska law provides that any person operating a motor vehicle in this state is deemed to have given his or her consent to

chemical testing of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in his or her system. See Neb. Rev. Stat. § 60-6,197 (Reissue 2004). When a motorist refuses to submit to such testing, law enforcement officials are frustrated in their investigative duty of gathering evidence. They are unable to determine whether the motorist was driving a vehicle while under the influence of alcohol or drugs or whether the motorist was operating the vehicle in a lawful manner. The ALR refusal-to-submit provisions in § 60-498.01 are rationally related to the government's legitimate interests in enforcing its implied consent law and in gathering evidence in situations in which law enforcement officers have probable cause to believe motorists are driving while under the influence of alcohol or drugs.

Accordingly, we conclude that § 60-498.01 does not violate the Equal Protection Clauses of the federal and state Constitutions by treating motorists who refuse to submit to chemical testing differently than motorists who submit to, but fail, such testing. The district court's equal protection ruling did not conform to the law and was thus erroneous.

## CONCLUSION

We conclude the district court erred in ruling that the provisions in § 60-498.01 pertaining to refusal to submit to chemical testing violate drivers' due process and equal protection rights. Because we have determined the district court erred in both cases, we need not address the State's additional assignment of error in Shiels' case.

With respect to Kenley, we remand the cause to the district court with directions to reinstate the administrative revocation of Kenley's driver's license.

With respect to Shiels, the statute in effect at the time of Shiels' arrest, § 60-6,205, required an administrative license revocation to be "based on a valid arrest." See *Young v. Neth*, 263 Neb. 20, 24, 637 N.W.2d 884, 888 (2002). In his appeal to the district court, Shiels challenged the validity of his arrest. Due to its other holdings, the district court found it unnecessary to reach Shiels' argument concerning his arrest. Since that issue was not reached in the district court, it is not before us. We therefore remand the

cause to the district court for further proceedings consistent with this opinion with directions to determine the issue of whether Shiels' arrest was valid, as required by § 60-6,205.

CAUSE IN NO. S-04-1186 REMANDED WITH DIRECTIONS.
CAUSE IN NO. S-05-230 REMANDED FOR FURTHER PROCEEDINGS.

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GAYLEN L. CATRON, APPELLANT, V.
MARVIN R. LEWIS ET AL., APPELLEES.

712 N.W.2d 245

Filed April 14, 2006. No. S-04-1212.

1. **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.
2. **Actions: Negligence: Mental Distress.** In Nebraska, where there is no impact or physical injury to the plaintiff, the plaintiff seeking to bring an action for negligent infliction of emotional distress must show either (1) that he or she is a reasonably foreseeable "bystander" victim based upon an intimate familial relationship with a seriously injured victim of the defendant's negligence or (2) that the plaintiff was a "direct victim" of the defendant's negligence because the plaintiff was within the zone of danger of the negligence in question.
3. **Negligence: Mental Distress: Liability.** Persons in the zone of danger are clearly foreseeable plaintiffs to the negligent actor insofar as they have been placed at unreasonable risk of immediate bodily harm by the actor's negligence. The fact that the harm results solely through emotional distress should not protect the actor from liability for such conduct.

Appeal from the District Court for Morrill County: PAUL D. EMPSON, Judge. Affirmed.

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

James L. Zimmerman, of Zimmerman Law Firm, P.C., L.L.O., for appellees Marvin R. Lewis and Skylar L. Panek.

Jon Bruning, Attorney General, Vicki L. Adams, and Frederick J. Coffman for appellee State of Nebraska.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

MCCORMACK, J.

## NATURE OF CASE

This action was brought by Gaylen L. Catron against Marvin R. Lewis, Skylar L. Panek, and the State of Nebraska (collectively the defendants). Catron was operating a motorboat on Center Lake at the Bridgeport State Recreation Area in Morrill County, Nebraska, pulling two tubes ridden by two of his daughter's friends, Samantha Rader and Aimee Stuart. Panek accidentally struck and killed Rader with a jet ski he was operating. The jet ski was owned by Lewis, and the recreation area is operated by the State.

Catron's action sought damages for emotional distress stemming from his witnessing the accident and his unsuccessful attempt to rescue Rader. Catron alleged that such distress was a proximate result of the negligent acts or omission of the defendants, specifically, the negligent operation of the jet ski by the then 14-year-old Panek, the negligent entrustment of the jet ski to Panek by Lewis, and the failure of the State to operate the Bridgeport State Recreation Area in a manner reasonably safe for foreseeable users under foreseeable conditions.

The district court granted summary judgment in favor of the defendants, and Catron appeals.

## BACKGROUND

The accident in question occurred on July 5, 2002. On that day, Catron took his boat out on Center Lake to take Rader and Stuart riding on towable tubes. Rader and Stuart were friends of Catron's daughter and were not related to him. The towropes which attached the tubes that Rader and Stuart were riding to Catron's boat were approximately 61 feet long. The tubes generally stayed within 1½ feet of each other on the water. Rader and Stuart rode the tubes sitting facing away from the boat.

The lake is circular with a center island and two narrower and shallower channels connecting the two sides of the "circle." Boat traffic travels in a counterclockwise direction. After going around the lake twice, pulling the tubes in which Rader and Stuart rode, Catron decided to go onto shore, where Rader and Stuart had

camped the night before with Catron's daughter and some other girls. After having gone through one of the narrow channels, and heading counterclockwise, Catron testified that he made his customary loop maneuver to go in straight toward the shore. This involved slowing down so that the tubes did not swing to the side of the boat and making a small circle in which he briefly traveled clockwise before traveling perpendicular to the traffic flow in order to nose straight onto the beach. As he was traveling straight east toward the shore, Catron stated that he noticed two jet skis heading north (counterclockwise) toward the right side of Catron's boat. One of the jet skis was being ridden by Panek.

Catron estimated that when he first saw them, the jet skis were 75 yards away going approximately 35 to 40 miles per hour. Catron then looked back behind his boat to confirm that the tubes were traveling straight behind his boat. Stuart confirmed in her deposition testimony that right before the accident, the ropes pulling the tubes were taut and that the tubes were traveling directly behind the boat, inside the wake.

In his deposition, Catron indicated that he feared for his safety "[j]ust when [the jet skis were] aiming at my boat." He subsequently explained during a psychiatric examination that he was not really afraid that the jet skis were going to hit his boat; he just did not know for sure what they were going to do. He was able to make eye contact with Panek and the other boy riding the jet skis before they turned, and he assumed they would either shut down or turn to avoid hitting his boat. Catron did not make any evasive maneuvers. When the jet skis turned, Catron became afraid they were going to hit the tubes Rader and Stuart were on.

Panek did in fact run into Rader, killing her. Catron testified that he saw Panek's jet ski hit the tube Rader was on and then saw Rader lying face down in the water "in a pool of blood." Catron jumped in, swam over to her, and floated her back to the boat. Rader was nonresponsive. With assistance, Catron was able to get Rader to shore.

Panek also testified by deposition as to the events immediately preceding the accident. He stated that after coming out (counterclockwise) from the narrow channel, he saw Catron's boat coming in his general direction and then turning in front of him. In order to avoid the boat, Panek stated that he turned to his left

toward the rear of Catron's boat. Panek testified that he did not see the tubes trailing behind the boat until he was upon them.

Panek's description of the accident differs from Catron's in that Panek testified that he first saw Catron's boat as it was heading east and Panek was heading north to northwest. He then stated that the boat turned north to northeast toward shore, as Panek was turning west, effectively swinging the tubes in front of him.

Both Panek's and Catron's versions of the event, however, place the accident at least 61 feet from the rear of Catron's boat.

After the accident, Catron sought help coping with the mental injuries he suffered from witnessing Rader's death. Prior to the accident, Catron had no history of depression, anxiety, emotional problems, or psychiatric treatment. A psychiatrist treating Catron shortly after the accident diagnosed him with major depression, anxiety disorder, and adjustment disorder. The severity of Catron's symptoms was such that it warranted the psychiatrist's certification to Catron's employer that Catron was temporarily disabled from performing his regular occupation as a result of his "major depressive disorder and anxiety/adjustment disorder." Catron accordingly was unable to work for approximately 3 months following the accident. Catron was eventually diagnosed with posttraumatic stress disorder and continues to take antidepressants.

Following the filing of Catron's action against the State, the State raised the affirmative defense that it was immune from suit pursuant to Neb. Rev. Stat. § 81-8,219(1), (7), and (8) (Reissue 2003), and made a motion for summary judgment. Panek and Lewis also moved for summary judgment, arguing that no claim could be had against them for emotional distress because Catron did not fear for himself but was in fear for the people on the tubes. They also argued that Catron did not qualify as a "bystander" because he was not related to the victim. Panek and Lewis also argued that the evidence failed to show distress sufficiently severe to be recoverable. The State argued at the summary judgment hearing that in addition to its claims of lack of negligence and sovereign immunity, Catron was precluded from recovery because, given the distance of over 60 feet, he was not within the zone of danger. As Catron's counsel acknowledged at

the hearing, "elements of proof are that we have to prove negligence by the defendant, we have to prove that the plaintiff was in the zone of danger."

The summary judgment order filed October 1, 2004, granted summary judgment as to Catron's action against the defendants. The district court reasoned that Catron's allegations against the State fell under the discretionary function exception to the State Tort Claims Act and were therefore barred by sovereign immunity. In addition, without specifically rejecting the parties' argument that Catron was neither a bystander nor within the zone of danger, the court reasoned that summary judgment was proper as to all the defendants because Catron's emotional distress did not rise to the standard of being " 'so severe that no reasonable person could have been expected to endure it.' "

## ASSIGNMENT OF ERROR

Catron assigns that the district court erred in sustaining the defendants' motions for summary judgment.

## STANDARD OF REVIEW

[1] 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. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

## ANALYSIS

[2] In Nebraska, where there is no impact or physical injury to the plaintiff, the plaintiff seeking to bring an action for negligent infliction of emotional distress must show either (1) that he or she is a reasonably foreseeable "bystander" victim based upon an intimate familial relationship with a seriously injured victim of the defendant's negligence or (2) that the plaintiff was a "direct victim" of the defendant's negligence because the plaintiff was within the zone of danger of the negligence in question. See, *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003); *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). In addition, such plaintiffs whose only injury is an emotional one must show that their emotional distress is medically diagnosable and significant

and is so severe that no reasonable person could have expected to endure it. See *Hamilton v. Nestor, supra*.

The evidence is undisputed that Catron suffered no physical impact or injury from the accident which he attributes to the negligence of the defendants. Furthermore, Catron makes no argument that he had an intimate familial relationship with the fatally injured victim of the accident, Rader. The defendants argue that regardless of whether Catron's alleged emotional distress is of sufficient severity to be legally compensable, he cannot recover for such emotional distress because he was not within the zone of danger of the accident. We agree that viewing the evidence in a light most favorable to Catron, he was clearly not within the zone of danger, and we affirm the district court's grant of summary judgment in favor of the defendants on that basis. See *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991) (this court may affirm grant of summary judgment on any ground available to trial court, even if it is not same reasoning relied upon below).

In *James v. Lieb, supra*, in differentiating "bystanders" from "direct victims," we described the fact that bystanders are not "immediately threatened with physical injury." 221 Neb. at 49, 375 N.W.2d at 111. See, also, *Nielson v. AT & T Corp.*, 597 N.W.2d 434 (S.D. 1999) (zone of danger includes all parties who are placed in immediate risk of physical harm by defendant's negligent conduct); *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 457 N.E.2d 1, 75 Ill. Dec. 211 (1983) (to be in zone of danger, party must have been in such proximity to accident in which direct victim was physically injured that there was high risk to him of physical impact).

[3] The zone of danger has been described as a complement to the basic requirement that persons exercise reasonable care to protect others from injury. "Those who breach their basic duty of care to others will be required to compensate those who are injured, even when the injuries are not caused by direct impact, but by the operation of foreseeable emotional distress." *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236, 240-41 (Utah 1992). Persons in the zone of danger are clearly foreseeable plaintiffs to the negligent actor insofar as they have been placed at unreasonable risk of immediate bodily harm by the actor's negligence.

The fact that the harm results solely through emotional distress should not protect the actor from liability for such conduct. See, *Lozoya v. Sanchez*, 133 N.M. 579, 66 P.3d 948 (2003); *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990); Restatement (Second) of Torts § 436 (1965).

In *Zea v. Kolb*, 204 A.D.2d 1019, 613 N.Y.S.2d 88 (1994), the court held that an action for negligent infliction of emotional distress should have been dismissed because the plaintiff was never in any danger from the vehicle that struck and killed the victim. The plaintiff saw the vehicle while standing in a driveway and feared for the victim who was riding her bicycle on the opposite shoulder of the road. The plaintiff immediately ran after the vehicle, but remained on the opposite shoulder of the road and never overtook it. When the vehicle struck the victim, the plaintiff was 12 to 15 feet away. The plaintiff admitted she was never in any danger from the defendant's vehicle.

Similarly, in *Iacona v. Schrupp*, 521 N.W.2d 70 (Minn. App. 1994), the court affirmed summary judgment in favor of the defendants on the ground that the plaintiff was not within the zone of danger of a truckdriver's negligent conduct. The plaintiff sought damages for emotional distress resulting from witnessing his friend get run over by the truck that was backing up alongside the road to assist the plaintiff who was lying in the grass disorientated. Since the plaintiff was not actually in the road at the time the truckdriver was backing up, the court found he was not in danger of physical injury. Stating that a defendant has no duty to avoid injury to those not placed in peril by his conduct, the court concluded that to hold the truckdriver liable for the plaintiff's distress would "impose on a negligent tortfeasor liability out of proportion to his culpability." *Id.* at 73. Compare *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003) (as operator of one of vehicles involved in collision, motorist was clearly within zone of danger).

Here, it is clear that Catron was not immediately threatened with physical injury as a result of the alleged negligence which resulted in Rader's death. While Catron described the jet skis at one point as coming directly toward him at a rapid speed, Catron admitted he was not in immediate danger. Rather, at that point, the jet skis were approximately 75 yards away, and Catron

assumed the jet skis would either stop or turn in order to avoid a collision with the boat. This is what apparently happened, resulting in the collision with Rader, who was riding in the tube some 61 feet away from the rear of Catron's boat.

While it might be argued that others outside the zone of danger are also foreseeable victims, no jurisdiction allows recovery for all emotional harms, no matter how intangible or trivial, that might be causally linked to the negligence of another. *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994). This is true because "there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act," and thus, to allow recoverability for all such injuries "holds out the very real possibility of nearly infinite and unpredictable liability for defendants." 512 U.S. at 545-46.

This court has extended the class of potential plaintiffs to "bystanders" outside the zone of danger who have a close familial relationship with a seriously injured victim because, as the court in *Migliori v. Airborne Freight Corporation*, 426 Mass. 629, 637, 690 N.E.2d 413, 418 (1998), explained, "[p]ersons bearing close 'familial or other relationship' to the directly injured third person comprise a discrete and well-defined class, membership in which is determined by preexisting relationships." For witnesses having no such close relationship with the victim, however, we limit recoverability to those persons who are within the zone of danger of the negligent conduct which resulted in the incident in question.

## CONCLUSION

Catron was clearly neither a bystander nor a direct victim of the alleged acts which resulted in Rader's death. As a result, Catron cannot recover for the emotional distress allegedly caused by the negligence of the defendants. We, therefore, need not address any alternative grounds for affirmance argued by the parties. Although our reasoning differs from that of the district court, we affirm the district court's grant of summary judgment as to all the defendants.

AFFIRMED.

WRIGHT, J., not participating.

# STATE OF NEBRASKA EX REL. STEVEN M. JACOB, APPELLANT, V. SUZANNE E. BOHN ET AL., APPELLEES.

711 N.W.2d 884

Filed April 14, 2006. No. S-04-1410.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Declaratory Judgments.** Whether to entertain an action for declaratory judgment is within the discretion of the trial court.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, 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. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
6. **Mandamus.** The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
7. **Mandamus: Proof.** In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
8. **Constitutional Law: Actions.** In order to state a cause of action under 42 U.S.C. § 1983 (2000), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States.
9. **Declaratory Judgments.** Neb. Rev. Stat. § 25-21,154 (Reissue 1995) indicates discretionary rather than mandatory power, and whether to entertain an action for declaratory judgment is within the discretion of the trial court.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Steven M. Jacob, pro se.

Jon Bruning, Attorney General, and Maureen Hannon for appellees.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Steven M. Jacob filed an action in the district court for Lancaster County against Suzanne E. Bohn, Harold Clarke, and Frank Hopkins (collectively the Appellees). Jacob was identified as an inmate at the Nebraska State Penitentiary, Bohn was identified as the mental health administrator for the Nebraska Department of Correctional Services (DCS), Clarke was identified as the director of DCS, and Hopkins was identified as the assistant director of DCS. Jacob sought a writ of mandamus requiring Bohn to provide him with copies of certain of his mental health records. Jacob also sought judgment against the Appellees pursuant to 42 U.S.C. § 1983 (2000) for having denied him access to his mental health records. Finally, Jacob sought a declaratory judgment requiring Clarke to promulgate and file certain administrative regulations. The district court granted the Appellees' motion to dismiss Jacob's action for failure to state a claim for relief. Jacob appeals. We affirm.

## STATEMENT OF FACTS

In 1991, Jacob underwent certain mental health evaluations conducted by DCS as a part of the inmate classification procedure. The records of such tests were maintained by Bohn as the mental health administrator for DCS. On August 7, 2003, Jacob made a written request of Bohn for a copy of such mental health records. Having received no response, on September 3, Jacob filed an informal grievance and was told that Bohn had received his request and was in the process of responding to it. Jacob subsequently filed grievances as part of DCS' formal appeal process. Jacob filed a "step one" grievance on September 17 and a "step two" grievance on September 26. In response to the step two grievance, Hopkins, on behalf of Clarke, stated on October 22 that "[y]our comments regarding [DCS'] policies for providing inmates with access to their mental health records are noted."

On November 20, 2003, Jacob filed his initial action for writ of mandamus in district court seeking an order requiring Bohn to provide him a copy of his mental health records. Jacob alleged

that he was not being treated by any physician, psychologist, or mental health practitioner at the time he had requested his records on August 7 or at the time he filed his action. Jacob alleged that he had a right to a copy of his records pursuant to Neb. Rev. Stat. § 83-178 (Cum. Supp. 2004), Neb. Rev. Stat. § 71-8403 (Reissue 2003), and DCS' administrative regulation No. 115.23 (AR 115.23), dated November 11, 2002. Jacob alleged that such statutes and regulation gave him a right to obtain a copy of his records, and he sought mandamus ordering Bohn to provide a copy of the requested records or to show cause why she should not provide such copy.

Jacob also included a "Second Cause of Action" pursuant to 42 U.S.C. § 1983 in which he sought judgment against the Appellees for violating his civil rights. Jacob alleged that § 71-8403(2) created in him a property interest in the requested records. He alleged that Bohn had violated his property interest and that Clarke and Hopkins had given tacit approval to her failure to provide the records to Jacob. For relief, Jacob sought nominal damages and costs of the action.

On April 5, 2004, Jacob sought leave to amend his complaint. He asserted that he had recently learned that AR 115.23 had not been promulgated or filed with the Secretary of State. He therefore sought leave to amend to set forth a cause of action for declaratory judgment in which he would seek a declaration that he had a right pursuant to Neb. Rev. Stat. §§ 83-4,111 and 83-4,112 (Reissue 1999) to have AR 115.23, titled "Mental Health Services," and administrative regulation No. 116.01 (AR 116.01), dated December 12, 1994, titled "Inmate Rights," promulgated. Jacob was given leave to amend. On May 7, 2004, Jacob filed an amended complaint including a third cause of action for declaratory judgment. This amended complaint is the operative complaint on appeal.

On May 21, 2004, the Appellees filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003). Following a hearing, on June 25, the court entered an order sustaining the motion on the basis that Jacob had failed to state a cause of action. The court determined that the language of § 83-178(2) made the release of mental health records of an inmate discretionary and that therefore, mandamus was not

available to obtain such records. The court further determined that because there was no mandatory duty under § 71-8403(1) to provide mental health records, Jacob had no protected interest at stake and therefore no cause of action under 42 U.S.C. § 1983. Finally, the court determined that because AR 115.23 contained virtually the same language as § 71-8403(1), Jacob's request for a declaratory order requiring the promulgation of AR 115.23 and AR 116.01 was "pointless." The court therefore ordered that the Appellees' motion to dismiss be sustained, but gave Jacob 21 days to file a second amended complaint. Jacob did not file a second amended complaint. On November 4, the court entered an order dismissing Jacob's action. Jacob appeals the dismissal.

## ASSIGNMENTS OF ERROR

Jacob asserts that the district court erred in (1) finding that Bohn had no duty to provide him a copy of his mental health records, (2) finding that he had no protected interest in his mental health records and therefore no cause of action under 42 U.S.C. § 1983, and (3) dismissing his action for declaratory judgment.

## STANDARDS OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[3,4] Whether to entertain an action for declaratory judgment is within the discretion of the trial court. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004). 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. *Id.*

## ANALYSIS

*Jacob Was Not Entitled to Mandamus.*

Jacob asserts that the district court erred in concluding that because Bohn had no absolute duty to provide him a copy of his mental health records, he was not entitled to mandamus. We determine that neither § 83-178(2), § 71-8403, nor AR 115.23 creates in Jacob a clear right to access to his mental health records or a clear duty on the part of Bohn to provide such records, and we therefore conclude that the district court did not err in determining that Jacob was not entitled to mandamus.

[5-7] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002). The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.* In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *Id.*

Jacob sought mandamus against Bohn. Jacob alleged that pursuant to §§ 83-178(2) and 71-8403 and AR 115.23, he had a right to obtain, and Bohn had a duty to provide to him, a copy of his mental health records. In order to obtain mandamus, Jacob needed to show clearly and conclusively that under such statutes and regulation or otherwise, he was entitled to access his mental health records and that Bohn was legally obligated to provide such records. Section 83-178(2) provides in part:

> An inmate may obtain access to his or her medical records by request to the provider pursuant to sections 71-8401 to 71-8407 notwithstanding the fact that such medical records may be a part of his or her individual [DCS] file. [DCS] retains the authority to withhold mental health and psychological records of the inmate when appropriate.

Section 71-8403 provides in part:

> (1) A patient may request a copy of the patient's medical records or may request to examine such records. Access to such records shall be provided upon request pursuant to sections 71-8401 to 71-8407, except that mental health medical records may be withheld if any treating physician, psychologist, or mental health practitioner determines in his or her professional opinion that release of the records would not be in the best interest of the patient unless the release is required by court order. The request and any authorization shall be in writing and shall be valid for one hundred eighty days after the date of execution by the patient.
>
> (2) Upon receiving a written request for a copy of the patient's medical records under subsection (1) of this section, the provider shall furnish the person making the request a copy of such records not later than thirty days after the written request is received.

AR 115.23 provides in part:

> Access to the Mental Health Care Records shall be controlled by the Director of Mental Health or designee and shall not be granted without a court order except as stated below.
>
> . . . .
>
> . . . An inmate may request access to his/her psychological and Mental Health Care Record, and [DCS] will allow inmates access to their psychological and mental health records upon request unless any treating physician, psychologist, or mental health practitioner determines in their [sic] professional opinion that release of the records would not be in the best interest of the patient unless the release is required by court order. (Neb. Rev. Stat. §71-8403).

We conclude that the above-quoted statutes and regulation do not entitle Jacob access to the records in this case, nor do they legally obligate Bohn to provide such records. Section 83-178(2) provides that inmates may obtain access to their medical records, but because DCS "retains the authority to withhold mental health and psychological records of the inmate when appropriate," the statute is discretionary in nature. The statute did not obligate Bohn to provide the mental health records requested by Jacob

without exception. Instead, § 83-178(2) allowed Bohn the discretion to withhold the records if it was determined such withholding was appropriate.

Section 71-8403 and AR 115.23 also generally provide that medical records are to be provided; however, both provisions also allow discretionary exceptions when the records at issue involve mental health and psychological matters. Section 71-8403(1) provides that "mental health medical records may be withheld if any treating physician, psychologist, or mental health practitioner determines in his or her professional opinion that release of the records would not be in the best interest of the patient." AR 115.23 similarly provides that DCS "will allow inmates access to their psychological and mental health records upon request unless any treating physician, psychologist, or mental health practitioner determines in their [sic] professional opinion that release of the records would not be in the best interest of the patient." Because both § 71-8403(1) and AR 115.23 provide that "any treating physician, psychologist, or mental health practitioner" may determine that the release of mental health records would not be in the best interests of the patient, the release of mental health records under these provisions is discretionary.

Jacob argues that the withholding exceptions in § 71-8403 and AR 115-23 do not apply in this case because he was not being "treated" at the time he made the request for his mental health records and that therefore, there was no "treating" professional and no patient. Brief for appellant at 8. We do not read the phrases "any treating physician, psychologist, or mental health practitioner" and "best interest of the patient" in either § 71-8403 or AR 115.23 to exclude Bohn as a person currently eligible to determine whether release of mental health records was indicated or to exclude Jacob as a patient. "Patient" is defined in Neb. Rev. Stat. § 71-8402(3) (Reissue 2003) as including a patient or former patient. By seeking the records, Jacob has alleged in effect that he was a former patient and that Bohn was the mental health administrator for DCS who had control of the mental health records at the time Jacob sought their release. Giving § 71-8403 and AR 115.23 a sensible reading, under both provisions, Bohn was the current health professional who was able to determine whether release of the records of the former

patient was in the patient's best interests. In the present case, it was within Bohn's discretion to determine whether release of the mental health records would be in Jacob's best interests under § 71-8403 and AR 115.23.

We determine that Jacob did not show clearly and conclusively under the statutes and regulation cited or otherwise that he was entitled to access to the requested mental health records or that Bohn was legally obligated to provide such records. We therefore conclude that the district court did not err in determining that Jacob was not entitled to mandamus and in dismissing Jacob's action for mandamus. Jacob's first assignment of error is without merit.

*Jacob Was Not Entitled to Relief Under 42 U.S.C. § 1983.*

Jacob next asserts that the district court erred in concluding that he had no protected interest in the requested records and therefore no cause of action under 42 U.S.C. § 1983. As his second cause of action, Jacob alleged that § 71-8403(2) created in him a property interest in his mental health records and that the Appellees violated his property interest when they denied him access to the records. Jacob sought damages pursuant to 42 U.S.C. § 1983. We conclude that the district court did not err in dismissing this cause of action.

[8] In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States. See *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). Jacob argues that he had a property interest protected by federal due process. However, in order to have a protected property interest, one must have a legitimate claim of entitlement. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001). Property interests for purposes of procedural due process are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law. *Id.*

As discussed above, Jacob had no entitlement under state law to the mental health records he sought and, therefore, he had no constitutionally protected interest. As a result, Jacob failed to

allege that he had been deprived of any "rights, privileges, or immunities secured by the Constitution and laws" of the United States, and we conclude that he failed to state a cause of action under 42 U.S.C. § 1983. The district court did not err in so concluding and dismissing this cause of action. Jacob's second assignment of error is without merit.

*The District Court Did Not Err in Denying Declaratory Judgment.*

Finally, Jacob asserts that the court erred in dismissing his request for declaratory judgment. In his amended complaint, Jacob requested a declaration that he had a right to have AR 115.23 and AR 116.01 promulgated and filed pursuant to the Administrative Procedure Act. We conclude that the district court did not abuse its discretion in dismissing Jacob's action for declaratory judgment.

Jacob argued that if AR 115.23 did not create an enforceable right because the regulation had not been promulgated, then he was entitled to a declaration that this regulation and AR 116.01 must be promulgated. We note that the district court did not dismiss Jacob's action for mandamus because the regulations had not been promulgated. Instead, the court found that AR 115.23 and AR 116.01 contained "virtually the exact language" as the statutes upon which Jacob was relying and that such statutes were unavailing. With regard to Jacob's request for declaratory judgment, the court determined that because the regulations did not create any greater right in Jacob than existed under the statutes, Jacob's action seeking a declaration that both regulations must be promulgated was "pointless."

[9] Under Neb. Rev. Stat. § 25-21,154 (Reissue 1995), a 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 stated that § 25-21,154 indicates discretionary rather than mandatory power and that whether to entertain an action for declaratory judgment is within the discretion of the trial court. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004).

As noted in part above, the language of the regulations, like the language of the statutes, does not create a mandatory duty to

release mental health records, but instead provides for discretion to withhold such records. Therefore, whether or not the regulations ought to have been filed and promulgated, the regulations would not have given Jacob an absolute right of access to the records that he sought. Therefore, a declaration that the regulations ought to have been filed and promulgated would not have terminated the uncertainty or controversy in these proceedings where the ultimate issue involving release of the mental health records nevertheless remained discretionary. The district court did not abuse its discretion by dismissing Jacob's action for declaratory judgment. Jacob's final assignment of error is without merit.

## CONCLUSION

We conclude that the district court did not err in determining that Jacob was not entitled to mandamus, relief under 42 U.S.C. § 1983, or declaratory judgment. We therefore affirm the court's dismissal of Jacob's action.

AFFIRMED.

WRIGHT, J., not participating.

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# TROY CARRUTH, APPELLANT, V. STATE OF NEBRASKA, DOING BUSINESS AS UNIVERSITY OF NEBRASKA MEDICAL CENTER, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

712 N.W.2d 575

Filed April 21, 2006. Nos. S-04-1305, S-04-1422.

1. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) provides that when a matter outside of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2004).
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Limitations of Actions: Appeal and Error.** The determination of 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.

4. **Malpractice: Limitations of Actions.** If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law.
5. **Limitations of Actions: Negligence: Torts.** It has generally been stated that in a negligence action, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs.
6. **Limitations of Actions: Malpractice.** For claims alleging medical malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed.
7. ____: ____. The 1-year discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 1995) is inapplicable when a plaintiff discovers his or her cause of action while the statute of limitations period is still running.
8. **Tort Claims Act.** Tort claims against a state agency must be brought under the State Tort Claims Act.
9. **Tort Claims Act: Public Officers and Employees: Limitations of Actions.** Neb. Rev. Stat. §§ 81-8,213 and 81-8,227 (Reissue 2003) have been interpreted to require a claimant to file his or her claim with the State Claims Board within 2 years of the accrual of the claim and to provide that the suit must be filed in court within 6 months after the claims board provides written notice to the claimant of final disposition if the 2-year limitations period would otherwise expire before the end of the 6-month period.
10. **Limitations of Actions.** The discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 1995) is a tolling provision which permits the filing of an action after the 2-year statute of limitations only in those circumstances where the cause of action was not discovered and could not reasonably have been discovered within that period.
11. **Statutes: Words and Phrases.** Under Neb. Rev. Stat. § 25-213 (Reissue 1995), a person is within the age of 20 years until he or she becomes 21 years old.
12. **Limitations of Actions: Negligence.** The beneficence of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact discovers, or in the exercise of reasonable diligence should have discovered, an injury within the initial period of limitations running from the wrongful act or omission.

Appeals from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Phillip G. Wright, and, on brief, David M. Handley, of Wright & Associates, for appellant.

Earl G. Greene III, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee State of Nebraska, doing business as University of Nebraska Medical Center.

Michael G. Monday, of Sodoro, Daly & Sodoro, for appellees University Medical Associates and Debra Sudan, M.D.

HENDRY, C.J., CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

HANNON, Judge, Retired.

## NATURE OF CASE

These consolidated appeals concern the time limit within which a plaintiff must bring an action for alleged malpractice under the statutes of limitation for professional negligence, Neb. Rev. Stat. § 25-222 (Reissue 1995), and for the State Tort Claims Act, Neb. Rev. Stat. § 81-8,227 (Reissue 2003), when the alleged negligent act occurred during the plaintiff's minority but was not discovered (or reasonably discoverable) until after the plaintiff's 21st birthday but within 2 years of that birthday. The plaintiff in this action, Troy Carruth, maintains that Neb. Rev. Stat. § 25-213 (Reissue 1995), which tolls the applicable statutes of limitation when a plaintiff is under the age of 21 years at the time the cause of action accrued, does not apply in this case because the professional negligence was not discovered until he was 22 years old, and hence, he claims his causes of action did not accrue when he was under the age of 21 years. We conclude that because of the interplay of these statutes, as previously interpreted, when a plaintiff is under the age of 21 years at the time his or her claim accrues, the statute of limitations period runs from the plaintiff's 21st birthday, and that when the injury is discovered within the 2-year limitations period, the discovery principle does not apply to toll the applicable statutes of limitation. Therefore, Carruth's claims in these cases were not timely filed.

## STANDARD OF REVIEW

The defendants raised the statute of limitations issue by filing motions to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a claim upon which relief can be granted. See *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005). A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Harris v. Omaha Housing Auth., supra.*

[1] In this case, the record shows that Carruth did not allege his date of birth in his complaints, and therefore, the complaints did

not contain a pertinent fact. That fact was placed in the record by stipulation of the parties. Rule 12 provides that when a matter outside of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2004). The district court's order was couched in terms of the granting of motions to dismiss, and the court dismissed the cases as it would have under the old procedure. However, substantively the same result was accomplished, and therefore, we shall treat the orders appealed from as orders granting the defendants' motions for summary judgment and dismissing the complaints.

[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. *NEBCO, Inc. v. Adams*, 270 Neb. 484, 704 N.W.2d 777 (2005).

[3,4] The determination of 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. *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998). If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law. *Id.*

## FACTS

The parties have stipulated that Carruth was born on February 2, 1980. Carruth has alleged that on January 31, 1997, at the age of 16 years, he underwent a liver transplant at the University of Nebraska Medical Center (UNMC) under the direction and supervision of defendant Dr. Debra Sudan, who was employed by defendant University Medical Associates. On February 1, as part of Carruth's postoperative treatment, medical staff inserted a nasogastric (NG) catheter and a gastric pH monitor. He was discharged from UNMC on February 6.

In October 2002, Carruth, then 22 years old, began to experience severe pain in his abdomen. He underwent surgery on October 30, and surgeons discovered in his small intestine a piece of either the NG catheter or the gastric pH monitor, which

Carruth alleges became separated during his treatment at UNMC in 1997 and eventually lodged in his intestine.

On September 23, 2003, Carruth filed a claim against UNMC with the State Claims Board. On October 28, 2003, he filed a complaint against the defendants in the district court for Lancaster County, but because he did not serve UNMC, UNMC was dismissed without prejudice in that case. The case was eventually transferred to the district court for Douglas County due to venue considerations. On June 9, 2004, Carruth filed another complaint against the defendants in the district court for Douglas County. In this second action, however, Carruth served UNMC, but not the other defendants. Thus, although Carruth's cases in district court were captioned identically, Sudan and University Medical Associates were the defendants of record in the proceedings below in case No. S-04-1422, while UNMC was the defendant of record in case No. S-04-1305.

The district court granted the defendants' motions to dismiss. Carruth filed a motion for new trial, which the court treated as a motion to alter or amend the judgment, and the court overruled his motion. The appeals were consolidated, and this court moved them to its docket on its own motion pursuant to the court's 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

Carruth has assigned six errors, but they may be fairly summarized as alleging that the district court erred in determining that Carruth's cause of action accrued on February 6, 1997; in determining that the applicable statutes of limitation were tolled until Carruth reached 21 years of age; and in failing to find that the cause of action accrued on October 30, 2002, when Carruth discovered the medical malpractice.

## ANALYSIS

[5,6] Carruth's claims are based upon professional negligence. It has generally been stated that in a negligence action, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002); *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997). This

principle has been referred to as "the occurrence rule." See, e.g., *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996). In medical malpractice actions, Nebraska has adopted the continuing treatment doctrine and has merged it with the occurrence rule. See *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001). For claims alleging medical malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed. See, *id.*; *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996).

The statute of limitations applicable to professional negligence, § 25-222, provides in pertinent part:

> Any action to recover damages based on alleged professional negligence . . . 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 . . . .

(Emphasis supplied.)

[7] This court has held that the 1-year discovery exception of § 25-222 is inapplicable when plaintiffs discover their causes of action while the statute of limitations period is still running. In *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989), the defendant surgeon operated on the plaintiff in February 1981 and continued to treat her through December 1982. In August 1984, another physician discovered facts which amounted to the discovery of possible malpractice in the 1981 surgery. The statute of limitations was deemed to have commenced to run in December 1982. The plaintiff filed her action June 11, 1985, a date more than 2 years after treatment had ended but within 1 year of the date the possible malpractice was discovered. This court held that the running of the 2-year statute of limitations barred the plaintiff's action, even though she discovered the cause of action just 4 months before the expiration of the limitations period. This ruling has been followed in *Egan v. Stoler*,

265 Neb. 1, 653 N.W.2d 855 (2002), and in *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998).

[8,9] The case at hand is somewhat complex because a separate statute of limitations applies to Carruth's claim against UNMC. UNMC is operated by the Board of Regents of the University of Nebraska, which is a state agency, and tort claims against a state agency must be brought under the State Tort Claims Act. See *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), *overruled on other grounds, Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988). The applicable statute of limitations under the State Tort Claims Act, § 81-8,227, provides in pertinent part as follows:

> (1) Every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by such act. . . .
>
> . . . .
>
> (4) This section and section 25-213 shall constitute the only statutes of limitations applicable to the State Tort Claims Act.

Section 81-8,227 and Neb. Rev. Stat. § 81-8,213 (Reissue 2003) have been interpreted to require a claimant to file his or her claim with the State Claims Board within 2 years of the accrual of the claim and to provide that the suit must be filed in court within 6 months after the claims board provides written notice to the claimant of final disposition if the 2-year limitations period would otherwise expire before the end of the 6-month period. See *Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002).

[10] In *Weaver*, the plaintiff was treated by the defendant physician for liver problems in 1991 and was last treated by him as late as July 1992. The plaintiff learned of possible negligence by the defendant in February 1994. Although she learned of the possible malpractice action within the initial 2-year statute of limitations period, she waited to file her action until January 1995, within 1 year of the date of discovery but more than 2 years after the defendant had last treated her. The applicable statute of limitations in *Weaver* was Neb. Rev. Stat. § 44-2828 (Reissue 2004), which provided the same 2-year limitations period and the same discovery rule as found in § 25-222. In concluding the statute of

limitations had run, this court said: "The discovery exception is a tolling provision which permits the filing of an action after the 2-year period only in those circumstances where the cause of action was not discovered and could not reasonably have been discovered within that period." *Weaver v. Cheung*, 254 Neb. at 354, 576 N.W.2d at 777.

[11] Carruth was under the age of 21 years when the claimed negligent act or omission occurred, that is, when part of either the NG catheter or the gastric pH monitor allegedly separated and was left in Carruth's body. Therefore, the limitations periods in §§ 25-222 and 81-8,227 were subject to the tolling provision found in § 25-213. That statute provides in pertinent part:

> [I]f a person entitled to bring any action mentioned in this chapter . . . or the State Tort Claims Act . . . 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.

*Id*. Under § 25-213, a person is within the age of 20 years until he or she becomes 21 years old. *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000).

The defendants argue that Carruth's claims accrued when the alleged negligent act or omission occurred, i.e., in 1997. They admit that the cause of action was not discovered (and could not reasonably have been discovered) until October 30, 2002. They argue, however, that under § 25-213, the 2-year limitations period did not begin to run until Carruth's 21st birthday on February 2, 2001, and that the 2-year period had not yet expired when Carruth discovered the alleged negligent act on October 30, 2002. On this basis, the defendants maintain that the discovery rule is not applicable and that the claims were barred by the applicable statutes of limitation because Carruth failed to file suit on or before February 2, 2003.

Carruth relies on the discovery rule in his assertion that the applicable limitations periods did not begin to run until October 30, 2002, the date on which the foreign material was found in his small intestine. If the discovery rule applied, his claims would have been timely filed. However, Carruth misapprehends

the operation of the discovery rule. It does not apply in this case because discovery was made before the 2-year period of the applicable statutes of limitation had run.

As support for his argument, Carruth relies upon *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), in which a medical doctor left a foreign object in the plaintiff nearly 9 years before it was discovered. This court held in the plaintiff's favor and stated that "the cause of action in this case did not accrue until the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, that a foreign object had been left in her body." *Id.* at 43, 115 N.W.2d at 585. *Spath* differs from the case at hand in two respects. First, the plaintiff in *Spath* was not under the age of 21 years when the foreign object was left in her body. Second, the application of the discovery rule has since been restricted, both by statute, as this court pointed out in *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 546 N.W.2d 310 (1996), and by later case law.

*Berntsen* involved alleged professional negligence by an accounting firm. The plaintiffs maintained the statute of limitations period did not begin to run until the negligent act was discovered or in the exercise of reasonable diligence should have been discovered—a position identical to Carruth's position in this case. The plaintiffs in *Berntsen* relied upon *Spath* to support their position. The *Berntsen* court explained that *Spath* was decided in 1962, before the discovery rule was codified in § 25-222 by the Legislature in 1972. The *Berntsen* court then explained why the statement upon which Carruth relies is no longer correct. In so doing, this court reaffirmed the long-held occurrence rule by stating:

> Importantly, § 25-222 does not alter our long-held approach to when a cause of action accrues. We continue to abide by the occurrence rule in actions arising in tort and in malpractice actions . . . . Under that rule, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs.

*Berntsen*, 249 Neb. at 911, 546 N.W.2d at 314-15.

[12] Later, this court summarized the application of the discovery rule in *Shlien v. Board of Regents*, 263 Neb. 465, 640

N.W.2d 643 (2002) (holding that discovery rule is applicable to State Tort Claims Act). The court stated:

> [T]he beneficence of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact discovers, or in the exercise of reasonable diligence should have discovered, the injury within the initial period of limitations running from the wrongful act or omission. However, in a case where the injury is not obvious and is neither discovered nor discoverable within the limitations period running from the wrongful act or omission, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury.

*Shlien*, 263 Neb. at 473, 640 N.W.2d at 650.

These cases did not specifically consider a situation such as Carruth's, where the plaintiff was under 21 years of age when the alleged professional negligence occurred. Clearly, under § 25-213, Carruth's right to bring this lawsuit was extended until 2 years after he reached his 21st birthday on February 2, 2001. Section 25-213 reads as follows: "[I]f a person entitled to bring any action . . . is, at the time the cause of action accrued, within the age of twenty years . . . such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed." This statute does not purport to change the occurrence rule, but tolls the running of the statute of limitations period. The statute, then, allowed Carruth to bring these actions within the time limited for the actions (i.e., 2 years) after his 21st birthday on February 2, 2001. In other words, he had until February 2, 2003, to file his claims, but he failed to do so.

## CONCLUSION

Carruth's claims accrued on February 6, 1997, when he was discharged from UNMC following his liver transplant. Because he was under the age of 21 years at that time, § 25-213 tolled the running of the applicable 2-year limitations period until February 2, 2001, the date on which he became 21 years old. Accordingly, Carruth had until February 2, 2003, to file his claims against the defendants. Carruth did not file any claim until September 2003. Because the foreign material was found in his small intestine in

October 2002, within the limitations period, the discovery rule is inapplicable. Therefore, the district court did not err in dismissing Carruth's complaints based on the fact that his claims were barred by the applicable statutes of limitation.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.

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C. RONALD LAMBERT AND CHARLOTTE K. LAMBERT, APPELLANTS, AND SANITARY AND IMPROVEMENT DISTRICT NO. 5, APPELLEE, V. JAMES J. HOLMBERG AND MARY LOU HOLMBERG, APPELLEES.

712 N.W.2d 268

Filed April 21, 2006. No. S-04-1334.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
2. **Trespass: Title.** To bring an action in trespass, the complaining party must have had title to or legal possession of the land when the acts complained of were committed.
3. **Trespass: Liability.** Liability for trespass exists if an actor intentionally enters land in the possession of another, or causes a thing or a third person to do so.
4. **Trespass: Words and Phrases.** An actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land. It is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.
5. **Trespass.** A trespass can be committed on, above, or beneath the surface of the land.
6. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
7. **Trespass: Injunction.** When simple acts of trespass are involved, equity generally will not act. However, where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted.
8. ____: ____. Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.

9. **Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
10. **Trespass: Injunction: Equity.** A continuous and repeated trespass does not automatically demand injunctive relief, because an action for injunction sounds in equity.
11. **Equity.** Equity is not a rigid concept, and its principles are not applied in a vacuum. Rather, equity is determined on a case-by-case basis when justice and fairness so require.
12. **Injunction.** The writ of injunction is not a "writ of right," and, particularly when the interests of the public are involved, may be withheld when it is likely to inflict greater injury than the grievance complained of.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

James G. Egley, of Moyer, Moyer, Egley, Fullner & Montag, for appellants.

Kristopher J. Covi, Mark F. Enenbach, and Thomas O. Kelley, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees James J. Holmberg and Mary Lou Holmberg.

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

STEPHAN, J.

This is an equitable action seeking injunctive relief for a repeated and continuous trespass involving a private sewerline. The district court for Platte County determined that James J. Holmberg and Mary Lou Holmberg committed an indirect trespass when they connected the sewerline from their home to a public sewer system which ultimately connected to a private sewerline owned by C. Ronald Lambert and Charlotte K. Lambert. The court determined, however, that the Lamberts were not entitled to injunctive relief because they failed to prove substantial damages. Although we determine on de novo review that a direct or traditional trespass occurred, we conclude that the Lamberts have an adequate remedy at law and are not entitled to injunctive relief.

## FACTS

The Holmbergs are the owners of a residence located in Columbus, Platte County, Nebraska. Sanitary Improvement

District No. 5 (SID 5) is located to the east of the Holmberg residence, across 48th Avenue. In approximately 1973, the Lamberts developed the Hillside Estates subdivision, which is located south of SID 5 and southeast of the Holmberg residence. The Lamberts also own undeveloped property located to the south of Hillside Estates. When developing Hillside Estates, the Lamberts constructed roads and laid sewerlines in the subdivision.

In 1973, the Lamberts dedicated the Hillside Estates subdivision and 60th Street located therein. In the deed of dedication, the Lamberts specifically dedicated to the perpetual use and benefit of the public each of the strips set out and designated in the subdivision as public roads, and further granted perpetual easements as shown on the plat for the installation and maintenance of utilities to serve the owners of the subdivision lots. The dedication was accepted by Platte County and the city of Columbus. Neither the deed of dedication nor the resolutions of acceptance provided the Lamberts any exclusive rights to the sewers or other utilities and roads dedicated to the use and benefit of the public.

A sanitary sewerline located beneath the dedicated streets of the Hillside Estates subdivision crosses the southern boundary of the subdivision and then extends east across the undeveloped property owned by the Lamberts. The line running across this undeveloped Lambert property extends 1,872 feet before connecting with the sewerline maintained by the city of Columbus. This 1,872-foot section of "private" sewerline is the site of the alleged trespass.

In 1980, the Lamberts entered into a perpetual hookup agreement which authorized SID 5 to connect its system of sewers to the sewerline running across the Lamberts' private property for the purpose of conveying SID 5 sewage to the sewer main owned by the city. SID 5 paid the Lamberts $16,280 and agreed to be proportionately responsible for future maintenance of the Lamberts' sewerline. In 1987, the Lamberts entered into a similar perpetual hookup agreement with Sanitary Improvement District No. 9 (SID 9), which permitted that district to also run its sewage through the Lambert line prior to connecting with the sewer main owned by the city. SID 9 is located north of the Holmberg residence and northwest of SID 5. Under the agreement, SID 9 paid

the Lamberts $16,000 and agreed to be proportionately responsible for future maintenance of the sewerline.

The Lamberts also developed an area directly north of SID 5 known as Country Shadows. In 1994, the Lamberts connected the Country Shadows sewer system to the SID 5 sewer system without first securing the permission of SID 5. As a result of negotiations, the Lamberts subsequently paid $14,070 for the right to connect the Country Shadows sewer system to that of SID 5.

In October 2000, the Holmbergs notified SID's 5 and 9 and the Lamberts of their desire to connect to an existing sewerline located beneath 48th Avenue, which lies to the east of the Holmberg residence and to the west of SID 5, Hillside Estates, and the undeveloped Lambert property. Sewage entering at this connection point would necessarily pass through the Lamberts' private sewerline prior to entering the city's sewage system. The Holmbergs expressed a willingness to pay fees similar to those paid by other homeowners in the area. The Lamberts refused to grant permission to use the private line.

In November 2000, the Holmbergs received a permit from the city of Columbus allowing them to connect to the city sewer system. The Holmbergs also acquired a permit from Platte County allowing them to construct their sewer hookup across 48th Avenue. The Holmbergs then hired a contractor and, at their own expense, connected to the existing sewerline located beneath 48th Avenue. The point of connection is beneath a public roadway and is not within the geographic boundaries of SID 5 or any property owned by the Lamberts. However, sewage entering at this connection point eventually and necessarily passes through the segment of private sewerline owned by the Lamberts before it reaches the city sewer system.

The Lamberts brought this action alleging that the Holmbergs' use of the Lamberts' private sewerline constitutes a repeated and continuous trespass entitling the Lamberts to injunctive relief. SID 5 later joined in the petition. After conducting an evidentiary hearing, the district court concluded that because the sewer connection was not on property owned by either the Lamberts or SID 5, there was no direct trespass committed. The court reasoned that the action was instead one for indirect trespass and

refused relief after concluding that the Lamberts failed to prove they suffered substantial damages. The Lamberts filed 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). SID 5 has not joined in the appeal.

## ASSIGNMENTS OF ERROR

The Lamberts assign that the trial court erred in (1) finding that the Holmbergs' use of the Lamberts' sewerline is not a case of direct trespass, (2) adopting the doctrine of indirect trespass and requiring the Lamberts to prove substantial damages, (3) applying the doctrine of indirect trespass to a case which bears no relation to the line of cases out of which the doctrine arose, and (4) determining that the Lamberts did not prove substantial damages.

## STANDARD OF REVIEW

[1] An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

## ANALYSIS

### Traditional or Indirect Trespass?

[2] The Lamberts assert that the district court erred in finding that an indirect trespass occurred. They argue that the action is instead based upon a direct or traditional trespass theory as defined by our case law and the Restatement (Second) of Torts § 157 et seq. (1965). To bring an action in trespass, the complaining party must have had title to or legal possession of the land when the acts complained of were committed. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994). It is undisputed that the Lamberts have legal possession of the private sewerline. However, the district court concluded that the possession requirement was not established by the Lamberts in the instant case because the geographic point at which the Holmbergs connected to the sewer was not on the Lamberts' property and was instead beneath a

public street. See Neb. Rev. Stat. § 39-1404 (Reissue 2004) (no private party may acquire interest in any part of city street).

[3,4] The geographic point of connection is not outcome determinative because liability for trespass exists if an actor intentionally "enters land in the possession of [another], or *causes a thing* or a third person to do so." (Emphasis supplied.) Restatement, *supra*, § 158(a) at 277. The Holmbergs' connection to the sewerline beneath 48th Avenue clearly and necessarily causes sewage to enter and pass through the privately owned sewerline beneath the undeveloped Lambert property. Although the entry was not direct and immediate, it nevertheless amounted to a trespass because an "actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land." Restatement, *supra*, § 158, Comment on Clause (a)*i*. at 278. Further, "it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." *Id*. at 278-79.

Without expressly stating these principles, we have applied them in analogous situations. In *Lackaff v. Bogue*, 158 Neb. 174, 62 N.W.2d 889 (1954), the plaintiffs constructed ditches in order to divert water from two lakes. Although the ditches were constructed entirely on the plaintiffs' land, they caused the lake water to drain over the defendants' land. The trial court found a trespass had occurred and entered an injunction requiring the plaintiffs to fill the ditches, and we affirmed. Similarly, in *Faught v. Platte Valley Public Power & Irri. District*, 147 Neb. 1032, 25 N.W.2d 889 (1947), we affirmed a decision ordering an irrigation district to increase the carrying capacity of a canal located on the district's property after the negligent design of the canal caused floodwaters to trespass onto a farmer's land.

In a case involving facts similar to those of this case, the Supreme Court of Alabama applied a traditional trespass analysis and found that the repeated dumping of sewage into a private line by way of a separate private line was a continuous trespass. *Underwood v. West Point Manufacturing Company*, 270 Ala. 114, 116 So. 2d 575 (1959). Other jurisdictions have similarly applied

a traditional trespass theory, even when the act alleged to constitute a trespass occurred away from the complaining landowner's premises. See, *Miller v. Carnation Company*, 33 Colo. App. 62, 68, 516 P.2d 661, 664 (1973) (interpreting Restatement (Second) of Torts § 158 (1965) and finding that "landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property"); *Western Union Telegraph Co. v. Bush*, 191 Ark. 1085, 1090, 89 S.W.2d 723, 725 (1935) ("[i]t is sufficient if the wrongdoer actually set in motion some dangerous agency which in itself, though far distant from the wrongdoer, inflicts a wrong, such is a 'breaking of the close,' and for such trespass relief is granted").

The Holmbergs rely on *Cornwall v. Garrison*, 59 Idaho 287, 81 P.2d 1094 (1938), in support of their argument that the instant case involves only an indirect trespass. In that case, the court held that one who constructs a sewer beneath a city street is not the owner of the sewer and thus cannot enjoin its use by another. This holding is factually inapplicable to the instant case because it is undisputed that the Lamberts do have a private ownership interest in at least one portion of the sewer system through which the Holmbergs are emitting waste material. Moreover, the Lamberts' private sewerline is not located beneath a public street. The rationale of *Cornwall* thus does not aid us in resolving the instant dispute.

[5] This court has never considered whether to recognize the doctrine of indirect trespass. We need not do so here because we conclude that the record establishes that the Holmbergs' act of connecting to the sewer system beneath 48th Avenue constituted a trespass on the Lamberts' property under traditional trespass principles. Sewage released by the Holmbergs at the connection point necessarily passes through the Lamberts' private sewerline before reaching the city sewer system, and thus it is more than a "substantial certainty" that the connection will ultimately result in a trespass on the Lamberts' private line. See Restatement, *supra*. When the sewage emitted from the Holmberg residence ultimately enters the Lamberts' private sewerline, it constitutes a continuous and repeated trespass on that segment of sewerline located beneath the Lamberts' undeveloped property, inasmuch

as a trespass can be committed on, above, or beneath the surface of the land. See Restatement, *supra*, § 159.

PROPRIETY OF INJUNCTIVE RELIEF

[6] An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001); *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

[7-9] When simple acts of trespass are involved, equity generally will not act. See *Harders, supra*. However, where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. *Id*. Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. *Lackaff v. Bogue*, 158 Neb. 174, 62 N.W.2d 889 (1954). In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Id*. An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Standard Oil Co. v. O'Hare*, 122 Neb. 89, 239 N.W. 467 (1931).

In other cases involving continuous and repeated trespasses, we have concluded that injunctive relief was proper without requiring the landholder to show anything other than nominal damages. *Harders, supra* (adjacent landowners properly enjoined from using farm lane even though use did not harm landholder); *Thomas v. Weller*, 204 Neb. 298, 281 N.W.2d 790 (1979) (injunction proper where one repeatedly moved sand in duckblind, even though no evidence of damage or irreparable harm); *Van Donselaar v. Conkey*, 177 Neb. 169, 128 N.W.2d 390 (1964) (injunction proper to prevent repeated trespass on farmland); *Jurgens v. Wiese*, 151 Neb. 549, 554, 38 N.W.2d 261, 264 (1949) ("[e]quity will interfere by injunction to prevent destruction of a

hedge . . .”); *Fenster v. Isley*, 143 Neb. 888, 11 N.W.2d 822 (1943) (injunction proper against one who continually trespassed upon land to harvest).

Case law from other jurisdictions also generally supports the award of injunctive relief in situations involving repeated trespasses into sewer systems. For example, in *Underwood v. West Point Manufacturing Company*, 270 Ala. 114, 116 So. 2d 575 (1959), the homeowner’s action in connecting to a private sewerline was held to be a continuous trespass for which there was no adequate remedy at law, entitling the owner of the sewer system to injunctive relief. See, also, *Newport Manor v. Carmen Land Co.*, 82 So. 2d 127 (Fla. 1955) (builder of private sewer can compel unauthorized user to disconnect); *Atkinson Trust & Sav. Bank v. DeRoo*, 332 Ill. App. 251, 75 N.E.2d 46 (1947) (injunction proper to prevent tap into a private drain where connection would cause overload); *Kittrell v. Angelo*, 170 Ark. 982, 282 S.W. 363 (1926) (same).

[10-12] However, a continuous and repeated trespass does not automatically demand injunctive relief, because an action for injunction sounds in equity. See, *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003); *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003). Equity is not a rigid concept, and its principles are not applied in a vacuum. Rather, 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). Moreover, the writ of injunction is not a “ ‘writ of right,’ ” and, particularly when the interests of the public are involved, may be withheld “ ‘when it is likely to inflict greater injury than the grievance complained of.’ ” *McCubbin v. Village of Gretna*, 174 Neb. 139, 145, 116 N.W.2d 287, 291 (1962). Stated another way,

> [a] court of equity can never be justified in making an inequitable decree. If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies.

*McCann v. Chasm Power Co.*, 211 N.Y. 301, 305, 105 N.E. 416, 417 (1914).

The function of the sewerline at issue in this action is a matter of significant public concern because proper disposition of sewage is "an absolute essential." *City of Omaha v. Matthews*, 197 Neb. 323, 326, 248 N.W.2d 761, 763 (1977). See, also, *Bedford Township v Bates*, 62 Mich. App. 715, 233 N.W.2d 706 (1975) (generally discussing importance of sewer systems to public health). The relationship between a private sewer system and nearby public systems is a factor which other courts have weighed in deciding whether to grant injunctive relief for a continuous and repeated trespass involving sewerlines. Although the court in *Underwood* ultimately concluded that injunctive relief was proper, it expressly considered the public interest, noting that there was no indication in the record that the landowner's sewage system was "so effected with a public interest as to entitle all property owners in the vicinity who are willing to pay a reasonable fee to connect with it." 270 Ala. at 118, 116 So. 2d at 578. Similarly, the court in *Atkinson Trust & Sav. Bank* noted that there was no evidence that the private sewer at issue was "an integral part of the public sewer system of the village." 332 Ill. App. at 255, 75 N.E.2d at 49. In *Bradley v. Schwab*, 3 Ohio App. 359 (1914), the court refused to enjoin a connection to a private sewer, specifically finding that there was no showing that the tap resulted in an overburden on the system.

Thus, although the trespass in this case was repeated and continuous, we conclude that equity requires a balancing of the degree to which it impaired the Lamberts' property rights against the public interest in proper disposition of sewage in order to determine whether the trespass should be enjoined. The trespass, while real, was largely imperceptible. Unlike the circumstances in *Atkinson Trust & Sav. Bank* and *Kittrell*, there is no proof that the infusion of the Holmbergs' sewage commingled with that originating in the two sanitary and improvement districts would overload or even threaten the capacity of the private sewerline. Also, the record reflects that the Holmbergs have always stood ready to pay connection fees and a proportionate share of future maintenance costs on the same basis as homeowners in SID's 5 and 9, a pledge repeated by their counsel during oral argument of this appeal. Thus, the nature of the trespass at issue here results in

only minimal interference with the Lamberts' possessory interest in their property.

Unlike the complainant in *Underwood v. West Point Manufacturing Company*, 270 Ala. 114, 116 So. 2d 575 (1959), the Lamberts do not operate a private sewage disposal system. Their sewerline connects at both ends to public sewerlines and is, therefore, a conduit through which sewage flows from public sewers to the sewage system of the city of Columbus. The record thus establishes that the Lamberts' private sewerline has become an integral part of a public sewer system. All of the sewer systems in the area of the Holmberg residence ultimately connect to the Lamberts' private line prior to connecting to the city's sewer system. The public interest would not be served, and indeed could be harmed, if the Holmbergs were prevented from connecting to a public sewer system having a privately owned segment, where they are willing to pay for the privilege of using that segment on the same terms as other users and their use would not overload or otherwise harm the system. Thus, while permitting the Holmbergs' connection will nominally impede the Lamberts' exclusive rights to possession of their sewerline, we conclude that such impediment is outweighed by the public interest in efficient and safe disposal of sewage. Neither equity nor the public interest is served by permitting the owner of a private sewerline connecting public sewer systems to unreasonably deny access.

On the unique facts of this case, we conclude on de novo review that injunctive relief for the continuous and repeated trespass is not proper. Any failure of the Holmbergs to pay connection fees and a proportionate share of future maintenance costs can be adequately remedied by an action at law. The same is true with respect to the Lamberts' allegations that the Holmbergs' connection reduces by one the number of currently undeveloped lots which can eventually be connected to the sewer system. Here, the legal remedy available to the Lamberts is at least as "plain and complete and as practical and efficient to the ends of justice and its prompt administration" as the remedy of injunctive relief. *Standard Oil Co. v. O'Hare*, 122 Neb. 89, 93, 239 N.W. 467, 469 (1931).

## CONCLUSION

For the reasons discussed, we affirm the judgment of the district court denying injunctive relief.

AFFIRMED.

WRIGHT, J., not participating.

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# METROPOLITAN UTILITIES DISTRICT OF OMAHA, A NEBRASKA POLITICAL SUBDIVISION AND MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE, V. AQUILA, INC., APPELLEE, A DELAWARE CORPORATION, AND THE NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE AND CROSS-APPELLANT.

712 N.W.2d 280

Filed April 21, 2006. No. S-05-127.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Statutes.** The meaning of a statute is a question of law.
3. **Administrative Law: Final Orders: Appeal and Error.** A final order entered by a district court in a judicial review under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
5. **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.
6. **Statutes: Jurisdiction.** Jurisdictional statutes are strictly construed.
7. **Public Service Commission: Statutes: Jurisdiction.** Neb. Rev. Stat. § 57-1306 (Reissue 2004) specifically gives the Nebraska Public Service Commission jurisdiction to determine whether extensions or enlargements are in the public interest.
8. **Administrative Law: Words and Phrases.** An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.
9. **Administrative Law: Parties.** When an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder and is a required party.

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

Paul M. Schudel and Krista L. Kester, of Woods & Aitken, L.L.P., and Susan E. Prazan for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

L. Steven Grasz, Megan Sebastian Wright, and Michael J. Mullen, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellee Aquila, Inc.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

CONNOLLY, J.

Metropolitan Utilities District of Omaha (MUD) appeals the district court's order affirming a decision of the Nebraska Public Service Commission (PSC). The PSC ordered MUD to cease and desist construction of a gas main extension. Aquila, Inc., MUD's competitor, filed a formal complaint with the PSC for a determination that MUD's proposed extension was not in the public interest as required by Neb. Rev. Stat. § 57-1303 (Reissue 2004). The PSC found that MUD's extension was not in the public interest and ordered MUD to cease and desist construction. Applying the factors set out in § 57-1303, the court found that the proposed extension was not in the public interest and affirmed the PSC's order. On appeal, MUD contends that the PSC lacked jurisdiction over the matter or, in the alternative, that the extension is in the public interest. Because the record reflects competent evidence to support the district court's finding, we affirm.

## I. BACKGROUND

### 1. TERMS AND GENERAL BACKGROUND

MUD is a political subdivision operating as a natural gas and water utility in the city of Omaha and in Sarpy County, Nebraska. Aquila, an investor-owned natural gas utility, operates in areas of Sarpy County. Aquila and MUD are distributors of natural gas and have contracts with Northern Natural Gas (Northern), which supplies natural gas to distributors in the area.

Northern transfers the natural gas to each of its distributors at a servicing town border station (TBS). Each TBS serves only one distributor and is designed to supply a specific amount of natural gas. TBS's operate independently of each other and are designed and used by MUD, but are owned by Northern.

According to MUD, urban encroachment around a TBS can create safety issues. MUD prefers to have its TBS's equally spaced around the perimeter of its service area and in undeveloped areas. When it builds a TBS, it considers the current customer load and the potential for new customers. According to MUD, it oversizes its TBS's so that the zones of influence of each TBS overlap if there is a loss of service from any particular TBS.

### 2. Disputed Issue

At issue is a new TBS built at 174th Street and Fairview Road in Sarpy County (Fairview TBS) for extension of three separate gas mains to connect MUD's southwest service area to the Fairview TBS. MUD has added 8,000 customers in the area in the past 3 years and expects to add about 3,000 more each year.

In 2002, MUD's board of directors authorized the extension of its gas mains along U.S. Highway 50 from 1,500 feet south of U.S. Highway 370 to Fairview Road and along Fairview Road from Highway 50 to 174th Street. It also authorized the construction of the Fairview TBS. MUD decided on the site for the Fairview TBS because it is located 5½ miles south of MUD's existing service border. MUD previously considered six other areas, but they were rejected for varying reasons, such as objections by Aquila, proximity to a school, proximity to a planned business park, and future grade changes to the road.

MUD and Northern then entered into a contribution agreement which provided, among other things: (1) a contribution by Northern of $4.35 million in aid of construction to MUD payable in September 2002, with Northern retaining ownership of the branch line; (2) realignment of an amount of natural gas flow from a TBS located at 84th and Center Streets (Center Street TBS) to other mutually agreed-upon MUD delivery points to give Northern the ability to lower the branch line pressure; and (3) reimbursement to Northern for the cost of the Fairview TBS up to $500,000 by MUD. Because of the contribution agreement, the amount of natural gas per day at the Center Street TBS was reduced and a portion moved to a TBS located at 175th and Center Streets.

In May 2003, Aquila filed a formal complaint with the PSC seeking an order that MUD's proposed gasline extension under the contribution agreement violated Neb. Rev. Stat. §§ 57-1301 to 57-1307 (Reissue 2004) because it was not in the public interest. The PSC ultimately determined that the extension was not in the public interest and entered an order to cease and desist additional construction. MUD appealed to the district court and made the PSC a party to the appeal. The PSC unsuccessfully sought to be dismissed from the action.

The district court affirmed. The court first rejected an argument that it lacked jurisdiction. The court next applied the public interest factors under § 57-1303 and concluded that MUD failed to show that the extension was in the public interest. MUD appeals, and the PSC cross-appeals.

## II. ASSIGNMENTS OF ERROR

MUD assigns, rephrased and consolidated, that the district court erred by (1) determining that it had jurisdiction and (2) affirming the cease and desist order. On cross-appeal, the PSC assigns that the district court erred by not dismissing it from the action.

## III. STANDARD OF REVIEW

[1,2] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005). In addition, the meaning of a statute is a question of law. *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

[3] A final order entered by a district court in a judicial review under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002).

[4] In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

## IV. ANALYSIS

### 1. Jurisdiction

MUD first argues that the PSC lacked jurisdiction over the dispute because the extension's purpose was operationally driven to maintain and enhance MUD's subsystem reliability and capacity and was not for the extension of service to new customers. According to MUD, § 57-1303 applies only to extensions of services to new customers. We disagree.

Section 57-1303 provides in part:

> No investor-owned natural gas utility or metropolitan utilities district may extend or enlarge its natural gas service area or extend or enlarge its natural gas mains or natural gas services unless it is in the public interest to do so.

Under § 57-1306, the PSC is given power to determine whether an extension or enlargement is in the public interest:

> If the investor-owned natural gas utility or the metropolitan utilities district disagrees with a determination by an investor-owned natural gas utility or a metropolitan utilities district that a proposed extension or enlargement is in the public interest, the matter may be submitted to the Public Service Commission for hearing and determination in the county where the extension or enlargement is proposed . . . . In making a determination whether a proposed extension or enlargement is in the public interest, the commission shall consider the factors set forth in sections 57-1303 and 57-1304. The commission shall have no jurisdiction over a metropolitan utilities district or natural gas utility beyond the determination of disputes brought before it under sections 57-1301 to 57-1307.

[5,6] 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. *McCray v. Nebraska State Patrol, ante* p. 1, 710 N.W.2d 300 (2006). Further, we strictly construe jurisdictional statutes. See *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

[7] The plain language of § 57-1303 states that it applies to extensions or enlargements of a natural gas service area or extensions or enlargements of natural gas mains or natural gas

services. Section 57-1306 specifically gives the PSC jurisdiction to determine whether extensions or enlargements are in the public interest. The statute does not limit the determination to only extensions of service to new customers. Instead, it specifically includes enlargement of natural gas mains or services without reference to new customers. Under the plain language of §§ 57-1303 and 57-1306, the PSC had jurisdiction.

### 2. Public Interest Determinations

MUD contends that its extension is in the public interest.

Section 57-1303 provides five factors to be considered when determining whether an extension or enlargement is in the public interest. Under § 57-1303:

> In determining whether or not an extension or enlargement is in the public interest, the district or the utility shall consider the following:
>
> (1) The economic feasibility of the extension or enlargement;
>
> (2) The impact the enlargement will have on the existing and future natural gas ratepayers of the metropolitan utilities district or the investor-owned natural gas utility;
>
> (3) Whether the extension or enlargement contributes to the orderly development of natural gas utility infrastructure;
>
> (4) Whether the extension or enlargement will result in duplicative or redundant natural gas utility infrastructure; and
>
> (5) Whether the extension or enlargement is applied in a nondiscriminatory manner.

In addition, Neb. Rev. Stat. § 14-2117 (Reissue 1997) provides in part:

> No metropolitan utilities district may extend or enlarge its service area unless it is economically feasible to do so. In determining whether or not to extend or enlarge its service area, the district shall take into account the cost of such extension or enlargement to its existing ratepayers.

We note that no one single factor may be dispositive to any particular case. Cases may vary, and whether an extension is in the public interest depends on the facts and circumstances of each case.

The district court found that the extension was not in the public interest because MUD (1) failed to prove it was economically feasible, (2) failed to consider the impact on ratepayers, and (3) did not take orderly development into consideration. The court found that the extension was not redundant and that there was no evidence of discriminatory purpose or effect.

(a) Economic Feasibility

MUD argues that it has shown the economic feasibility of the extensions. According to MUD, the project was subjected to its budget review and was determined to be economically feasible. It also argues that any further analysis was not required because the extensions are for increasing system performance and safety instead of growth.

According to MUD, it has shown economic feasibility for the following reasons: (1) It considered expanding the capacity of existing TBS's, but believed that would not be feasible because of area growth and because the reduction in pressure at the Center Street TBS required a new TBS to meet demand; (2) the Fairview TBS location presented the best way to shore up and maintain the system's reliability in that section of the service area; and (3) the extension required only slight grade changes in the road, the area was not well populated, and the site location was near a landfill, which site would likely not face future urban encroachment.

Although the extensions were included in MUD's budget process for determining feasibility of the budgeted items, MUD stated in its answers to interrogatories that because Northern provided money to MUD that it used for the project, "no further economic feasibility analysis was needed." At a hearing before the PSC, a MUD employee admitted that an independent economic feasibility study was not completed, but that a "ballpark number" or analysis was performed. Also, MUD's argument that it failed to do an economic feasibility study because the extension was for enhanced system reliability is undermined by the testimony of MUD's senior gas designer. He testified that the Fairview TBS was sized for future growth. In addition, the record reflects that Northern plans to apply to the Federal Energy Regulatory Commission (FERC) to seek recovery of $4.35 million from its

ratepayers. The court found that "if Northern is successful in its application, ratepayers of MUD and Aquila will be required to pay a portion of the payment through their rates."

The district court found that MUD did not complete a before-the-fact economic feasibility analysis of the extension. The court noted that although the extensions were intended in part to make up for loss of capacity at the Center Street TBS, the extension's primary purpose was for growth. The court discounted MUD's argument that it considered economic feasibility as part of the budget process. The court stated: "Section 57-1303(1) requires a specific economic feasibility analysis of a proposed extension or enlargement, not a generic representation that, through the general course of doing business, economic feasibility is considered for each project for which there is capital expenditure authorization through normal budgetary process."

The court noted that it was possible for costs to get passed to ratepayers if Northern were successful in its application to the FERC to recover the $4.35 million paid under the contribution agreement and if the cost reimbursed to Northern for the Fairview TBS were passed to ratepayers. The court also concluded that before MUD extended or enlarged its service area, it had to comply with § 14-2117, which requires a determination of economic feasibility, taking into account the effect of the extension or enlargement on ratepayers.

We determine that the district court's findings are supported by competent evidence. The record shows that an economic feasibility study was not completed before the extension was started. The record contains evidence that when the extension was considered in the budget process, MUD failed to consider that it would have to reimburse Northern up to $500,000 for the Fairview TBS. Further, although MUD contends that the extension was for an upgrade to system reliability and safety, the record contains competent evidence to support the district court's conclusions that the primary purpose for the extension was for growth. Yet, MUD did not consider the system's growth as a factor when considering economic feasibility of the extension. Thus, there was competent evidence to support the conclusion of the district court that MUD failed to determine economic feasibility before it began the extension and, thus, violated § 14-2117.

Accordingly, we determine that the district court's finding that MUD failed to show that the extension was economically feasible was supported by competent evidence.

(b) Impact on Ratepayers

MUD argues that the district court wrongly determined that it failed to consider the impact on ratepayers. MUD argues that any rate increase would be offset by increased reliability and improvement to its system and that the extension would resolve the safety and capacity issues at the Center Street TBS. According to MUD, it would cost more to make changes at the Center Street TBS to fix the safety and capacity concerns.

Because the Fairview TBS was designed to accommodate projected use 5 years into the future, the court found that the primary purpose of the Fairview TBS was to accommodate future growth that could affect ratepayers. In addition, the court found that although the Fairview TBS was developed to meet future capacity, the evidence failed to show when it would require full capacity. The court found that if Northern were successful in its application to the FERC to recover the $4.35 million paid to MUD under the contribution agreement, a percentage of those costs would be passed to MUD and Aquila ratepayers. Likewise, it found that ratepayers would be responsible for the cost of MUD's reimbursement to Northern.

As previously stated, MUD failed to consider the potential effect on ratepayers. The record reflects that the Fairview TBS was constructed with growth in mind and is designed to be oversized for at least 5 years. Although MUD states that it needs to consider future customers and oversizes TBS's to cover for loss of service, MUD was still required to consider the effect of such items on ratepayers. In addition, such determinations were required before MUD undertook construction. Despite MUD's arguments that it determined there was no effect on ratepayers, the record supports the court's determinations that the extension's purpose was to accommodate MUD's growth and that how the growth impacted its ratepayers was not properly considered. Accordingly, we find there was competent evidence to support the court's factual findings concerning the impact on ratepayers.

(c) Orderly Development of Infrastructure

MUD contends that the court erred when it determined that the extension did not contribute to the orderly development of the natural gas infrastructure. MUD argues it considered evidence of safety concerns and that it considered and rejected a number of alternate TBS sites.

The court found that although the Fairview TBS would provide some relief at the Center Street TBS and MUD provided reasons for its location, the location was established for the primary purpose of establishing a foothold in an area fertile for future customers. The court stated that although such a decision might be good business acumen, it did not consider whether the extension promoted orderly development of the infrastructure.

As in the sections regarding feasibility and impact, the record contains evidence that MUD chose to place the Fairview TBS near the edge of its existing borders and in a location that would place it in an area of high future growth. The record also supports the conclusion that although relief for the Center Street TBS was a factor, the goal of growth was a primary factor. The district court's findings that MUD failed to show that the extension contributed to orderly development were supported by competent evidence. Because we find that the court's factual findings in all respects were supported by competent evidence, we affirm.

3. Cross-Appeal

The PSC contends that it was not a required party to the appeal under Neb. Rev. Stat. § 84-917 (Reissue 1999) because its main role in the action was to act as a neutral factfinding body.

Since August 2003, appeals of PSC orders are in accordance with the Administrative Procedure Act. Neb. Rev. Stat. § 75-136 (Reissue 2003). Section 84-917(2)(a) provides in part:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record.

[8,9] An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party. *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005). See *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984). However, when an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder and is a required party. *In re Application of Metropolitan Util. Dist., supra*. See *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

We recently noted that the overall power of the PSC concerning natural gas utilities gave the PSC the authority to set conditions on certifications, resolve disputes, investigate complaints, and issue and enforce orders. *In re Application of Metropolitan Util. Dist., supra*, citing Neb. Rev. Stat. § 66-1804(1) (Reissue 2003). In that case, MUD submitted an application seeking certification as a competitive natural gas provider. We determined that under the authority given to the PSC, the PSC was not acting as a neutral factfinding body and was a proper party to the action.

Here, the PSC jurisdiction extends to §§ 57-1301 to 57-1307. Section 57-1306, however, limits the role of the PSC, providing in part as follows:

> If the investor-owned natural gas utility or the metropolitan utilities district disagrees with a determination by an investor-owned natural gas utility or a metropolitan utilities district that a proposed extension or enlargement is in the public interest, the matter may be submitted to the Public Service Commission for hearing and determination in the county where the extension or enlargement is proposed and shall be subject to the applicable procedures provided in sections 75-112, 75-129, and 75-134 to 75-136. In making a determination whether a proposed extension or enlargement is in the public interest, the commission shall consider the factors set forth in sections 57-1303 and 57-1304. *The commission shall have no jurisdiction over a metropolitan utilities district or natural gas utility beyond the determination of disputes brought before it under sections 57-1301 to 57-1307.*

(Emphasis supplied.)

Here, the PSC was not acting as a certifying agency or the primary civil enforcement agency. Nor was the PSC acting in the role of an adversarial party or enforcing a previous order. Instead, the PSC was acting as a factfinding body to determine the validity of Aquila's complaint seeking a cease and desist order. In this circumstance, we determine that the PSC was not a necessary party to the action. Therefore, the district court should have dismissed the PSC from the appeal.

## V. CONCLUSION

We determine that the PSC and the district court had jurisdiction over the action. We further determine that the record contains competent evidence to support the district court's factual determination that the extension was not in the public interest. On cross-appeal, we agree that the PSC was not a necessary party to the appeal. Accordingly, we affirm the cease and desist order, but direct that the PSC be dismissed from the action.

AFFIRMED WITH DIRECTION.

WRIGHT, J., not participating.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. MICHAEL G. REILLY, RESPONDENT.

712 N.W.2d 278

Filed April 21, 2006. No. S-05-1035.

Original action. Judgment of disbarment.

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

PER CURIAM.

## INTRODUCTION

This is an attorney reciprocal discipline case in which the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, filed a motion for reciprocal discipline against respondent, Michael G. Reilly.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 3, 1982. On January 13, 2006, the Iowa Supreme Court revoked respondent's license to practice law in the State of Iowa. See *Iowa Supreme Ct. Atty. Disc. Bd. v. Reilly*, 708 N.W.2d 82 (Iowa 2006). The Iowa Supreme Court's opinion reflects that as a result of an "uncontrollable gambling habit that left him constantly in need of funds," respondent misappropriated from his law firm's trust account over $96,000 belonging to one client. *Id.* at 85. Respondent later repaid certain of the misappropriated moneys by writing a check on his personal bank account, but the bank account from which he paid those moneys had insufficient funds, and the bank that had cleared the check "was saddled with a $96,000 overdrawn account," which was not repaid for more than 1 year. *Id.* at 83. The Iowa Supreme Court revoked respondent's license due to respondent's "misappropriation of client funds [and a] check-kiting scheme undertaken in an effort to replace the [misappropriated] funds." See *id.* at 85.

On or about August 30, 2005, relator, through the chairperson of the Committee on Inquiry of the Second Judicial District, moved this court to temporarily suspend respondent from the practice of law in the State of Nebraska pending an investigation into the disciplinary charges then pending against respondent in Iowa. On October 19, this court entered an order temporarily suspending respondent from the practice of law. On January 17, 2006, relator filed a motion for reciprocal discipline, based upon the Iowa Supreme Court's revocation of respondent's license to practice law in Iowa. On February 15, this court entered a show cause order directing the parties to show cause why this court should or should not enter an order imposing the identical discipline, or greater or lesser discipline, as the court deemed appropriate, pursuant to Neb. Ct. R. of Discipline 21 (rev. 2001). Respondent filed a response to our show cause order, in effect admitting the essential facts that resulted in the revocation of his license to practice law in Iowa.

## ANALYSIS

We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed

and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Jones,* 270 Neb. 471, 478, 704 N.W.2d 216, 223 (2005). In a reciprocal discipline proceeding, "a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction." *State ex rel. Counsel for Dis. v. Petersen*, 267 Neb. 176, 177, 672 N.W.2d 637, 638 (2004). We therefore determine that the imposition of discipline is appropriate in this case.

With respect to the type of discipline appropriate in an individual case, we have stated that "[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case." *State ex rel. Counsel for Dis. v. Hart*, 270 Neb. 768, 771, 708 N.W.2d 606, 609 (2005). Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Horneber*, 270 Neb. 951, 708 N.W.2d 620 (2006). We apply these factors to the instant reciprocal discipline case.

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel. Counsel for Dis. v. Hart, supra.* Respondent urges as a mitigating factor his "addiction to gambling." We have taken this into account; however, any mitigating effect that might have resulted from this condition is overshadowed by the facts in the instant case. We agree with the Iowa Supreme Court, which stated that "[u]nfortunately, [respondent's gambling] is a matter which, although regrettable and cause for sympathy, does not obviate the seriousness of the improper attorney conduct that has occurred." *Iowa Supreme Ct. Atty. Disc. Bd. v. Reilly*, 708 N.W.2d 82, 85 (Iowa 2006).

We have considered the case file and the applicable law. Upon due consideration, the court finds that respondent should be

disbarred from the practice of law in the State of Nebraska, effective immediately.

## CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that respondent should be and is hereby disbarred from the practice of law in the State of Nebraska, and we therefore order him disbarred from the practice of law, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Furthermore, 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. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

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# STATE OF NEBRASKA, APPELLEE, V. STEVEN A. LISTON, APPELLANT.

712 N.W.2d 264

Filed April 21, 2006. No. S-05-1046.

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. **Constitutional Law: Statutes.** A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge.
3. **Constitutional Law: Criminal Law: Statutes: Demurrer.** In order to bring a constitutional challenge to the facial validity of a criminal statute, the proper procedure is to file a motion to quash or a demurrer.
4. **Constitutional Law: Statutes: Pleas: Waiver.** Once a defendant has entered a plea, or a plea is entered for the defendant by the court, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash.
5. **Statutes: Legislature: Intent.** A preamble or policy statement in a legislative act is not generally self-implementing, but may be used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Casey J. Quinn for appellant.

Jon Bruning, Attorney General, and Corey O'Brien for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

MCCORMACK, J.

## NATURE OF CASE

Appellant, Steven A. Liston, was found guilty by a jury of "on-line enticement of a child." He appeals from the district court's order of conviction. Liston has asserted constitutional challenges to the charging statute, Neb. Rev. Stat. § 28-320.02 (Cum. Supp. 2004). This appeal raises the issue of whether these challenges were waived by Liston's failure to request a withdrawal of his not guilty plea before filing a motion to quash asserting these challenges.

## BACKGROUND

In January 2005, the State filed an information against Liston, charging him with the following count, pursuant to § 28-320.02:

> [O]n or about the 1st day of July, 2004, STEVEN A. LISTON . . . did then and there knowingly or intentionally solicit, coax, entice or lure a peace officer who is believed by such person to be a child sixteen (16) years of age or younger, by means of a computer, to engage in first degree sexual assault and/or sexual assault of a child.

Liston and his counsel signed a form entitled "Written Arraignment and Waiver of Physical Appearance," which was filed with the court on January 25, 2005. The form provides in relevant part:

> Pursuant to Neb.Rev.Stat. [§] 29-4206, I _____, Defendant in the above-entitled action, waive my right to physically appear for arraignment in District Court and ask the Court to enter a plea of not guilty on my behalf subject to the following pretrial motion(s) (if applicable) filed or to be filed pursuant to Statute:
>
> ___ plea in abatement
> ___ demurrer
> ___ motion to quash

___ plea in bar
___ other: _____

Liston marked an "X" beside "plea in abatement" and "motion to quash." The district court's journal entry for February 3, 2005, shows that pursuant to this waiver, the court entered Liston's not guilty plea "subject to any pretrial motions noted therein."

On May 31, 2005, Liston filed a motion to quash the information, asserting three constitutional challenges to § 28-320.02. He alleged that the statute was facially vague, a violation of his right of free speech, and an impermissible regulation of an instrumentality of interstate commerce. The district court overruled his motion to quash without comment. A jury trial was conducted on June 13 through 15, after which the jury returned a verdict of guilty.

On June 17, 2005, Liston filed a notice of appeal from the district court's overruling of his motion to quash. The Nebraska Court of Appeals, however, summarily dismissed the appeal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001). *State v. Liston*, 13 Neb. App. lxxii (No. A-05-752, July 27, 2005), citing *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000) (holding that overruling of motion to quash does not affect substantial right and is therefore not final, appealable order). On August 31, Liston was sentenced to 3 years' probation and required to register as a sex offender. He also appealed from this order and filed a notice of constitutional issues pursuant to Neb. Ct. R. of Prac. 9E (rev. 2001) with his brief. This court granted Liston's petition to bypass the Court of Appeals.

## ASSIGNMENTS OF ERROR

Liston assigns that the district court erred in overruling his motion to quash because § 28-320.02 is unconstitutionally vague, a violation of the right of free speech, a violation of the Equal Protection Clause, and an unconstitutional regulation of interstate commerce.

## 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. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004).

## ANALYSIS

[2] Liston contends that § 28-320.02 is facially unconstitutional on four different grounds. A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

[3,4] In order to bring a constitutional challenge to the facial validity of a criminal statute, the proper procedure is to file a motion to quash or a demurrer. See *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002). Pursuant to Neb. Rev. Stat. § 29-1812 (Reissue 1995), this court has held that once a defendant has entered a plea, or a plea is entered for the defendant by the court, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash. *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002).

Indisputably, Liston did not seek to withdraw his plea of not guilty before filing a motion to quash over 4 months after he had filed his written arraignment with the court. Liston contends that he was not required to do so because the written arraignment form that he signed authorized the district court to enter his plea subject to his motion to quash. We therefore review the district court's authority to accept a conditional plea of not guilty.

[5] As noted, the form that Liston signed referenced Neb. Rev. Stat. § 29-4206 (Cum. Supp. 2004). Section 29-4206 does not, however, authorize district courts to accept pleas of not guilty on a conditional basis. Moreover, such an interpretation would be inconsistent with the Legislature's statement of intent in Neb. Rev. Stat. § 29-4201 (Cum. Supp. 2004). A preamble or policy statement in a legislative act is not generally self-implementing, but may be used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part. *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). Section 29-4201 provides: "It is the intent and purpose of sections 29-4201 to 29-4207 to authorize . . . certain district court arraignments by writing in criminal proceedings *consistent with the statutory and constitutional rights* guaranteed by the Constitution of the United States and the Constitution of Nebraska." (Emphasis supplied.)

The language of § 29-4201 demonstrates that the Legislature did not intend to allow written arraignments to supersede Nebraska's criminal procedure statutes. Relevant here, the waiver of defects statute, § 29-1812, specifically provides: "The accused *shall be taken to have waived* all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." (Emphasis supplied.)

A defendant's waiver of defects under § 29-1812 is mandatory and does not permit a district court to entertain his or her facial challenge to a statute raised in a motion to quash so long as the defendant's plea to the general issue still stands. Nothing in § 29-4206 contravenes the language of § 29-1812, nor did the Legislature alter § 29-1812 at the time that Neb. Rev. Stat. §§ 29-4201 to 29-4207 (Cum. Supp. 2004) were enacted. Thus, the Legislature is presumed to have retained the requirement under § 29-1812 that a defendant must withdraw his or her plea to the general issue before filing a motion to quash, even if the defendant's plea is entered pursuant to a written arraignment. See *State v. Neiss*, 260 Neb. 691, 701, 619 N.W.2d 222, 229-30 (2000) ("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").

We conclude that a district court does not have authority to permit a defendant to file a motion to quash challenging the facial validity of a statute unless the defendant first obtains leave to withdraw his or her plea of not guilty.

Liston also argues that even if the district court did not have authority to make his plea subject to a motion to quash to be filed in the future, he should still be allowed to challenge the statute's constitutionality because he detrimentally relied on a court-provided form. Liston focuses on the phrase "subject to" in the following sentence of the written arraignment: "I . . . ask the Court to enter a plea of not guilty on my behalf *subject to* the following pretrial motion(s) (if applicable) filed or to be filed pursuant to Statute." (Emphasis supplied.) He contends that "subject to" in this context means that his plea was "contingent or dependent"

upon his motion to quash to be filed in the future. Supplemental brief for appellant at 3.

We reject Liston's interpretation of the form. The same sentence that Liston relies upon also specifies that a defendant's pretrial motions have been filed or will be filed "pursuant to Statute." Pursuant to § 29-1812, once a defendant enters a plea to the general issue, or the court enters a plea on behalf of the defendant, he or she must withdraw the plea before filing a motion to quash. *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002). Similarly, the form specifies that Liston's plea of not guilty was subject only to *applicable* pretrial motions, and a motion to quash is not applicable after a defendant enters a plea to the charge unless the plea is first withdrawn. Read with Nebraska's criminal procedure statutes, this form cannot alter the statutory requirement as set forth in § 29-1812.

## CONCLUSION

We conclude that Liston's constitutional arguments on appeal are procedurally barred because Liston's motion to quash was not filed until almost 4 months after the court entered a plea of not guilty on his behalf. He has therefore waived any defects alleged in the motion.

AFFIRMED.

WRIGHT, J., not participating.

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# THE LAMAR COMPANY OF NEBRASKA, L.L.C., DOING BUSINESS AS LAMAR OUTDOOR, AND MERCY ROAD LIMITED PARTNERSHIP, APPELLANTS, V. OMAHA ZONING BOARD OF APPEALS, CITY OF OMAHA, ET AL., APPELLEES, AND WAITT OUTDOOR, LLC, AND ROBERT MILLER PROPERTIES, INC., INTERVENORS-APPELLEES.

713 N.W.2d 406

Filed April 27, 2006. No. S-04-1300.

1. **Zoning: Appeal and Error.** On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.

2. ____: ____. In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law.
3. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
4. **Statutes.** The meaning of a statute is a question of law.
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.
6. **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: ROBERT V. BURKHARD, Judge. Affirmed.

Aimee J. Haley, of Fullenkamp, Doyle & Jobeun, for appellants.

Donald P. Dworak, of Gross & Welch, P.C., for intervenors-appellees.

Alan M. Thelen, Assistant Omaha City Attorney, for appellees.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and HANNON, Judge, Retired.

MCCORMACK, J.

## NATURE OF CASE

Following the denial by the Omaha Zoning Board of Appeals (Board) of its application for a sign permit and request for variance, The Lamar Company of Nebraska, L.L.C., doing business as Lamar Outdoor (Lamar), along with Mercy Road Limited Partnership, its lessor (collectively Appellants), appealed to the Douglas County District Court. Waitt Outdoor, LLC (Waitt), and Robert Miller Properties, Inc. (Miller), filed a motion to intervene, which was sustained. The district court affirmed the decision of the Board denying the permit and variance. Appellants timely filed this appeal.

## BACKGROUND

The underlying facts are undisputed. Lamar maintained an off-premises advertising sign, a billboard, on property leased from

Miller and located at 6801 Mercy Road in Omaha, Nebraska. The lease between Lamar and Miller was set to expire on August 31, 2003. Lamar and Miller attempted to renegotiate the lease but were unable to reach an agreement. The terms of the lease required Lamar to remove the billboard at 6801 Mercy Road within 30 days of the expiration of its lease.

After failing to reach an agreement with Lamar, Miller entered into a lease agreement with Waitt for the construction and maintenance of a new billboard, to be located at approximately the same location as Lamar's sign. On May 19, 2003, Waitt applied to the city planning department for a sign permit. On May 29, Waitt requested from the Board certain variances, which were necessary because the new billboard would be located within 150 feet of a recreational trail which was in an area zoned for residential use. A hearing was scheduled on Waitt's application on July 17, but was held over due to a determination that Waitt also needed a variance regarding the size of the sign planned for the site. At its August 21 hearing, the Board considered Waitt's application, granted the necessary variances, and issued the sign permit.

Lamar, meanwhile, entered into a lease agreement on June 12, 2003, with Mercy Road Limited Partnership to construct and maintain a billboard at 6855 Mercy Road, which is a parcel of property adjacent to 6801 Mercy Road. The record establishes that the proposed billboard locations on these two parcels were within 700 feet of each other. On June 12, Lamar also applied to the city planning department for a sign permit. In that application, Lamar noted that it currently maintained a sign at 6801 Mercy Road and promised to remove that sign within 60 days of the issuance of a permit for 6855 Mercy Road. Lamar's application was denied, and in a letter dated June 24, 2003, explaining the denial, the city planning department noted that "Omaha Municipal Code section 55-826(a)(3) requires 700 feet of spacing between advertising sign locations. Waitt . . . has previously applied for a billboard location at 6801 Mercy Road which is pending before the . . . Board . . . ." Lamar appealed to the Board on June 30. Its appeal was scheduled to be heard at the same July 17 meeting scheduled for Waitt's application, but was held over due to Waitt's request for further variances made earlier at that

meeting. Lamar's appeal was ultimately heard and denied on August 21. At that same August 21 hearing, Lamar alternatively argued that it was entitled to a variance due to a "practical difficulty or an unnecessary hardship" because of the Board's prior approval of Waitt's permit. That request was also denied.

Appellants filed an appeal in the district court. Waitt and Miller (collectively Intervenors) motioned to intervene. That motion was sustained by the district court. After a hearing on appeal, the district court affirmed the decision of the Board. Appellants then filed this appeal. We moved this 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

Appellants assign, consolidated and restated, that the district court erred in (1) sustaining Intervenors' motion to intervene, (2) affirming the denial of Lamar's application for a sign permit, and (3) affirming the Board's decision with respect to Waitt's permit application.

## STANDARD OF REVIEW

[1,2] On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001). In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law. *Id.*

## ANALYSIS

### Intervention of Waitt and Miller

Appellants first assign that the district court erred in sustaining Intervenors' motion to intervene. The statutory right to intervention is governed by Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004), which provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in

> any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

Appellants argue that intervention is inappropriate because (1) the Board adequately represents the interests of Intervenors; (2) Intervenors have failed to allege facts sufficient to show a direct and legal interest affected by the appeal before the district court; (3) Intervenors intervened at the intermediate appellate level, rather than prior to trial as required by § 25-328; and (4) Intervenors failed to appear in opposition to Lamar's appeal before the Board.

[3] A review of the record shows that Intervenors offered no evidence at the hearing before the district court. While counsel for Intervenors did present oral argument to the district court at that hearing, such argument was essentially a reiteration of the Board's argument. Moreover, in its brief before this court, the arguments made by Intervenors are the same as those made by the Board. We conclude that, even assuming the district court erred in allowing Intervenors leave to intervene at the intermediate appellate level, Appellants were not prejudiced by that error. Error without prejudice provides no ground for appellate relief. *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004). Accordingly, we need not address Appellants' arguments with respect to intervention.

### Whether Board Erred in Denying Lamar's Application

In their second assignment of error, Appellants assign that the district court erred in affirming the Board's denial of Lamar's application for a sign permit. Appellants argue first that Lamar's "[a]pplication complied with all requirements of the [Omaha Municipal] Code and Lamar was entitled to a permit as a matter of right." Brief for appellants at 26. In support of their argument, Appellants direct us to the definition of "advertising sign location," found at Omaha Mun. Code, ch. 55, art. XVIII, § 55-822(b)

(1980), and contend that Waitt's pending application had no effect on Lamar's application because an "advertising sign location" was "considered established upon issuance of a valid sign permit." § 55-822(b).

The Board, however, argues that (1) Neb. Rev. Stat. § 14-410 (Reissue 1997) required that Lamar's application be denied due to Waitt's pending application and request for variances; (2) the city planning department had a "first in time, first in right" policy to handle applications, thus Waitt's application and request for variances had to be resolved before Lamar's application could be acted upon; and (3) due process dictated that Waitt's application and request for variances be resolved before Lamar's application could be acted upon.

[4,5] The meaning of a statute is a question of law. *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 703 N.W.2d 887 (2005).

[6] 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. *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005).

Section 14-410 provides in relevant part that "[a]n appeal stays all proceedings in furtherance of the action appealed from . . . ." A stay is defined as "[t]he postponement or halting of a proceeding, judgment, or the like." Black's Law Dictionary 1453 (8th ed. 2004). A plain reading of § 14-410, then, provides that when Waitt filed its request for variances on May 29, 2003, all proceedings in furtherance of that action were halted.

Appellants argue, however, that § 14-410 is inapplicable, as that statute only stays proceedings during an appeal, but that, rather than filing an appeal, Waitt simply requested certain variances. Alternatively, Appellants argue that § 14-410 only operates to stay proceedings " 'in furtherance of the action appealed from' " and that any appeal by Waitt had no effect on Lamar's application. Brief for appellants at 28.

To begin, we disagree with Appellants' contention that Waitt did not file an appeal, but instead only requested certain variances. According to the record, Waitt filed with the city planning department an application for a sign permit on May 19, 2003. Due to the sign's location adjacent to an area which was zoned for residential use, the city planning department informed Waitt that it could not issue the permit. On May 29, Waitt filed with the Board an application for a variance, requesting a waiver of Omaha Mun. Code, ch. 55, art. XVIII, § 55-826(a)(4) (1980), which provided that a billboard could not be erected within 150 feet of an area zoned for residential use. In addition, Waitt subsequently requested other variances. Though the request for variances was not termed an "appeal," a review of the record indicates that the request was in response to the city planning department's action in initially denying Waitt's application for a sign permit.

Moreover, Neb. Rev. Stat. § 14-411 (Reissue 1997) sets forth a zoning board's power to grant variances and provides in relevant part:

> Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the board of appeals shall have the power *in passing upon appeals*, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

(Emphasis supplied.)

A plain reading of § 14-411 provides that a zoning board's power to grant variances exists as the board "pass[es] upon appeals." Given this language, we conclude that a zoning board's variance power is appellate in nature. See 4 Kenneth H. Young, Anderson's American Law of Zoning § 22.05 (4th ed. 1997). Even if we were to assume that Waitt's request for variances was not considered an appeal, an assumption which is not supported by the record, we conclude that in granting those variances, the Board was exercising appellate jurisdiction. Accordingly, Appellants' contention that Waitt's application for variances was

not an appeal and thus did not implicate § 14-410 is without merit.

We also disagree with Appellants' argument that Lamar's application was not "in furtherance" of Waitt's appeal. The zoning ordinances at issue make it clear that, notwithstanding the zoning board's power to grant variances, there can be only one billboard in a 700-foot area. See § 55-826(a)(3). If Lamar's application was to be approved and a permit issued while Waitt's appeal was pending, it would effectively deny Waitt its right of appeal. It would make little sense for § 14-410 to stay proceedings with respect to an appeal if another party was permitted to render that appeal moot by altering the circumstances upon which the appeal is based. The right to appeal from the denial of an application for a sign permit cannot be protected unless the statutory stay extends not only to the application at issue, but to other applications that would affect an appellant's ability to obtain relief upon a successful appeal. Thus, we agree with the Board that under the circumstances of this case, § 14-410 gave the Board the authority to deny Lamar's application until such time as Waitt's application was resolved.

Appellants also argue that the Board should have granted Lamar's request for a variance of the 700-foot rule. Appellants contend that the Board created the hardship faced by Lamar when it granted Waitt's requests for variances.

As noted, § 14-411 grants to zoning boards the discretion "to vary or modify the application of any of the regulations or provisions of such ordinance" in the event of "practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance." In *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 979, 628 N.W.2d 677, 684 (2001), this court held that

> administrative boards such as the board of zoning appeals provide "expertise and an opportunity for specialization unavailable in the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not to be taken lightly or minimized by the judiciary."

Quoting *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992).

Our review of this issue is limited to the question of whether the district court abused its discretion or made an error of law. Given the discretion granted to the Board as outlined in *Eastroads*, we cannot conclude that the district court either abused its discretion or made an error of law in affirming the Board's decision to deny Lamar's requested variance.

Appellants' second assignment of error is without merit.

### District Court's Purported Affirmance of Waitt Application

In their third and final assignment of error, Appellants argue that the district court erred when it found that "[t]he decisions of the . . . Board . . . '*in granting Waitt's application* and denying Lamar's application on August 21, 2003, were not illegal; were supported by the evidence; and were not arbitrary, unreasonable or clearly wrong.' " (Emphasis supplied.) In support of their argument, Appellants, citing *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996), argue that the district court's review extended only to issues which were brought up for review from the Board and that the granting of Waitt's application was not properly before the district court.

Although we agree with Appellants that the district court would have lacked jurisdiction to determine any issues related to Waitt's application, we do not read the district court's order as doing so. Rather, we read the district court's reference to the Waitt application as merely the court's recognition of the interrelatedness of the two applications and not an attempt by the district court to rule on the merits of Waitt's application. Appellants' third and final assignment of error is without merit.

## CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Wright and Miller-Lerman, JJ., not participating.

# STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. GARY D. MELLOR, RESPONDENT.

712 N.W.2d 817

Filed May 5, 2006. No. S-96-1290.

1. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of findings of the referee, provided, however, that where credible evidence is in conflict on material issues of fact, it considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** In considering an application for reinstatement to the practice of law, the Nebraska Supreme Court owes a solemn duty to protect the public and the legal profession, which consideration must be performed without regard to feelings of sympathy for the applicant.
3. ____. A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law. The primary concern is whether the applicant, notwithstanding the former misconduct, is now fit to be admitted to the practice of law and whether there is a reasonable basis to believe that the present fitness will permanently continue in the future.
4. ____. Reinstatement after disbarment should be difficult rather than easy.
5. **Disciplinary Proceedings: Proof.** A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement. This burden must be met by clear and convincing evidence. The proof of good character must exceed that required under an original application for admission to the bar, in that it must overcome the former adverse judgment as to the applicant's character.
6. ____: ____. The more egregious the misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law.
7. **Attorneys at Law.** The practice of law is a profession which can be attended by significant stress, and a lawyer's inability to manage such stress can harm the interests of a client.
8. **Disciplinary Proceedings: Attorneys at Law.** In addition to moral reformation, an applicant for reinstatement after disbarment must also otherwise be eligible for admission to the bar as in an original application.

Original action. Application denied.

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

James R. Kozel for respondent.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

PER CURIAM.

Gary D. Mellor was disbarred by this court on June 20, 1997. *State ex rel. NSBA v. Mellor*, 252 Neb. 710, 565 N.W.2d 727 (1997). On June 24, 2005, he filed an application for reinstatement of his license to practice law in Nebraska. Counsel for Discipline filed a resistance to the application, and we appointed a referee pursuant to Neb. Ct. R. of Discipline 10(V) (rev. 2005). After conducting an evidentiary hearing, the referee recommended denial of the application, and Mellor filed exceptions. The matter was then briefed and argued to this court. Upon consideration of the record and the arguments of counsel, we deny Mellor's application for reinstatement.

## FACTS

Mellor was admitted to the Nebraska bar in 1989. In 1997, he was disbarred after voluntarily surrendering his license and admitting that he violated Canon 1, DR 1-102(A)(1), (3), and (6) of the Code of Professional Responsibility as adopted by the Nebraska Supreme Court. See *State ex. rel. NSBA v. Mellor, supra*. Mellor's violations of the code resulted from his conviction for violating 18 U.S.C. §§ 2 and 2252(a)(2) (1994) by knowingly and intentionally receiving a visual depiction of a minor engaging in sexually explicit conduct that was mailed, shipped, or transported by computer in interstate commerce. Mellor entered a guilty plea in the U.S. District Court for the District of Kansas, admitting that he committed the charged felony offense. Consistent with federal sentencing guidelines in place at the time of his conviction, Mellor was sentenced to 366 days in prison, to be followed by 2 years of supervised release. He received credit for good time and was released after he had been incarcerated for 10½ months.

After his release, Mellor moved to Omaha, Nebraska, and sought treatment with a counselor he had been seeing prior to his incarceration. He was referred to another counselor and continued in counseling from 1998 to 2005, for the most part with Marlys Oestreich, who testified on his behalf. During that time, he successfully completed his term of supervised release.

Based upon her initial evaluation, Oestreich concluded that Mellor was in the early stages of sexual addiction. However, she

concluded that he did not have pedophilic tendencies. Oestreich developed a course of therapy for Mellor and measured his progress based on several criteria. At the hearing on October 28, 2005, she testified that Mellor had made "excellent" progress in dealing with his addiction. Oestreich testified that she had no concerns from a clinical standpoint that readmitting Mellor to the practice of law would endanger any member of the public and that through his treatment, he was able to use more appropriate tools to deal with stress.

Mellor has no criminal record other than the 1996 conviction which resulted in his disbarment. He has maintained gainful employment since his release, working for the same employer in the field of retail sales for the past 4 years. He obtained and held a real estate broker's license from August 1998 until at least July 2004 and, at the time of the hearing, was in the process of seeking a professional license to be a drug and alcohol counselor. As part of his practicum requirement, Mellor volunteers at a homeless shelter that provides inpatient residential treatment for drug and alcohol addicts.

In responses filed in this proceeding, the Disciplinary Review Board did not oppose Mellor's reinstatement and the Committee on Inquiry of the Second Judicial District recommended that his application for reinstatement be granted. Mellor's wife, daughter, and a longtime friend testified in support of Mellor's good character. Mellor also submitted a letter from a business owner who has known him for approximately 10 years and an affidavit of support from a longtime friend, both attesting to his good character. He also submitted a letter from his former wife, describing the good relationship which Mellor has maintained with his children.

The referee found Mellor to be credible and determined that Mellor's own testimony created a favorable impression. However, the referee expressed concern that there were no written recommendations from an employer, a treating psychiatrist, a lawyer, a judge, or a minister. The referee also noted what he perceived as a lack of legal proficiency should Mellor be readmitted. The referee concluded that Mellor had not presented clear and convincing evidence to justify his reinstatement from the order of disbarment.

## STANDARD OF REVIEW

[1] In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the findings of the referee, provided, however, that where credible evidence is in conflict on material issues of fact, it considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. See *In re Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367 (1996).

## ANALYSIS

[2-4] As the court which disbarred Mellor, we have inherent power to reinstate him to the practice of law. See *State ex rel. Sorensen v. Goldman*, 182 Neb. 126, 153 N.W.2d 451 (1967). However, in considering an application for reinstatement to the practice of law, this court owes a solemn duty to protect the public and the legal profession, which consideration must be performed without regard to feelings of sympathy for the applicant. See *id*. A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law. The primary concern is whether the applicant, notwithstanding the former misconduct, is now fit to be admitted to the practice of law and whether there is a reasonable basis to believe that the present fitness will permanently continue in the future. *Id*. In other words, reinstatement after disbarment should be difficult rather than easy. *Id*.

[5,6] A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement. *State, ex rel. Spillman, v. Priest*, 123 Neb. 241, 242 N.W. 433 (1932). This burden must be met by clear and convincing evidence. Rule 10(J) and (V). The proof of good character must exceed that required under an original application for admission to the bar, in that it must overcome the former adverse judgment as to the applicant's character. See *State, ex rel. Spillman, v. Priest, supra*. It follows that "[t]he more egregious the misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law." *Matter of Robbins*, 172 Ariz. 255, 256, 836 P.2d 965, 966 (1992).

[7] The misconduct which precipitated Mellor's disbarment was a federal felony offense committed in 1996. Mellor attributes

his misconduct to an addictive disorder for which he has sought and received treatment. We note that Mellor's efforts to rehabilitate himself appear sincere and successful to a significant degree. The record reflects stability in his familial relationships and employment. However, there is also evidence that on two occasions, in 1999 and 2003, Mellor engaged in conduct which, although not unlawful, was related to the conduct which resulted in his conviction. His therapist characterized this conduct as a "slip or relapse." She also opined that his conduct in this respect was in reaction to stress. The practice of law is a profession which can be attended by significant stress, and a lawyer's inability to manage such stress can harm the interests of a client. *In re Application of Hartmann*, 270 Neb. 628, 705 N.W.2d 443 (2005). The persons who testified or submitted written opinions supportive of Mellor's present character and fitness to practice law did not purport to have personal knowledge of the stress and pressure associated with the work of a lawyer. The record in this case reflects that Mellor discontinued his involvement in a support group dealing with his addiction, and there is no indication that he has made any contact with the Nebraska Lawyers Assistance Program. Thus, we have an insufficient basis upon which to predict whether Mellor's rehabilitation has progressed to the point where he could function as a lawyer without reverting to addictive and potentially unlawful behavior in response to stress.

We share the referee's concern that the record includes no testimony or written support from lawyers or judges regarding Mellor's present character and fitness to practice law. Legal professionals who are acquainted with an individual are in a unique position to assess that person's character and fitness to be a lawyer. This court and others have placed considerable weight on such evidence in deciding whether a disbarred lawyer has met the burden of showing rehabilitation sufficient to warrant reinstatement. In *State ex rel. Sorensen v. Goldman*, 182 Neb. 126, 128, 153 N.W.2d 451, 453 (1967), we noted that a sufficient showing of rehabilitation during a 33-year period of disbarment included "recommendations of eminent judges, lawyers, businessmen, and lay citizens." In *In re Reinstatement of Holleman*, 826 So. 2d 1243 (Miss. 2002), the Mississippi Supreme Court considered the reinstatement application of an

attorney disbarred for a criminal offense similar to that committed by Mellor. The court held that there was sufficient evidence to warrant reinstatement where the evidence included letters from several bar presidents, a former state Supreme Court justice, and numerous other attorneys.

Mellor points to the filings made in his case by the chair of the Disciplinary Review Board, who stated that he was unaware of any information "which would indicate that [Mellor] should not be reinstated," and by the chair of the Committee on Inquiry of the Second Judicial District, who recommended reinstatement because he knew of "no reason why [Mellor] should not be reinstated." The latter filing was made pursuant to rule 10(V), which states that copies of a disbarred lawyer's application for reinstatement

> shall be furnished the Relator, the Counsel for Discipline, the current Chairperson of the Committee on Inquiry for the District which exercised original jurisdiction, and the Chairperson of the Disciplinary Review Board, any one or more of whom may appear and resist such application. Any other persons may likewise appear upon obtaining leave of the Court and make such resistance. Within twenty days thereafter, the Counsel for Discipline and the District Committee on Inquiry, by its Chairperson, shall each file a written statement recommending the application be granted or denied and the reasons therefor.

Because they include no detailed reasoning and there is no indication that they are based on an independent investigation, we regard the filings made in this case by the chairpersons of the Committee on Inquiry and the Disciplinary Review Board as statements that they would not resist reinstatement, and we accord them little weight in considering whether Mellor has met his burden of proof. The recommendations here are unlike the recommendation relied upon by the court in *In re Reinstatement of Holleman, supra*. In that case, the state bar association's recommendation of reinstatement was based on an independent investigation, including a deposition to which the applicant voluntarily submitted.

[8] In addition to moral reformation, an applicant for reinstatement after disbarment must also otherwise be eligible for

admission to the bar as in an original application. See *State ex rel. Sorensen v. Goldman, supra*. Mellor has not demonstrated that he is currently competent to practice law in Nebraska. The record reflects that Mellor maintained a very limited law practice in Nebraska after moving to Kansas in 1994 and that he was twice unsuccessful in passing the Kansas bar examination. Other than assisting inmates with legal matters during his incarceration, it does not appear that he has engaged in any law-related activity or employment since 1996. At the time of the hearing, he had not made arrangements for association with any practicing attorney if his license were reinstated. In contrast, the successful applicant for reinstatement in *In re Reinstatement of Holleman*, 826 So. 2d 1243 (Miss. 2002), had worked as a paralegal after his release from prison and continued to study the law and attend continuing legal education programs. He also provided evidence that the firm for which he worked as a paralegal would employ him as an attorney if his license were reinstated. Even so, the court made reinstatement contingent upon passage of the state bar examination and continued participation in Alcoholics Anonymous or a similar program.

We conclude on the basis of our independent review that Mellor has not met his burden of showing by clear and convincing evidence that his license to practice law in Nebraska should be reinstated at this time. The application is therefore denied.

APPLICATION DENIED.

WRIGHT and MCCORMACK, JJ., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
GERMAI R. MOLINA, APPELLANT.

713 N.W.2d 412

Filed May 5, 2006. No. S-04-1230.

1. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a

second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

4. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
5. **Criminal Law: Convictions: Statutes: Legislature: Intent.** A determination of whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on such offenses.
6. **Double Jeopardy: Statutes: Proof.** In both the multiple punishment and multiple prosecution contexts, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one for double jeopardy purposes is whether each provision requires proof of a fact which the other does not.
7. **Criminal Law: Appeal and Error.** A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit.
8. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
9. **Indictments and Informations: Lesser-Included Offenses.** The State is not required to elect between charges when a crime and a lesser-included offense are charged in separate counts of the same information.
10. **Double Jeopardy: Proof.** Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not.
11. **Criminal Law: Statutes: Double Jeopardy.** When applying the test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), to separately codified criminal statutes which may be violated in alternative ways, only the elements for which the defendant has been punished should be compared to determine whether multiple punishments have been imposed for the same offense.
12. **Homicide: Minors: Lesser-Included Offenses.** Second degree murder is not a lesser-included offense of child abuse resulting in death.
13. **Pleadings.** The decision to grant or deny an amendment to a pleading rests in the discretion of the court.
14. **Trial: Witnesses: Indictments and Informations.** Whether to permit the names of additional witnesses to be endorsed upon an information after the information has been filed is within the discretion of the trial court.
15. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
16. **Witnesses: Indictments and Informations.** The purpose of Neb. Rev. Stat. § 29-1602 (Cum. Supp. 2004) is to notify the defendant as to witnesses who may testify against the defendant and give the defendant an opportunity to investigate them.
17. **Rebuttal Evidence: Witnesses: Indictments and Informations.** The requirement that the names of the witnesses for the State must be endorsed upon the information has no application to rebuttal witnesses.

18. **Trial: Witnesses: Indictments and Informations.** A trial court may allow witnesses to be endorsed after an information is filed when doing so does not prejudice the defendant in the preparation of his or her defense.
19. **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 discretion a factor in determining admissibility.
20. **Trial: Rules of Evidence.** Under Neb. Evid. R. 106, the admission of evidence is not a matter of right, but rests with the sound discretion of the court.
21. **Trial: Rules of Evidence: Appeal and Error.** A ruling pursuant to Neb. Evid. R. 403 for exclusion of relevant evidence will be upheld on appeal unless the ruling is an abuse of discretion.
22. **Trial: Rebuttal Evidence: Appeal and Error.** The abuse of discretion standard is applied to an appellate court's review of a trial court's ruling on the admissibility of rebuttal testimony.
23. **Trial: Rebuttal Evidence.** Rebuttal evidence is confined to that which explains, disproves, or counteracts evidence introduced by the adverse party.
24. ____: ____. A trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence only for good reason and in the furtherance of justice.
25. ____: ____. Rebuttal evidence is confined to new matters first introduced by the opposing party and is not an opportunity to bolster, corroborate, reiterate, or repeat a case in chief.
26. **Hearsay: Words and Phrases.** Prior consistent out-of-court statements are defined as nonhearsay and are admissible to rebut a charge of recent fabrication, improper influence, or improper motive only when those statements were made before the charged recent fabrication, improper influence, or improper motive.
27. **Evidence: Impeachment.** Attempts at impeachment cannot be equated to charges of recent fabrication.
28. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
29. **Lesser-Included Offenses.** To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case.
30. **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.
31. **Lesser-Included Offenses: Minors.** Negligent child abuse as defined by Neb. Rev. Stat. § 28-707(3) (Cum. Supp. 2004) and intentional child abuse as defined by § 28-707(4) are lesser-included offenses of child abuse resulting in serious bodily injury as defined by § 28-707(5) and child abuse resulting in death as defined by § 28-707(6).
32. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that

(1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

33. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
34. **Jury Instructions: Lesser-Included Offenses.** Error in failing to instruct the jury on a lesser-included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to the defendant under other properly given instructions.
35. **Trial: Evidence: Jury Instructions.** In any situation in which a limiting instruction was given at the time evidence was introduced, NJI2d Crim. 5.3 must be given at closing if requested.
36. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
37. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
38. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
39. ____. In construing an individual jury instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.
40. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
41. **Evidence: Proof.** The State must prove beyond a reasonable doubt every element of the charged offense.
42. **Constitutional Law: Jury Instructions: Convictions: Proof.** The proper inquiry is not whether a jury instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. The constitutional question is whether there is a reasonable likelihood that the jury understood the instruction to allow conviction based on proof insufficient to meet the standard of *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
43. **Criminal Law: Juries: Waiver.** Under Neb. Rev. Stat. § 29-2022 (Reissue 1995), after submission of a criminal case to the jury, the defendant has the right to have the jury kept together until the jury agrees upon a verdict or is discharged by the court, and this right may be waived only by specific agreement or consent of counsel for the parties.
44. **Appeal and Error: Words and Phrases.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

45. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
46. **Trial: Attorneys at Law.** One is allowed considerable latitude in making an opening statement.
47. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** Under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
48. **Effectiveness of Counsel: Appeal and Error.** With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
49. **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.
50. **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.
51. **Right to Counsel: Appeal and Error.** A trial court's decision to dismiss appointed counsel is reviewed for an abuse of discretion.
52. **Right to Counsel: Waiver: Effectiveness of Counsel.** Once counsel has been appointed for an indigent accused, the accused must remain with the appointed counsel unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.
53. **Courts: Appeal and Error.** The order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.
54. **Attorneys at Law: Conflict of Interest.** Appointed counsel may be removed because of a potential conflict of interest, and such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Jerry L. Soucie and James R. Mowbray, of Nebraska Commission on Public Advocacy, and, on brief, Gerard A. Piccolo, Hall County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

GERRARD, J.

Germai R. Molina was convicted of second degree murder and child abuse resulting in death, arising out of the death of his 2-year-old daughter, Diana Molina. Molina was sentenced to a term of imprisonment of not less than 80 years to life on each conviction, sentences to be served consecutively. Molina appeals from his convictions and sentences. For the reasons that follow, we affirm the judgment of the district court.

## I. BACKGROUND

Diana, born September 18, 2000, was brought to the emergency room at St. Francis Hospital in Grand Island, Nebraska, at approximately 3:30 a.m. on July 23, 2003, by Molina and his wife, also named Diana (Mrs. Molina). Diana did not have a pulse and was not breathing on her own. When Dr. Barry Hoover, the emergency room physician, asked what had occurred, Molina "replied something about the child had fallen down some stairs and then he made a comment about something that a cousin had injured the child."

After a half hour of attempted resuscitation, Diana was pronounced dead. Dr. Hoover observed that Diana's body was covered from head to toe with bruising and swelling and had abrasions or superficial lacerations in the shape of a line. Dr. Hoover testified that he

> [n]oticed that she had a lot of bruising to her right ear, she had a smaller amount of bruising to the left ear; she had what we call periorbital ecchymosis or you can think of it as racoon eyes, she had bruising around both eyes; she had bruising and abrasion or a superficial laceration to the chin.

Dr. Hoover also testified that Diana

> had on her back what we would call confluent ecchymosis. That means that there was bruising to the extent that the individual bruises melded into one large bruise almost; they — they overlapped each other. I mean, there was just a tremendous amount of bruising on the back and the front of the torso. She also had multiple linear abrasions or superficial lacerations, and again, by that I mean, injuries or markings on the body that were in a fine linear pattern just like you would draw a straight line and those were oriented at various angles.

Dr. Hoover opined that Diana's injuries were not consistent with a fall down the stairs, but had been caused by blunt force trauma, inflicted by a belt or similar item within 24 to 36 hours before Diana's death. The pediatrician on call for the hospital who had assisted with Diana's care also observed Diana's injuries and similarly opined that the injuries were inconsistent with falling downstairs and had not been caused accidentally.

Dr. Jerry Jones, a pathologist at the University of Nebraska Medical Center, performed an autopsy on Diana the day after her death. Dr. Jones testified that Diana's body was covered with bruises and abrasions that were indicative of blunt trauma. Dr. Jones stated that the extent of the bruising indicated that "[t]his young lady underwent a horrendous beating prior to when — before she died." Dr. Jones identified particular bruises as defensive wounds, indicating that Diana "was trying to protect herself." Dr. Jones also identified severe hemorrhages on the front of Diana's scalp, back of the scalp, and midoccipital scalp, which injuries were "proof positive of impacts to the head," and hemorrhaging on the surface of Diana's brain.

Dr. Jones opined that based on these findings, he was "certain" that Diana's death was caused by fatal blunt impact to the head. Based upon microscopic examinations of sections taken from the injuries, Dr. Jones opined that Diana's injuries had been sustained within 24 to 36 hours before her death. Specifically, Dr. Jones testified to a reasonable degree of medical certainty that the cause of Diana's death was "blunt trauma to the head with acute subdural and subarachnoid hemorrhage and diffuse brain swelling with compression of the brain stem" and that there was

"no possibility that these could have been sustained as a result of any accidental event." Dr. Jones stated:

> These injuries were all inflicted and they were all part and parcel of the same beating, and again as I indicated, this child endured a horrific beating all over her body including her head before her death, and again to reiterate, there is no possibility that this distribution and pattern and extent of these injuries could have been sustained in any accidental manner whatsoever.

Tim Meguire, an investigator with the Grand Island Police Department, began the investigation into Diana's death. Meguire testified that when he made contact with Molina at the hospital, Molina said that Diana had been injured falling down the stairs at the family's home. After viewing Diana's body, Meguire accused Molina of not being entirely truthful. When Meguire explained that the bruising he had observed did not seem to be consistent with falling down the stairs, Molina said that "some of the bruising had been — been there when he brought Diana up from El Salvador; again, that some of the family down there was abusing — abusing her." When Meguire said that the marks on Diana's body were more consistent with being struck by a belt, Molina admitted to spanking Diana for urinating on the floor. Meguire said that when Molina was told that Diana was dead, he "cried for a few moments."

Meguire placed Molina under arrest at the hospital and interviewed Molina later that morning in an interrogation room at the Grand Island police station. With one stipulated redaction, a video recording of the interview was played for the jury.

Molina said in the interview that the day before Diana's death, he woke up in the afternoon and went to register his car. He borrowed some money to pay for the registration and then went to the car dealer to get the title so he could register the car. He talked for a while with a friend who worked in automobile parts and then went to the Department of Motor Vehicles at about 4:30 p.m. Molina said he then went home and watched television with his wife.

The family lived in a two-story house in Grand Island. Molina and his wife slept in the basement with Diana and her younger

sister. The living room and kitchen were on the ground floor of the residence, and the bathroom and two bedrooms were on the upper floor. Molina's parents, Manuel and Nohemy Molina, slept in one of the upstairs bedrooms; Molina's sister, her son, and Molina's brother slept in the other bedroom.

After a time, Mrs. Molina went upstairs to cook food and Molina said he continued watching television in the basement with Diana. Molina went upstairs, and when he came back downstairs, Diana had urinated on the floor. Molina stated that he "spanked" Diana with a belt "four or five times" and then gave Diana some wipes and told her to clean it up, which she did. Molina said he went upstairs and told his wife what had happened, and she went downstairs and scolded Diana. They ate, and then Diana was given an apple to eat while Mrs. Molina did dishes and Molina returned to watching television. He was joined by his wife after Diana and her younger sister went to sleep. Molina said he and Mrs. Molina went to bed at about 1 a.m.

Molina said in the interview that about 2:30 a.m., Diana woke up and had to use the bathroom. Molina said he took her upstairs to use the bathroom, then cleaned her up. Molina said that as he was taking Diana back to bed, he turned at the top of the basement stairs to turn off the lights, and that Diana tripped and fell down the stairs. Molina said that when he got to her, she was unconscious. Molina said he splashed cold water on her face and rubbed alcohol on his hands and then on her nose, but Diana was unresponsive. He said he heard her heart beating, and he and Mrs. Molina attempted mouth-to-mouth resuscitation but did not know how. Molina put Diana in his car to take her to the hospital.

Molina explained in the interview that when he and his wife moved from El Salvador, Diana did not come with them because of concerns for her health. Diana had been left in El Salvador with her grandmother until Molina went on a bus to get her, about 1½ weeks before her death. When Molina was asked about the marks on Diana's body, Molina said that the marks on Diana's back were there when he picked up Diana in El Salvador. Molina said his wife's cousin in El Salvador had beaten Diana for breaking things.

However, Molina admitted in the interview that he had "spanked" Diana with a belt each of the four times she had

urinated in the bedroom, striking five or six blows each time. Diana had, according to Molina, been "spanked" in that way twice in the 2 or 3 days preceding the interview. Molina also admitted that he had "got kind of mad" when Diana urinated in bed and hit her a bit more that time. Molina also said that Diana had defecated in her pants about a week before the interview and had been "spanked" with a belt about six times on that occasion. Molina said that he had not shaken Diana or struck her with anything other than a belt. Molina admitted that he picked Diana up once by her hair, about 3 or 4 days before the interview, and told her to clean up where she had urinated. Diana's hair came out, and Molina said it was the last time he had done that. Molina explained that because Diana was 2, almost 3, years old, he told Diana when he punished her that she was old enough to know not to urinate in her room.

In the interview, Molina seemed confused by many of the questions about bruises and cuts on the front of Diana's body. Molina claimed that to his knowledge, Diana did not have bruises on her leg or head, or a mark on her nose, when she was taken to the hospital. Molina also claimed he did not know how Diana got a black eye, but suggested that maybe she had hit herself on the table. Molina said that he never saw anyone else spank her and that no one else had spanked her since she came to the United States. Molina specifically said he had not seen Mrs. Molina spank Diana.

Generally, Molina consistently claimed during the interview that Diana had fallen down the stairs. Molina seemed anxious during the interview, but was not particularly emotional until near the end of the interview, when he was told that he would be charged with first degree murder, and he became agitated and angry.

Molina was charged with one count of first degree murder and one count of child abuse resulting in death. Molina entered a plea of not guilty to each charge.

Mrs. Molina reached a plea agreement with the State and agreed to testify at Molina's trial. Mrs. Molina agreed to plead guilty to knowingly and intentionally permitting child abuse resulting in serious bodily injury, a Class III felony, and was to serve no less than 4 nor more than 20 years' imprisonment. Mrs.

Molina also understood that it was likely she would lose her parental rights to Diana's sister.

Mrs. Molina testified that she was awakened by "some noises" in the early morning hours on July 22, 2003, approximately 24 hours before Diana's death. Molina was awake and with Diana. Mrs. Molina said that Diana "was naked and her arms were raised and she was standing on top of something that looked like a white bucket." Diana's hair was wet, and there were marks on her body from a belt. Molina was sitting on the edge of the bed with the belt in his hand, telling Diana not to fall asleep, and that if she put her hands down, he was going to hit her with the belt. Mrs. Molina testified that Molina told her that he was punishing Diana because she had urinated in her crib. Mrs. Molina said that Molina kept Diana there for about 3 hours and hit her with the belt five times during that period. Mrs. Molina said she told Molina to let Diana go to sleep, but he refused, saying that Diana could not go to sleep because "she was always peeing and that she was filthy and that she was being punished." When Diana fell asleep and fell over, Molina put her back on her feet in the same position. Eventually, Molina put Diana in her crib.

Mrs. Molina testified that when she woke up around 10 a.m., Diana was again standing with her arms raised, and Molina was again telling her that if she dropped her arms, he would hit her with the belt. She remained in that position for approximately 2½ to 3 hours. Mrs. Molina said that when she told Molina not to make Diana suffer, Molina said that Mrs. Molina "needed to stop talking and telling him that because it would just make him spank her more and that it would just be best if I just would be quiet." Molina said that "he could do whatever he wanted because he was the father and he was the one that brought her into this world."

Mrs. Molina testified that about 1:30 or 2 p.m., Molina went out and got some food, and they then ate inside the room. Molina had Diana stand up again because she had urinated on the floor. Mrs. Molina testified that Molina was very angry and pulled Diana up by her hair, and a chunk of Diana's hair came out. Diana spent the rest of the day on her feet. If Diana lowered her arms, Molina yelled at her and hit her with a belt until she raised her arms again.

Mrs. Molina testified that around 8 p.m., Diana was allowed to drink some juice and eat an apple. Mrs. Molina said that she thought Diana "was very hungry because she was eating really fast and she was falling asleep and [Molina] went over and picked her up and spanked her or hit her about five times and then put her on top of the bucket again." Diana remained standing on the floor until Mrs. Molina went to bed at around midnight.

Mrs. Molina testified that she slept intermittently, but heard Diana say that her feet hurt and she wanted to go to bed. Molina would not let her and made her run around the room while Molina hit her. Mrs. Molina said it sounded as if Diana was running into the furniture or walls. Mrs. Molina said she heard Diana say she needed to use the bathroom, and Molina said he would take her out in the living room and "have her do it in the paper." Diana then told him she was finished, Molina said he would clean her up, and then they came back into the room.

Mrs. Molina testified that she heard Diana say her feet were hurting and that she wanted to sleep. After that, Mrs. Molina heard Diana screaming, and it sounded as if Molina was repeatedly hitting Diana with the belt. Mrs. Molina looked and saw Molina swinging Diana around and shaking her. Molina made Diana run and then after she fell, hit her repeatedly while she was on the floor. Mrs. Molina said that it sounded like Molina then repeatedly picked Diana up and dropped her to the floor "ten or twenty times." Molina hit Diana hard in the stomach; then, when Mrs. Molina looked, Molina was trying to get Diana up, but she was unresponsive. Molina told Mrs. Molina that Diana had fallen when he was bringing her back from the bathroom, but Mrs. Molina testified that she would have heard had Molina taken Diana up the stairs to the bathroom.

Mrs. Molina attempted to resuscitate Diana, but was unsuccessful. They decided to take Diana to the hospital, but Molina insisted on dressing her in an attempt to hide bruises that Mrs. Molina testified were "almost all over her body." According to Mrs. Molina, Molina "said that I should say that she had already come that way from El Salvador; that a cousin had beat her and that not all of those [bruises] were from him." "That I should say that — that what I had heard was that she had fallen down the

stairs when he — he was bringing her back from the bathroom." Mrs. Molina said that she told Molina " '[y]es,' that I would say that at the hospital so that he would take her to the hospital because if I didn't say that he wouldn't take her." They left for the hospital out the basement door, although that was not the door they usually used, because Molina said his mother was watching television and she would see what had happened and get worried.

Molina testified in his own defense. Molina said that during the afternoon of July 21, 2003, 2 days before Diana's death, Molina registered his car and then went to play baseball with a friend. Molina said that he got home about 9:30 or 10:30 p.m. Molina said he found that Diana was injured and put ice on her injuries. Molina testified that he thought Mrs. Molina had inflicted the injuries and that he told Mrs. Molina that it was child abuse.

Molina said that the next day, he got up and went car shopping. He remembered talking to a friend, Dan Mackey, at the car dealership. Molina then went home and was downstairs with his daughters while Mrs. Molina went upstairs to get something to eat. Molina left the house to go shop for automobile parts; passed the house of his cousin, Juan Retana; and saw Retana's car. Molina and Retana worked on the car and then went to a fast-food restaurant. They cruised for a while, and then Molina dropped off Retana and went home at around midnight.

Mackey, an employee of a used car dealership, testified that he talked to Molina at the dealership "around lunch time" on the day before Diana's death. Retana testified that he met Molina on the day before Diana's death, in the "[e]vening, like around 9:00; 9:00, 10:00." Retana testified that he and Molina talked and worked on Molina's car for 30 to 45 minutes, then went to get fast food. According to Retana, they ate for 45 to 60 minutes, then cruised for "[a]bout another hour, it was late, so I think I got home around 12:00, 12:00 or 1:00, somewhere around there."

Molina testified that after he got home, he watched television for a while and then went to bed. Molina testified that he was awakened by Diana, who said she had to go to the bathroom. Molina said he took Diana upstairs to use the bathroom, but she was limping, and Molina saw that Diana had new bruises she had

not had before. Molina testified that they went back downstairs, but when he stopped at the top of the basement stairs to turn out the light, Diana fell down the stairs. Molina said that he picked Diana up and took her to the bedroom, but she was unresponsive, and that he and Mrs. Molina tried to revive her. When that failed, they took Diana to the hospital.

Molina claimed that Mrs. Molina told him to tell the police that Diana's bruises had been inflicted by a cousin in El Salvador and that she told him she did not want to go to jail. Molina said that when he spoke to Meguire, Molina lied about the cousin in El Salvador, as his wife had suggested. Molina denied that he had caused any of Diana's injuries.

Molina was convicted and sentenced as set forth above, and filed a timely notice of appeal. Molina's appellate brief was filed on March 22, 2005. On July 7, Molina's trial counsel filed a motion to withdraw as Molina's counsel, accompanied by a June 24 affidavit in which Molina averred that he wished to assert ineffective assistance of counsel as an issue on appeal. On August 17, this court directed the trial court to appoint replacement counsel for Molina, and the trial court appointed the Nebraska Commission on Public Advocacy to represent Molina. The commission filed a motion for leave to file a replacement brief, but the State objected. This court entered an order directing Molina to file a supplemental brief, with any new content limited to claims of ineffective assistance of prior counsel.

Further factual details will be set forth below, as relevant to Molina's specific assignments of error.

## II. ASSIGNMENTS OF ERROR

In an appellate brief filed by trial counsel, Molina assigns, restated, that the district court erred in

(1) not granting Molina's motion to elect on double jeopardy grounds;

(2) not granting Molina's motion to vacate his second degree murder conviction on double jeopardy grounds;

(3) permitting the State to amend the information to endorse Dr. Matthias Okoye as a witness less than 30 days prior to trial;

(4) refusing to play for the jury the video recording of a pretrial police interview with Mrs. Molina;

(5) refusing to admit into evidence a letter from Molina to his mother; and

(6) not giving Molina's requested preliminary and final jury instructions with respect to: (a) lesser-included offenses of child abuse resulting in death, (b) the limiting instruction on statements admitted as relevant to credibility, (c) the State's burden of proof with respect to Molina's alibi, and (d) when the jury could go home after sequestration.

Molina also assigns that

(7) the State's comments during opening statements to the jury violated Molina's constitutional right to remain silent.

In a supplemental brief filed by the Nebraska Commission on Public Advocacy, Molina assigns, as restated, that

(8) the rule that requires a criminal defendant to raise issues of ineffective assistance of counsel on direct appeal when new counsel has been appointed should be overruled and replaced with the discretionary rule of *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003);

(9) there is plain error in that Molina received ineffective assistance of counsel at trial;

(10) there is plain error in that Molina received ineffective assistance of counsel in his original brief on direct appeal; and

(11) there is plain error in that the district court failed to conduct an evidentiary hearing on Molina's claim of ineffective assistance of counsel before allowing Molina's counsel to withdraw on direct appeal.

## III. ANALYSIS

### 1. Double Jeopardy

In his first two assignments of error, Molina contends that his convictions violate the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions, because second degree murder is a lesser-included offense of child abuse resulting in death.

#### (a) Background

On July 29, 2004, Molina filed a "Motion to Elect," asking the court "to Order the State to elect between Counts I and II of the most recent Amended Information," contending at that time that child abuse resulting in death was a lesser-included offense of first degree murder. At the hearing on the motion, Molina argued

that the two charges had different and inconsistent elements and that it would violate his due process rights to defend against the two charges in the same action. Molina conceded he did not believe the State could be compelled to elect between lesser-included offenses, but "it does not appear that under the current doctrine as adopted by the Nebraska Supreme Court that these two charges are, in fact, lesser includeds." Molina conceded his argument was inconsistent with his motion and said he "would indicate in the motion that I don't believe at this time it is a lesser included, under this analysis, and therefore, the motion should be modified in that area." The motion to elect was overruled.

After Molina was convicted, he filed a motion to vacate the murder conviction on double jeopardy grounds, arguing that second degree murder is a lesser-included offense of child abuse resulting in death. The court overruled the motion.

(b) Standard of Review

[1,2] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. See, *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993); *State v. Putz*, 11 Neb. App. 332, 650 N.W.2d 486 (2002), *affirmed* 266 Neb. 37, 662 N.W.2d 606 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006).

(c) Analysis

[3,4] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[5,6] A determination of whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on

such offenses. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001). In both the multiple punishment and multiple prosecution contexts, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one for double jeopardy purposes is whether each provision requires proof of a fact which the other does not. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

*(i) Motion to Elect*

In support of his first assignment of error, Molina argues that his "Motion to Elect" should have been granted on double jeopardy grounds. This assignment of error is without merit for two reasons.

[7,8] First, Molina's argument on appeal is not only inconsistent with, but directly contradictory to, his argument in the trial court regarding his motion to elect. In the trial court, Molina denied that the case presented lesser-included offenses. A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005). Furthermore, an objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Molina's appellate argument was expressly disclaimed at trial, and we therefore need not consider it.

[9] Second, we have clearly held that the State is not required to elect between charges when a crime and a lesser-included offense are charged in separate counts of the same information. See *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). As explained below, we reject Molina's lesser-included offense argument as presented in his motion to vacate. For purposes of resolving this assignment of error, however, we simply note that Molina's motion to elect would not have been properly granted if it had been based upon the reasoning of his appellate argument.

*(ii) Motion to Vacate*

In support of his second assignment of error, Molina makes the same argument with respect to his motion to vacate: that second

degree murder is a lesser-included offense of child abuse resulting in death. This argument has not been waived. See *id.*

[10,11] Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not. *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003). When applying the *Blockburger* test to separately codified criminal statutes which may be violated in alternative ways, only the elements for which the defendant has been punished should be compared to determine whether multiple punishments have been imposed for the same offense. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005).

The elements of second degree murder are the causation of death, intentionally, but without premeditation. See, Neb. Rev. Stat. § 28-304 (Reissue 1995); *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Child abuse resulting in death is proscribed by Neb. Rev. Stat. § 28-707 (Cum. Supp. 2004), which provides, as pertinent to the charge in this case:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> . . . .
>
> (b) Cruelly confined or cruelly punished[.]
>
> . . . .
>
> (6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

It is clear, and Molina concedes, that child abuse resulting in death requires proof of an element that second degree murder does not: that the death was that of a minor child. See *State v. White*, 217 Neb. 783, 351 N.W.2d 83 (1984). However, second degree murder also requires proof of an element that child abuse resulting in death does not: an intent to kill. See *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999). Child abuse resulting in death requires proof of the defendant's intent to commit child

abuse, as defined in the subsections of § 28-707(1), but it does not require proof that the defendant intended to kill the minor child. Second degree murder, on the other hand, requires proof of an intent to kill. See, *Jackson, supra*; *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999); *State v. Smith*, 3 Neb. App. 564, 529 N.W.2d 116 (1995).

[12] Because each offense requires proof of an element that the other does not, neither is a lesser-included offense of the other, and the Double Jeopardy Clause's protection against multiple punishments for the same offense is not implicated. Molina's second assignment of error is without merit.

### 2. Amendment of Information to Add Dr. Okoye as Witness

Molina argues that the court erred in permitting the State to amend the information, less than 30 days before trial, to add an additional witness. Molina argues that pursuant to Neb. Rev. Stat. § 29-1602 (Cum. Supp. 2004), when the death penalty is sought and the information contains a notice of aggravation, as was the case here, then the State cannot endorse additional witnesses less than 30 days before trial.

#### (a) Background

On July 9, 2004, the State filed a motion to amend the information to add Dr. Matthias Okoye as an expert witness. The State explained that Dr. Okoye was to serve as a rebuttal witness to the defense's expert witness, Dr. Janice Ophoven. The State explained that while it did not believe amending the information to add a rebuttal witness was necessary, the State had "tried to come forward and do the right thing here." Molina objected, but stated that "if the Court is going to grant the motion, I'll probably have to ask for a continuance." On July 12, the court granted the State's motion to amend the information, concluding that it was within the court's discretion to permit the amendment and that although the addition of the witness was requested 18 days prior to trial,

> the purpose for which the witness is added was stated in open court by the State and the Court is of the opinion that the defense has sufficient time to take the witness's

> deposition or investigate what the witness may or may not say and adequately prepare for this witness.

The amended information was filed on July 16.

On July 15, 2004, the parties appeared in court, where the State agreed to Molina's motion to depose Dr. Okoye, and the parties stipulated that the deposition had been scheduled for the following Monday, July 19. On July 26, Molina filed a motion for continuance, based in part on the allegation that while the deposition of Dr. Okoye had been held on July 19, the deposition transcript was over 200 pages long and had not been made available until July 26. On the same date, the court denied the motion for continuance, finding that there was nothing in the defense's motion "which indicates that the defense is prejudiced in any manner." Jury selection began on July 30.

Dr. Ophoven, a forensic pathologist, testified as a defense witness. She reviewed photographs from the home, hospital, and autopsy; medical records for Diana and Diana's sister; interviews and videotapes; histopathology; and Dr. Jones' autopsy report.

Dr. Ophoven indicated that no microscopic examination had been made of Diana's brain or spinal cord. Dr. Ophoven opined that how and when a brain injury occurred is not clear without a microscopic examination. Dr. Ophoven said that some of the autopsy findings had "not been examined and not documented" and that this resulted in unanswered questions. Dr. Ophoven opined that the autopsy was "incomplete and leaves serious unanswered questions in the determination as to why there was brain swelling."

Dr. Ophoven opined that "the blood inside of the skull is the consequence of blunt force trauma or injury to the head that resulted in bruises in the scalp and a small film of subdural over the surface of the brain" but that "[t]he blood itself was not sufficient to cause the swelling or herniation of the brain." Dr. Ophoven opined that the bald spot on Diana's head was old, not fresh.

Dr. Ophoven testified that from the information she was provided, she was unable to tell how Diana was injured. Dr. Ophoven testified that because only one section of skin was taken for microscopic examination, she could not verify whether Diana's different injuries could have been of different ages and

occurred at different times. Dr. Ophoven saw no evidence indicating that Diana's head had been struck against a hard surface 15 or 20 times. Because of the testing that had not been done, Dr. Ophoven said that no determination could be made whether Diana had been struck or had fallen and hit her head.

Dr. Okoye, a specialist in forensic pathology and cytopathology, testified as a rebuttal witness for the State. Dr. Okoye reviewed the autopsy performed by Dr. Jones and was provided with a copy of Dr. Ophoven's expert medical opinion report and a copy of her testimony. Dr. Okoye opined, within reasonable medical certainty, that Diana died from "blunt force trauma of the head associated with acute bilateral subdural hemorrhage and diffuse brain swelling, and in addition, there were contributory injuries, extensive contusions and abrasions of the face, trunk and extremities." Dr. Okoye ruled out a fall downstairs as the cause of Diana's injuries, since "[i]f this child suffered these injuries by just falling from the stairs, the child would have fallen 50 to [a] hundred times." Dr. Okoye opined that Diana's injuries were inflicted contemporaneously, 2 to 24 hours before her death. Dr. Okoye opined that additional microscopic slides of Diana's brain would not have contributed to the determination of Diana's cause of death, because naked-eye examination showed subdural and subarachnoid hemorrhaging, but no hemorrhage or contusion within the brain tissue, and further examination of the brain confirmed those findings. Dr. Okoye rejected Dr. Ophoven's testimony that staining microscopic slides could be used to date injuries.

(b) Standard of Review

[13-15] The decision to grant or deny an amendment to a pleading rests in the discretion of the court. *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005). Similarly, whether to permit the names of additional witnesses to be endorsed upon the information after the information has been filed is within the discretion of the trial court. See, § 29-1602; *State v. Brandon*, 240 Neb. 232, 481 N.W.2d 207 (1992). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Mason, ante* p. 16, 709 N.W.2d 638 (2006).

(c) Analysis

[16] Section 29-1602 provides:

> All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant. The prosecuting attorney shall subscribe his or her name thereto and endorse thereon the names of the witnesses known to him or her at the time of filing. After the information has been filed, the prosecuting attorney shall endorse on the information the names of such other witnesses as shall then be known to him or her as the court in its discretion may prescribe, except that if a notice of aggravation is contained in the information as provided in section 29-1603, the prosecuting attorney may endorse additional witnesses at any time up to and including the thirtieth day prior to the trial of guilt.

The purpose of § 29-1602 is to notify the defendant as to witnesses who may testify against the defendant and give the defendant an opportunity to investigate them. See *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

[17,18] But it has long been the rule in this state that the requirement that the names of the witnesses for the State must be endorsed upon the information has no application to rebuttal witnesses. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000). Furthermore, a trial court may allow witnesses to be endorsed after an information is filed when doing so does not prejudice the defendant in the preparation of his or her defense. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001).

In this case, Dr. Okoye testified as a rebuttal witness, and Molina has made no showing of how he was prejudiced by Dr. Okoye's endorsement less than 30 days prior to trial, nor has he assigned error to the overruling of his motion for continuance. It is impossible to conclude that Molina was prejudiced when he received more notice of Dr. Okoye's testimony than was required. In short, no abuse of discretion appears on this record. Molina's assignment of error is without merit.

3. Mrs. Molina's Video-Recorded Statement

Molina argues that the trial court erred in refusing to permit him to show the jury the entirety of Mrs. Molina's pretrial interview with police.

(a) Background

Prior to trial, Mrs. Molina was interviewed by Lt. Bradley Brush of the Grand Island Police Department, during which interview Mrs. Molina made statements inconsistent with her later trial testimony. Mrs. Molina admitted at trial, on direct examination by the State, that during the interview with Brush, she claimed that Diana slept and played a game on the day before she died. Mrs. Molina admitted that during the interview, she did not describe the abuse to which she later testified. Mrs. Molina also admitted at trial that she told Brush that Molina had hit Diana only about 13 or 14 times. Mrs. Molina testified at trial that during her interview with Brush, she was untruthful because she had been affected by letters Molina sent to her in jail, in which he urged her to describe the circumstances of Diana's death as he had, and he told her that she would be considered an accomplice and would get 20 years to life in prison. Molina did not object to the State's examination of Mrs. Molina in that regard.

Prior to cross-examining Mrs. Molina, Molina indicated his intent to introduce the entire 6½-hour video recording of Brush's interview of Mrs. Molina. Molina argued that the video recording was admissible as extrinsic evidence of an inconsistent statement made by a witness. Alternatively, Molina argued that under the doctrine of completeness, the court had the discretion to admit the record of the entire conversation with Brush, and not just the statements of which evidence had been adduced by the State. The State objected, inter alia, on the basis that except for any prior inconsistent statements, the interview was hearsay.

The court denied Molina's request to play the entire 6½-hour interview. The court stated that Molina would have the opportunity to cross-examine Mrs. Molina with respect to any inconsistent statements, and to offer extrinsic evidence of those statements, but that the court was "not going to let you, in the middle of the trial, give me six and a half hours of tape and expect me to let the jury hear six and a half hours of tape." The court indicated it was willing to consider the context of particular inconsistent statements, but not to simply play the entire interview to the jury. Molina indicated a willingness to edit the interview to focus on particular inconsistent statements; the court indicated

that it did not believe the entire interview was relevant and that it needed Molina to be more specific to consider his request.

Molina cross-examined Mrs. Molina extensively, but did not attempt to impeach her with statements she made to Brush, or introduce the video recording of any part of the interview at that time. At the end of the day, the court formally overruled Molina's request to play the entire interview.

Later in the trial, Molina examined Brush and adduced testimony about the inconsistencies between Mrs. Molina's trial testimony and her statement to Brush. Molina also questioned Mrs. Molina's attorney about those inconsistencies. After the attorney and Brush testified, Molina again offered the entire 6½-hour interview into evidence, and the court sustained the State's objection to the exhibit. The court later explained that the basis of the exclusion was Neb. Evid. R. 403, "for the reason that it would cause undue delay and be a waste of time to play the whole six and a half hours as presented."

(b) Standard of Review

[19] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Mason, ante* p. 16, 709 N.W.2d 638 (2006).

[20,21] Under Neb. Evid. R. 106, the admission of evidence is not a matter of right, but rests with the sound discretion of the court. See *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987). Similarly, a ruling pursuant to rule 403 for exclusion of relevant evidence will be upheld on appeal unless the ruling is an abuse of discretion. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

(c) Analysis

Molina argues that Mrs. Molina's interview with Brush was admissible pursuant to Neb. Evid. R. 613 and rule 106.

Rule 613(2) provides in part that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require."

Rule 106 provides:

> (1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.
>
> (2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.

The problem with Molina's argument is that it is unresponsive to the basis upon which the district court actually excluded the evidence at issue. The court relied upon rule 403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In this case, both the State and Molina adduced evidence of the prior inconsistent statements that were made by Mrs. Molina during the interview with Brush, so the jury was already aware of the statements. Molina was offered the opportunity to present sections of the interview and argue how those sections might have been admissible, under rule 106, to explain the context of Mrs. Molina's statements. Instead, Molina chose to offer the entire 6½-hour interview, and he did not explain in what way the entire interview was necessary to understand the statements about which evidence had already been adduced, and regarding which Mrs. Molina had been examined. Under such circumstances, we cannot say it was an abuse of discretion for the district court to conclude that the relevance of playing the entire video-recorded interview would be substantially outweighed by considerations of undue delay or wasting time. For that reason, we find no merit to Molina's assignment of error.

### 4. Molina's Letter to His Mother

#### (a) Background

During surrebuttal, Molina's mother, Nohemy, identified a letter that she said Molina had sent her. In the letter, Molina related a version of events that was substantially consistent with his trial testimony. Molina argued that the letter was admissible as a prior consistent statement. The State's objection to the letter, on the basis of improper surrebuttal, was sustained. Molina claims that this ruling was erroneous.

#### (b) Standard of Review

[22] The abuse of discretion standard is applied to an appellate court's review of a trial court's ruling on the admissibility of rebuttal testimony. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

#### (c) Analysis

[23,24] Rebuttal evidence is confined to that which explains, disproves, or counteracts evidence introduced by the adverse party. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *Fahlk, supra*. A trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence only for good reason and in the furtherance of justice. *Fahlk, supra*.

[25] Rebuttal evidence is confined to new matters first introduced by the opposing party and is not an opportunity to bolster, corroborate, reiterate, or repeat a case in chief. *Id.* See, also, *McLemore, supra* (no abuse of discretion in limiting cross-examination of rebuttal witness where defendant sought to adduce evidence that defendant could have adduced during case in chief). Here, Molina sought to adduce evidence, in surrebuttal, that simply reinforced the theory of the case he advanced in his case in chief. Molina could have attempted to introduce the letter in his case in chief, but did not do so.

Molina argues that the letter was responsive to Dr. Okoye's testimony in rebuttal of Dr. Ophoven. Essentially, Molina argues that the implication of Dr. Okoye's testimony was that Molina testified falsely when he said Diana fell down the stairs. Thus,

according to Molina, a prior consistent statement that Diana had fallen down the stairs was both responsive and admissible.

There are two reasons that this argument is without merit. First, Molina's letter was not a prior consistent statement as defined by Neb. Evid. R. 801(4), which provides in relevant part:

> A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

[26,27] Prior consistent out-of-court statements are defined as nonhearsay and are admissible to rebut a charge of recent fabrication, improper influence, or improper motive only when those statements were made before the charged recent fabrication, improper influence, or improper motive. *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). But attempts at impeachment cannot be equated to charges of *recent* fabrication. *Id.* In this case, Dr. Okoye's testimony operated to impeach Molina's, but was not a charge of recent fabrication—as is clear from the fact that the "fabrication" at issue, that Diana fell down the stairs, was present in Molina's statement to police only a few hours after Diana's death.

More importantly, Dr. Okoye's testimony served to rebut Dr. Ophoven's criticism of the autopsy report and opinion of Dr. Jones. That was the "new matter" introduced in the State's rebuttal—not the contention that Diana had not been killed by a fall down the stairs, which was evident throughout the State's case in chief. Molina's letter served only to corroborate, in the most literal sense, Molina's case in chief, which, as previously stated, is not proper rebuttal evidence. See *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). As such, the district court did not abuse its discretion in excluding it.

### 5. Jury Instructions

#### (a) Lesser-Included Offenses of Child Abuse Resulting in Death

Molina argues that the jury should have been instructed on lesser-included offenses of child abuse resulting in death.

*(i) Background*

At the jury instruction conference, Molina requested lesser-included offense instructions for intentional child abuse and negligent child abuse as being lesser-included offenses of child abuse resulting in death. The request was denied, and the jury was instructed as follows:

> Depending on the evidence you may return one of several possible verdicts. You may find the defendant Germai R. Molina:
>
> **II. AS TO COUNT II:**
>
> (1) Guilty of Child Abuse Resulting in Death; or
>
> (2) Guilty of Child Abuse Resulting in Serious Bodily Injury; or
>
> (3) Not guilty.
>
> The elements of Child Abuse Resulting in Death are:
>
> 1. That the defendant Germai R. Molina caused Diana Molina, a minor child, to be cruelly confined or cruelly punished; and
>
> 2. That the defendant Germai R. Molina did so knowingly and intentionally; and
>
> 3. That the defendant Germai R. Molina's acts resulted in the death of Diana Molina, a minor child; and
>
> 4. That the defendant Germai R. Molina did these acts between July 22, 2003 and July 23, 2003; and
>
> 5. That the defendant Germai R. Molina did these acts in Hall County, Nebraska.
>
> The elements of Child Abuse Resulting in Serious Bodily Injury are:
>
> 1. The defendant Germai R. Molina caused or permitted a minor child Diana Molina to be cruelly confined or cruelly punished; and
>
> 2. That the defendant Germai R. Molina did so knowingly and intentionally;
>
> 3. That the defendant Germai R. Molina's acts resulted in Diana Molina, a minor child, suffering serious bodily injury;
>
> 4. That the defendant Germai R. Molina did these acts between July 22, 2003 and July 23, 2003; and

> 5. That the defendant Germai R. Molina did these acts in Hall County, Nebraska.
>
> **B. EFFECT OF FINDINGS**
>
> You must separately consider in the following order the crimes of:
>
> Child Abuse Resulting in Death;
>
> Child Abuse Resulting in Serious Bodily Injury.
>
> For Child Abuse Resulting in Death you must decide whether the State proved each element beyond a reasonable doubt. If the State did so prove each element beyond a reasonable doubt, then you must find the defendant Germai R. Molina guilty of Child Abuse Resulting in Death and stop.
>
> If you find that the state did not so prove, then you must proceed to consider the next crime in the list, Child Abuse Resulting in Serious Bodily Injury.
>
> You must proceed in this fashion to consider each of the crimes in sequence until you find the defendant Germai R. Molina guilty of one of the crimes or find him not guilty of all of them.

The jury was also instructed on second degree murder and manslaughter as lesser-included offenses of first degree murder. The jury was instructed that to find Molina guilty of second degree murder, it must find that Molina caused the death of Diana "intentionally but without premeditation" and that to find Molina guilty of manslaughter, it must find that Molina killed Diana "unintentionally while in the commission of an unlawful act."

*(ii) Standard of Review*

[28] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. See, *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993); *State v. Putz*, 11 Neb. App. 332, 650 N.W.2d 486 (2002), *affirmed* 266 Neb. 37, 662 N.W.2d 606 (2003). Whether jury instructions given by a trial court are correct is a question of law. *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005). 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. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006).

*(iii) Analysis*

As pertinent, § 28-707 provides:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> . . . .
>
> (b) Cruelly confined or cruelly punished[.]
>
> . . . .
>
> (3) Child abuse is a Class I misdemeanor if the offense is committed negligently.
>
> (4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury . . . .
>
> (5) Child abuse is a Class III felony if the offense is committed knowingly and intentionally and results in serious bodily injury . . . .
>
> (6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

[29,30] To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case. *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003). 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. Mason, ante* p. 16, 709 N.W.2d 638 (2006).

[31] It is not disputed that negligent child abuse as defined by § 28-707(3) and intentional child abuse as defined by § 28-707(4) are lesser-included offenses of child abuse resulting in serious bodily injury as defined by § 28-707(5) and child abuse resulting in death as defined by § 28-707(6). See, *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998); *State v. Nguth*, 13 Neb. App. 783, 701 N.W.2d 852 (2005). The question is whether the evidence in this case produces a rational basis for acquitting Molina of the greater offense but convicting him of the lesser offense.

The underlying act of child abuse, which provides the basis for all these offenses, is defined as causing or permitting the minor child to be "[c]ruelly confined or cruelly punished." See § 28-707. Here, there is no dispute that Diana was cruelly confined or punished, and the evidence would require the conclusion that either Molina or Mrs. Molina inflicted the abuse. Based on the evidence, there is no basis for concluding that the abuse was not inflicted knowingly and intentionally by either Molina or Mrs. Molina, or that the abuse did not result in serious bodily injury. Finally, the evidence would permit one of two conclusions regarding the cause of Diana's death: either Diana's death resulted from the knowing and intentional abuse that was inflicted upon her by Molina or Mrs. Molina, or Diana's death resulted from a fall downstairs.

To find Molina guilty of intentional child abuse, but not guilty of child abuse resulting in serious bodily injury or child abuse resulting in death, would require the jury to conclude that Molina knowingly and intentionally abused Diana or permitted her abuse, but that the abuse did not result in serious bodily injury. As previously stated, the evidence would simply not permit the conclusion that the abuse of Diana did not result in, at the least, serious bodily injury.

With respect to negligent child abuse, however, the question is more difficult. Molina argues that if the jury credited his testimony, it could have concluded that Mrs. Molina cruelly punished Diana and that Molina negligently permitted Mrs. Molina to do so. This would have permitted the jury to conclude that Molina was guilty of negligent child abuse, but not guilty of knowingly or intentionally abusing Diana himself. Molina's argument has merit.

The rationale for instructing the jury on lesser-included offenses is that, as explained by the U.S. Supreme Court,

> "if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from

> theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."

(Emphasis in original.) *Beck v. Alabama*, 447 U.S. 625, 634, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), quoting *Keeble v. United States*, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). See, also, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

In this case, the evidence would have been sufficient, had the jury credited Molina's testimony, for the jury to conclude that Molina had not knowingly or intentionally abused Diana, but had negligently permitted Mrs. Molina to do so. Had the jury reached that conclusion, however, the instructions as given would have required the jury to either find Molina guilty of intentional child abuse or find him not guilty. The jury was denied the "third option" that would have been necessary had the jury credited Molina's testimony. We conclude that the district court erred in not instructing the jury on the lesser-included offense of negligent child abuse.

[32,33] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Mason, ante* p. 16, 709 N.W.2d 638 (2006). Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002). Molina's tendered instruction on the lesser-included offense of negligent child abuse was a correct statement of the law and was warranted by the evidence.

That, however, does not end our inquiry. While the court's instruction on the lesser-included offenses of child abuse resulting in death did not present the jury with an opportunity to find that Molina did not act intentionally, the court's instruction on the lesser-included offenses of first degree murder—second degree murder and manslaughter—required the jury to determine whether or not Molina intentionally caused Diana's death.

Under the instructions given in this case, intent to kill denoted the difference between second degree murder and manslaughter. See *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999). The question is whether the jury's finding that Molina was guilty of second degree murder, and not manslaughter, demonstrates that the court's failure to instruct the jury on negligent child abuse was not prejudicial.

[34] In that regard, a number of courts have found that " '[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.' " *People v. Horning*, 34 Cal. 4th 871, 906, 102 P.3d 228, 252, 22 Cal. Rptr. 3d 305, 333 (2004). See, e.g., *State v. Lynch*, 98 Ohio St. 3d 514, 787 N.E.2d 1185 (2003); *Commonwealth v. Chase*, 433 Mass. 293, 741 N.E.2d 59 (2001); *Colwell v. Com.*, 37 S.W.3d 721 (Ky. 2000); *People v. Millwee*, 18 Cal. 4th 96, 954 P.2d 990, 74 Cal. Rptr. 2d 418 (1998); *State v. Barletta*, 238 Conn. 313, 680 A.2d 1284 (1996); *Brown v. State*, 183 S.W.3d 728 (Tex. App. 2005); *State v. Marshall*, 197 Ariz. 496, 4 P.3d 1039 (Ariz. App. 2000); *People v Simonds*, 135 Mich. App. 214, 353 N.W.2d 483 (1984). As explained by the California Supreme Court,

> "in some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury."

*People v. Flood*, 18 Cal. 4th 470, 483, 957 P.2d 869, 877, 76 Cal. Rptr. 2d 180, 188 (1998), quoting *People v. Sedeno*, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974).

We find that rule to be applicable here. The jury in this case was given the opportunity, on count I, to determine whether or not Molina acted with or without intent, and it determined that

he acted with the intent to kill. That same jury could not have concluded that Molina acted without intent with respect to count II. Compare, e.g., *Lynch, supra*; *Colwell, supra*; *Millwee, supra*; *Barletta, supra*; *Brown, supra*; *Simonds, supra*. The court's refusal to instruct the jury on negligent child abuse was not prejudicial to Molina, because the jury necessarily rejected the evidence that would support a finding that only the lesser-included offense was committed. See *Flood, supra*. In view of the actual verdict returned by the jury, there is no reasonable or plausible basis for finding that the instructional error affected the jury's verdict. Molina was not prejudiced by the court's refusal to instruct the jury on negligent child abuse.

(b) Limiting Instructions on Statements Relevant to Credibility

Molina argues that the trial court erred in its final jury instruction regarding inconsistent statements admitted as relevant to witness credibility.

*(i) Background*

Manuel, Molina's father, testified that he was working outside on the day before Diana's death and that based on the absence of Molina's car, Molina had left the house at about 4 p.m. and returned at around midnight or 1 a.m.; however, Manuel did not actually see Molina leave. Manuel was cross-examined with respect to inconsistencies between his trial testimony and statements he made to Meguire regarding the events of that day and statements made to police shortly after Diana's death.

Nohemy, Molina's mother, testified that a few days before Diana's death, she saw Mrs. Molina grab Diana by the hair, because Diana was about to fall down the stairs, and pull out some of Diana's hair. Nohemy also testified that she saw Diana in the kitchen on the day before she died, at around noon, while Mrs. Molina was in the kitchen heating food. Nohemy was also cross-examined with respect to inconsistencies between her trial testimony and statements she made to Meguire regarding the events of that day, and statements made to police shortly after Diana's death.

Douglas Cline, a Grand Island police officer, testified regarding interviews conducted with Nohemy and Manuel, in which

Cline served as interpreter. Cline testified that during the interviews, Nohemy and Manuel had not related the events described in their trial testimony. Nohemy and Manuel testified in surrebuttal that Cline did not speak Spanish very well and did not understand what he was being told.

The court later instructed the jury as follows:

> During this trial I called your attention to certain out-of-court statements that were received in evidence only to aid you in deciding the credibility of the witnesses. *You must consider the statements of Diana Molina, Manuel Molina and Nohemy Molina only with regard to the credibility of these witnesses and for no other purpose*.

(Emphasis supplied.) Molina objected to the last sentence, arguing that only portions of the testimony of those witnesses were being proffered for a limited purpose but that the effect of the court's instruction would extend to the testimony of those witnesses in its entirety. Molina argued for a proposed jury instruction based on the Nebraska Jury Instructions, " 'You are only to consider these for a limited purpose when I told you to consider them for a limited purpose,' " but the court overruled the objection.

*(ii) Standard of Review*

Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005).

*(iii) Analysis*

[35] NJI2d Crim. 5.3A provides as follows: "During this trial I called your attention to some evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other." We have said that in any situation in which a limiting instruction was given at the time evidence was introduced, NJI2d Crim. 5.3 must be given at closing if requested. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

[36,37] For reasons not explained by the record, the court in this case departed from the language of NJI2d Crim. 5.3 and

instructed the jury as set forth above. Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case. *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003). But in an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Grosshans, supra*.

Molina was not prejudiced in this case. The language used by the district court could have been more artfully crafted, and adherence to the Nebraska Jury Instructions is normally preferable; however, when read in context, the instruction given was not an incorrect statement of the law. The sentence that the jury "must consider the statements of [Mrs.] Molina, Manuel Molina and Nohemy Molina only with regard to the credibility of these witnesses and for no other purpose" might be somewhat confusing if read in isolation. However, when read in context, it is clear that the "statements" of Mrs. Molina, Manuel, and Nohemy to which the instruction refers are not their entire testimony, but simply the prior inconsistent statements with which Mrs. Molina, Manuel, and Nohemy were impeached—the "out-of-court statements that were received in evidence only to aid [the jury] in deciding the credibility of the witnesses."

[38] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005). This instruction fairly presented the law, and there is no prejudicial error.

(c) Burden of Proof on Alibi Instruction

Molina argues that the alibi instruction given by the trial court was deficient because it did not specify the State's burden of proof.

*(i) Background*

The jury was instructed:

> An issue in this case is whether the defendant Germai R. Molina was present at the times and places alleged, namely, 224 East Second Street, during July 22 and July 23, 2003. The State of Nebraska must prove that he was.

Molina objected, stating that

> the defendant is requesting that the Court note that the — making the request that the Court instruct that the State is required to prove beyond a reasonable doubt that the defendant was at the — this particular place and partic- — at these particular times and without denoting what that burden is, we believe the same to be an improper burden shifting upon the defendant to prove his innocence in this particular case and we would object on that basis.

The objection was overruled.

The jury was instructed, before trial, that Molina was to be found not guilty "unless you decide the State of Nebraska has proved him guilty beyond a reasonable doubt based solely upon the evidence you hear in this case."

Prior to submission, the jury was again instructed to find Molina not guilty "unless you decide that the state has proved him guilty beyond a reasonable doubt." The jury was instructed that each of the elements of each crime must be proved beyond a reasonable doubt.

*(ii) Standard of Review*

Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005).

*(iii) Analysis*

Molina's complaint is that the alibi instruction set forth above did not specifically iterate the State's burden of proof beyond a reasonable doubt.

[39,40] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.* In construing an individual jury instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole. *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues

supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Mason, ante* p. 16, 709 N.W.2d 638 (2006).

[41,42] The State must prove beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). But the proper inquiry is not whether a jury instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. The constitutional question is whether there is a reasonable likelihood that the jury understood the instruction to allow conviction based on proof insufficient to meet the *In re Winship* standard. *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994); *McHenry, supra*.

Read as a whole, the jury instructions repeatedly told the jury that the State had the burden of proving Molina guilty beyond a reasonable doubt. There was no suggestion that an alibi defense somehow shifted the burden of proof on that issue to Molina. Compare, e.g., *Boeche v. State*, 151 Neb. 368, 376, 37 N.W.2d 593, 596 (1949) (disapproving instruction to jury that alibi defense was proper and legitimate " 'if proven' " and that defendant did not have burden of proving alibi beyond reasonable doubt). The alibi instruction given to the jury plainly informed them that the State had the burden of proof, and the State's burden of proving Molina guilty beyond a reasonable doubt was clear from the instructions read as a whole. There is no reasonable likelihood that the jury applied the instructions in an unconstitutional manner, and Molina has not met his burden of showing any prejudice from the alleged error.

(d) When Jury Could Go Home After Sequestration

Molina takes issue with the court's charge to the jury regarding the effect of sequestration.

*(i) Background*

At the July 26, 2004, pretrial hearing, the court asked the parties for their preferences regarding sequestration of the jury. The parties agreed that with proper admonitions, there need not be sequestration until after the case was submitted to the jury. The court took that "as a waiver of complete sequestration and it

would be the Court's intent and purpose to then not sequester the jury once selected until the case is given to them for their deliberations and verdict."

Prior to submission, the jury was instructed:

> The procedure that will be followed is that as your deliberations commence you will be kept together until you reach a verdict this shall include meal times, which will be arranged for you as a group. *You may not go home at night if you have not reached a decision.*

(Emphasis supplied.) Molina objected to the last sentence, arguing that the court's wording would place undue pressure on the jury to reach a hastened decision. Molina argued that the jury should be instructed that " 'you will be kept together at meal times and may not go home at night.' " The objection was overruled.

The case was submitted to the jury the afternoon of August 11, 2004. A verdict was returned at 11:19 a.m. on August 12.

*(ii) Standard of Review*

Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005).

*(iii) Analysis*

[43] Under Neb. Rev. Stat. § 29-2022 (Reissue 1995), after submission of a criminal case to the jury, the defendant has the right to have the jury kept together until the jury agrees upon a verdict or is discharged by the court, and this right may be waived only by specific agreement or consent of counsel for the parties. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002). Section 29-2022 specifically states in part, in language mirroring the court's instruction, that "[w]hen a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court."

Molina argues that the court's instruction could have pressured the jury to reach a hurried decision. We reject this argument for two reasons. First, we note that the record is not consistent with a hurried decision: The jury was sequestered for a night after the cause was submitted, then rendered a verdict the next morning.

Second, and more importantly, when the language of the court's instruction is compared to that of Molina's proposed instruction, we can discern no meaningful difference. In point of fact, the statement that the jury could "not go home at night" if it had "not reached a decision" is entirely accurate and something that the jury would have quickly discerned on its own, even had Molina's proposed instruction been given.

In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). There is no prejudice here.

For the foregoing reasons, we find no merit in Molina's sixth assignment of error.

### 6. State's Opening Statement and Molina's Right to Remain Silent

Molina argues that the State's opening statement had the effect of forcing Molina to surrender his right not to testify in his own defense.

#### (a) Background

The State's opening statement referred at length to the findings of abuse that the State said would be proved by the medical evidence to be presented at trial. The State said the evidence would show that Diana's death was caused by intentionally inflicted blunt force trauma, not an accident. The State also referred to Molina's statement to police, in which he initially said that Diana had fallen down the stairs, but then admitted to beating her with a belt. The State also noted that Molina had said no one else in his family had struck Diana and that Molina had claimed not to observe injuries on Diana's body that were obvious when she was presented at the emergency room. The State concluded:

> Now, you are going to hear in a few minutes from the defense on their opening statement and it will be our first chance to hear what they believe the evidence will show.
>
> I'd ask you, certainly, to keep an open mind until you have heard the evidence for yourself. I'd ask you to keep an open mind as you listen to the story over the next —

> unfold over the next four to five days, and as you listen to the evidence, keep in mind a couple of things. Keep in mind that the only person who said he had struck Diana was the defendant. That he, in fact, said he didn't know of anyone else having hit her. Keep in mind, that he's the one who says he used the belt to hit Diana, and I would ask you, ladies and gentlemen, a couple of other things.
>
> I would ask of you, first of all, that you not confuse the senseless, brutal nature of this act with an unintentional one. Just because it makes no sense to us why someone would do this to a child for soiling herself and soiling her surroundings while potty training doesn't mean the acts aren't deliberate, and I will ask you not to confuse remorse after the act is committed for fear of getting caught or lack of guilt.
>
> Ladies and gentlemen, the evidence will show you beyond a reasonable doubt that there was no stair fall. The evidence will show you there was no accident. Well, wait. There was one accident. That accident was a little girl had some toilet-training accidents, and because of those accidents, her father beat her to death over the course of a day.
>
> I would ask you to — when we come back on closing arguments to return the only verdict that is consistent with what you will have heard and that's consistent with the law as you will be instructed by [the] Judge . . . a verdict of guilty on both counts.

Molina made no objection to the State's opening statement.

(b) Standard of Review

[44] Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005).

(c) Analysis

[45] As previously noted, Molina did not object to the State's opening statement, either during the statement or immediately

after. Cf. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998) (in order to preserve, as ground of appeal, opponent's misconduct during closing argument, aggrieved party must have objected to improper remarks no later than at conclusion of argument). In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *Mata, supra*. Thus, we review this issue for plain error. See *id*.

[46] We find no such plain error or, indeed, any error at all with respect to the issue Molina raises. One is allowed considerable latitude in making an opening statement. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). The State's opening statement, as summarized above, consisted of an appropriate and accurate summary of the evidence the State would adduce at trial. If Molina was compelled, as a matter of trial strategy, to take the stand in his own defense, it was a result of the evidence adduced by the State, and not the opening statement that described what the evidence would be.

The district court did not commit plain error or, indeed, any error, in permitting the State's opening statement. Molina's assignment of error is without merit.

### 7. Ineffective Assistance of Counsel

#### (a) *Massaro v. United States*

[47] Under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005), *cert. denied* 546 U.S. 947, 126 S. Ct. 449, 163 L. Ed. 2d 341. Molina argues that this rule should be overruled and replaced with the discretionary rule of *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003).

Initially, we note that this case is a direct appeal from Molina's convictions and sentences, not a postconviction action in which an issue not raised on direct appeal may be procedurally barred.

While the issue of a procedural bar might be presented in a postconviction action filed by Molina, in the present case, any discussion would be entirely academic, and it is not the function of an appellate court to render advisory opinions. See *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986).

Furthermore, we recently rejected an identical argument in *State v. Marshall*, 269 Neb. 56, 61-62, 690 N.W.2d 593, 600-01 (2005), stating:

> We begin by addressing [the defendant's] argument that *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003), eliminates any procedural bar resulting from the failure of appellate counsel to raise claims of ineffective assistance of trial counsel on direct appeal. *Massaro* was a federal postconviction proceeding brought pursuant to 28 U.S.C. § 2255 (1994) in which the prisoner alleged ineffective assistance of trial counsel. A federal appeals court had affirmed the dismissal of the action on the ground of procedural default, due to the fact that Massaro was represented on direct appeal by new counsel who did not raise the issue of ineffective assistance of trial counsel. The Court acknowledged the general federal rule that "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice," noting that this "procedural-default rule is neither a statutory nor a constitutional requirement," but, rather, "a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." 538 U.S. at 504. Resolving a conflict among the federal courts of appeals, the U.S. Supreme Court held that "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." 538 U.S. at 509.
>
> The *Massaro* Court noted that a "growing majority" of state courts follow the rule adopted by its holding. 538 U.S. at 508. This court, however, has not adopted the rule. We do not interpret *Massaro* as requiring that we do so, inasmuch as the Court specifically acknowledged that procedural default rules are not constitutional requirements. The general

procedural default rule we have long applied in postconviction proceedings under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995) holds that 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. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). Thus, a motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a defendant was represented by a different attorney on direct appeal than at trial and the alleged deficiencies in trial counsel's performance were known or apparent from the record. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002); *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

The rule we reaffirmed in *Marshall, supra*, is not simply a matter of policy, but grounded in the Nebraska Postconviction Act. Neb. Rev. Stat. § 29-3003 (Reissue 1995) provides in part that "[t]he remedy provided by sections 29-3001 to 29-3004 is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state." The phrase "any other remedy" encompasses a direct appeal when the issue raised in the postconviction proceeding can be raised in the direct appeal. See *State v. Williams*, 181 Neb. 692, 150 N.W.2d 260 (1967). From that principle is derived the rule that a motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal or which were known to the defendant and counsel at the time of the trial and which were capable of being raised, but were not raised, in the defendant's direct appeal. See *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991).

Thus, we stated in *Whitmore, supra*, that the purpose of affording postconviction relief is not to permit the defendant endless appeals on matters already decided. Rather, the purpose is to correct errors of constitutional proportion which could not otherwise be raised on direct appeal, such as ineffectiveness of counsel who brought the direct appeal. *Id.* We concluded that this principle applied where new appellate counsel could have raised the ineffectiveness of trial counsel.

In short, our recent rejection of the *Massaro* standard is not simply a policy determination made by this court, but the consequence of well-established reasoning based in the language of the Nebraska Postconviction Act. In any event, the question of which issues might be procedurally barred in a postconviction action is not before us in the present proceeding. We decline Molina's invitation to reconsider our decision in *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

(b) Ineffective Assistance of Trial Counsel

Molina argues that trial counsel provided ineffective assistance of counsel at trial.

*(i) Standard of Review*

[48] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

*(ii) Analysis*

[49] To prevail on a claim of ineffective assistance of counsel under *Strickland, supra*, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[50] But in his supplemental appellate brief, Molina concedes that the record is insufficient to evaluate the ineffective assistance of counsel at trial. 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. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004).

At oral argument, the State conceded that where the appellant makes an allegation of ineffective assistance of counsel, even where the record is insufficient to review the issue, "you've

preserved the issue for postconviction." The State specifically conceded that would be the case even under the unique circumstances here, where new counsel was appointed after an appellate brief was filed through trial counsel.

But because, as Molina concedes, the record is insufficient in this appeal to resolve the issue of ineffective assistance of counsel at trial, we reject Molina's eighth assignment of error.

(c) Ineffective Assistance of Counsel on Direct Appeal

Molina also contends that prior to withdrawal, trial counsel provided him with ineffective assistance of counsel in his brief on direct appeal.

*(i) Standard of Review*

With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland, supra*, an appellate court reviews such legal determinations independently of the lower court's decision. *Canbaz, supra*.

*(ii) Analysis*

With respect to ineffective assistance of trial counsel on direct appeal, Molina again concedes that in most respects, the record is not sufficient to evaluate counsel's performance, or whether Molina was prejudiced by that performance. We do not consider the issue in those respects. However, Molina argues that the record is sufficient in one respect: Molina argues that trial counsel was ineffective in continuing to represent Molina, by filing a reply brief, after he was aware that Molina had completed an affidavit averring that he wished to pursue the issue of ineffective assistance of counsel.

Molina's argument is somewhat difficult to follow. Molina seems to be arguing that trial counsel should have presented Molina's affidavit to the district court so that new counsel could be appointed. But, obviously, trial counsel did withdraw from representing Molina, and new counsel was appointed. No prejudice resulted to Molina.

Molina also argues that a hearing could have been held in the district court regarding trial counsel's alleged ineffective assistance. Molina claims that

> [u]nder these procedures, evidence would have been presented and the district court could make factual findings regarding whether [trial counsel] was or was not ineffective. This Court would then have a developed factual record to review. If . . . Molina's motion was without merit, then [trial counsel] would be remain [sic] as appellate counsel.

Supplemental brief for appellant at 34. What Molina does not explain is how, if new counsel were not appointed to represent Molina, evidence could have been adduced as to the ineffective assistance of the counsel that would still be representing Molina at the hearing. Simply stated, Molina cites no authority, and we are unaware of any authority, for the procedures that Molina claims should have been followed.

We cannot conclude, on the record before us, that trial counsel was ineffective, or that Molina was prejudiced, because trial counsel failed to engage in the process that Molina now suggests. Molina's ninth assignment of error is without merit.

### (d) Evidentiary Hearing on Ineffective Assistance of Counsel

Finally, Molina argues that the district court should have held an evidentiary hearing regarding ineffective assistance of trial counsel when trial counsel moved to withdraw from representing Molina on appeal.

#### *(i) Standard of Review*

[51] A trial court's decision to dismiss appointed counsel is reviewed for an abuse of discretion. See, *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988); *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

#### *(ii) Analysis*

[52] Molina relies upon *State v. Sack*, 239 Neb. 690, 477 N.W.2d 921 (1991), in which we stated that once counsel has been appointed for an indigent accused, the accused must remain with the appointed counsel unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se, see *McPhail, supra*; (2) appointed counsel is incompetent, in which case new counsel is to be appointed, see *State v. Clark*,

216 Neb. 49, 342 N.W.2d 366 (1983); or (3) the accused chooses to retain private counsel, see *State v. Neal*, 231 Neb. 415, 436 N.W.2d 514 (1989). Molina argues that prior to replacing his counsel, a hearing should have established which of these conditions was met.

Molina's argument is without merit. First, his argument is tantamount to contending that new counsel should not have been appointed for him at all, when that was precisely what he wanted to occur. Even if the legal basis for appointing new counsel was insufficient, a defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005); *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

[53] Furthermore, we cannot say the trial court abused its discretion when the trial court's discretion was limited by our instructions to it. Specifically, after trial counsel filed a motion to withdraw, this court sustained the motion and directed the trial court to appoint new counsel for Molina. The order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005), *cert. denied* 546 U.S. 947, 126 S. Ct. 449, 163 L. Ed. 2d 341. The district court had no power to do anything except obey our mandate to appoint new counsel, see *id.*, and a hearing on why trial counsel was permitted to withdraw would have been well beyond the scope of our mandate.

[54] Finally, Molina misapprehends the meaning of the word "incompetent" in the context above. Appointed counsel may be removed because of a potential conflict of interest, and such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel. *Bruna, supra*. Molina's desire to argue that trial counsel was ineffective gave rise to a potential conflict of interest, because it placed trial counsel in the position of having to argue his own ineffectiveness. See, e.g., *U.S. v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996); *Sullivan v. U.S.*, 721 A.2d 936 (D.C. 1998); *People v. Parker*, 288 Ill. App. 3d 417, 680 N.E.2d 505,

223 Ill. Dec. 772 (1997). Thus, the record does provide a legal basis, pursuant to *State v. Sack*, 239 Neb. 690, 477 N.W.2d 921 (1991), for appointing replacement counsel to represent Molina.

The district court did not abuse its discretion in appointing new counsel for Molina without an evidentiary hearing on ineffective assistance of counsel. Molina's final assignment of error is without merit.

## IV. CONCLUSION

We decline to consider Molina's allegations of ineffective assistance of counsel for which the record is insufficient, and we find no merit to Molina's other assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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JOSHUA MCGRATH, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

713 N.W.2d 451

Filed May 5, 2006. No. S-04-1239.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. **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 Douglas County: PETER C. BATAILLON, Judge. Affirmed as modified.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellant.

E. Terry Sibbernsen and Andrew D. Sibbernsen, of Sibbernsen & Strigenz, P.C., for appellee.

William F. Austin, of Erickson & Sederstrom, P.C., for amicus curiae League of Nebraska Municipalities.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

STEPHAN, J.

Joshua McGrath sustained serious injuries when a vehicle which he was operating was struck by a vehicle operated by Michael Barnes, who was the subject of a vehicular pursuit by Omaha police. McGrath brought this action against the City of Omaha (the City) under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Supp. 1999), alleging negligence on the part of the officer conducting the pursuit and strict liability under § 13-911. Following a bench trial, the district court for Douglas County found that the officer was not negligent but held that the City was strictly liable based on a finding that McGrath's injuries and damages were proximately caused by the officer's actions during the vehicular pursuit. The court determined that McGrath sustained damages in the amount of $503,123.66. Pursuant to § 13-911(2), the court allowed the City a credit in the amount of $48,000, representing insurance payments made to McGrath, less the attorney fees incurred in obtaining the recovery. The City appeals, contending that the court erred in its determination of proximate cause and in calculating the credit. We affirm the judgment of the district court as modified.

## BACKGROUND

In the early morning hours of April 14, 2000, Barnes and four companions left an Omaha nightclub and proceeded north on 72d Street in a 1982 Buick, with Barnes at the wheel. After weaving through construction areas on 72d Street, Barnes brought the vehicle to an abrupt, sliding stop when he became aware of a red traffic signal at the intersection of 72d and Dodge Streets. Omaha Police Sgt. John Sears observed Barnes' erratic driving from his police cruiser, where Sears was also stopped at the same intersection, but in a southbound direction on 72d Street, waiting to turn east onto Dodge Street. When the light turned green and Barnes proceeded through the intersection, Sears made a U-turn and followed Barnes as he proceeded north on 72d Street and then turned east onto Cass Street. While proceeding east on Cass Street between 72d and 69th Streets, Sears activated his cruiser's overhead red flashing lights in an attempt to signal Barnes to pull over. Barnes did not comply, but instead,

accelerated and turned north onto 69th Street, at which point, Sears began pursuit and radioed for assistance from a police helicopter. Initially, and at several times during the pursuit, Sears attempted to activate the siren of his police cruiser, but he was never able to do so because a control knob was missing. Sears continued to pursue Barnes north on 69th Street at speeds ranging from 50 to 70 miles per hour.

As Barnes drove through the intersection of 69th and Blondo Streets, Sears was one to three blocks behind him. Sears observed that Barnes narrowly avoided colliding with a vehicle as Barnes drove through the intersection. Sears decided to slow his cruiser and terminate the pursuit at approximately 69th and Blondo Streets, where he turned off his cruiser's flashing lights. Sears lost sight of the Buick when it reached 69th and Lake Streets. Proceeding in "search mode," Sears turned right onto Lake Street and then turned left onto 68th Street with his cruiser's flashing lights turned off.

After turning right at 69th and Lake Streets, Barnes proceeded one block east and then turned south onto 68th Street. Barnes still saw the cruiser's flashing lights when he turned at Lake Street, and one of his passengers last saw the cruiser's flashing lights reflecting off nearby houses when Barnes was proceeding south between Lake and Grant Streets on 68th Street. After proceeding south on 68th Street for one block, Barnes turned left onto Grant Street, still believing the police were pursuing him and attempting to avoid police contact. Barnes proceeded east down a steep hill on Grant Street, reaching speeds exceeding 65 miles per hour. He did not stop for any of the stop signs between 68th and 65th Streets on Grant Street. As he proceeded east on Grant Street, Barnes' passengers told him they could no longer see the police cruiser. Within approximately 30 seconds of the last sighting of the cruiser's flashing lights, Barnes ran the stop sign at the intersection of 65th and Grant Streets and collided with a northbound pickup operated by McGrath. The collision tore the pickup in half, and the front section was propelled into a tree and exploded. McGrath and his passenger, Jimmie Joe Staley, both sustained severe burn injuries.

After complying with the notice provisions of the Political Subdivisions Tort Claims Act, McGrath and Staley filed separate

actions against the City in the district court for Douglas County. The actions were consolidated for trial and discovery. Following trial, the district court made written findings of fact in which it determined that the vehicular pursuit was the proximate cause of the collision and resulting injuries to McGrath and Staley. In making these findings, the court rejected the City's argument that Barnes should have known that the pursuit had ended before he turned east onto Grant Street.

The district court found that McGrath suffered second- and third-degree burns to 30 percent of his body, a right maxillary sinus fracture, a pelvic fracture, and a closed head injury. After the accident, McGrath was immediately transported to a hospital and was a patient there between April 14 and 28, 2000. McGrath was left with permanent scars on his face, arms, and other parts of his body and incurred medical expenses of $82,323.66, lost wages of $20,800, and a permanent disability impairment of 21 percent.

As compensation for his injuries, the district court initially awarded McGrath $503,123.66. The court later amended the judgment to allow the City a credit pursuant to § 13-911(2) in the amount of $48,000, representing a $72,000 payment which McGrath recovered from insurance carriers, reduced by $24,000 that he paid in attorney fees.

## ASSIGNMENTS OF ERROR

The City assigns, restated, that the district court erred (1) in concluding that the motor vehicle pursuit was the proximate cause of damages within the scope of § 13-911 and (2) in improperly applying § 13-911(2) by deducting attorney fees from the reimbursement for insurance payments.

## STANDARD OF REVIEW

[1,2] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Meyer v. State*, 264 Neb. 545, 650 N.W.2d 459 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005).

## ANALYSIS

### Proximate Cause

The parties stipulated that McGrath, like Staley, was an innocent third party within the meaning of § 13-911. The determination of the City's liability to both McGrath and Staley was based upon the same facts. For the reasons discussed in *Staley v. City of Omaha, post* p. 543, 713 N.W.2d 457 (2006), we conclude that the district court did not err in finding that McGrath's injuries were proximately caused by the nonnegligent actions of an Omaha police officer, Sears, during a vehicular pursuit, thereby triggering the City's strict liability under § 13-911.

### Credit

The City contends that the district court erred in calculating the amount which McGrath was required to reimburse the City, in the form of a credit against the judgment, for insurance payments he received. Section 13-911(2) provides in relevant part:

> Upon payment by a political subdivision of those damages sustained by an innocent third party [proximately caused by a police pursuit], whether upon voluntary settlement or in satisfaction of a judgment, the political subdivision shall be entitled to reimbursement of the amount of damages paid by the political subdivision from each and all of the following sources:
>
> . . . .
>
> (c) Every insurer or self-insurance surety of either the driver of the fleeing vehicle . . . .
>
> (d) Any uninsured or underinsured motorist insurer or self-insurance surety legally liable to the innocent third party . . . .

McGrath received $22,000 from Barnes' insurer and $50,000 from his own underinsurance carrier. Of this amount, he paid $24,000 in attorney fees and used the remainder to pay other expenses relating to the accident, including some of his medical expenses. In calculating the amount which McGrath was required to reimburse the City under § 13-911(2), the district court deducted the attorney fees from the insurance payments and awarded the City a credit against the judgment in the net amount of $48,000, reasoning that attorney fees are generally deductible

in similar circumstances. The court did not cite any legal authority for this proposition.

Section 13-911(2) lists sources from which a political subdivision held strictly liable to an innocent third party as a result of a vehicular pursuit may obtain reimbursement of damages it has paid. The statute does not specifically address the issue of how a credit against a judgment is to be calculated if the reimbursement source has made payment directly to the injured party through the efforts of an attorney prior to the entry of the judgment against the political subdivision.

The payments to McGrath by Barnes' liability insurance carrier and his own underinsured motorist carrier constituted a fund in which both McGrath and the City had an interest. Had McGrath not succeeded in establishing the City's liability for his injuries, the insurance payments would likely have been his only recovery. However, when the City's liability was established, it acquired a statutory right to reimbursement with respect to the aforementioned insurance payments which had been made to McGrath. We agree that this right is enforceable as a credit against the judgment in favor of McGrath against the City. The question is whether the credit can be calculated so as to, in effect, require the City to pay McGrath's attorney fees in connection with recovery of the insurance benefits. The City argues that there is no statute or common-law principle which would permit this result. McGrath does not provide any legal authority, but argues that because the City is the beneficiary of the efforts of his attorney in obtaining the insurance recovery, it should be responsible for the fees.

Although it is certainly not clear from the record or briefs, we perceive McGrath's argument and the reasoning of the district court to be premised upon the common fund doctrine. Based upon the holdings of this court in *Moyer & Moyer v. State Farm Mut. Ins. Co.*, 190 Neb. 174, 206 N.W.2d 644 (1973); *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969), and *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961), the Nebraska Court of Appeals summarized the common fund doctrine as being applicable

> when an attorney (1) expends time and effort in (2) creating a common fund in which others are interested, and (3)

> the party with the subrogation interest has substantially benefited from the attorney's efforts in creating the fund. Additionally, the amount of the attorney fee awarded does not necessarily correspond with the contract between the attorney and the insured, but instead depends on the nature of the services rendered and the general considerations applicable to court awards of attorney fees.

*Hauptman, O'Brien v. Milwaukee Guardian*, 7 Neb. App. 60, 66, 578 N.W.2d 83, 87 (1998). The court further noted that the key to establishing that the beneficiary of the common fund should be responsible for an attorney fee is "the record created by counsel who seeks the fee, because the burden to prove entitlement to the fee is on counsel." *Id.* at 67, 578 N.W.2d at 88. The general considerations for awards of attorney fees are well known: the services actually performed, the amount in controversy, the nature of the case, the results obtained, the extent of preparation of the case, the difficulty of the questions involved, the skill required, the customary charges of the bar for similar work, and the character and standing of the attorney. *Id.*

Assuming without deciding that the common fund doctrine would apply in the circumstances presented here, McGrath had the burden of proving that the City should be charged, in the form of a reduced credit under § 13-911(2), with all or a portion of the attorney fees McGrath paid. Although it is apparent that the City received a benefit from the efforts of McGrath's attorney in obtaining the insurance recovery, there is no evidence with respect to the nature of the services performed by the attorney and little evidence of the other factors relevant to the reasonableness of the attorney fees. See, *Krause v. State Farm Mut. Auto. Ins. Co., supra*; *Hauptman, O'Brien v. Milwaukee Guardian, supra*. Accordingly, we conclude that the district court erred in not crediting the City for the full amount of insurance benefits received by McGrath.

## CONCLUSION

We conclude that the district court did not err in finding that McGrath's injuries were proximately caused by the nonnegligent actions of an Omaha police officer, Sears, during vehicular pursuit, triggering the City's strict liability under § 13-911(1).

However, the district court erred in not awarding the City a credit against the judgment in the full amount of insurance payments made to McGrath from sources specified in § 13-911(2)(c) and (d). We modify the judgment by increasing the amount of the credit from $48,000 to $72,000 and affirm as modified.

AFFIRMED AS MODIFIED.

WRIGHT, J., not participating.

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JIMMIE JOE STALEY, APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

713 N.W.2d 457

Filed May 5, 2006. No. S-04-1240.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. **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.
3. **Trial: Expert Witnesses.** Determining the weight that should be given expert testimony is uniquely the province of the fact finder.
4. **Proximate Cause: Evidence.** The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong.
5. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which the result would not have occurred.
6. **Negligence: Proof.** The test of causation is not that the particular injury could be anticipated but whether after the occurrence, the injury appears to be the reasonable and probable consequence of the acts or omissions.
7. **Negligence: Motor Vehicles: Police Officers and Sheriffs: Proximate Cause.** A law enforcement officer's decision and action to terminate a vehicular pursuit do not instantaneously eliminate the danger to innocent third parties contemplated in Neb. Rev. Stat. § 13-911 (Reissue 1997). That danger continues until the motorist reasonably perceives that the pursuit has ended and has an opportunity to discontinue the hazardous, evasive driving behaviors contemplated in the statute. Thus, whether an injury to an innocent third party is proximately caused by the action of a law enforcement officer during vehicular pursuit is a question of fact which must necessarily be determined on a case-by-case basis.
8. **Constitutional Law: Statutes: Presumptions.** Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.

9. **Constitutional Law: Legislature: Presumptions.** The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.
10. **Constitutional Law: Equal Protection.** When a statute is challenged on equal protection grounds, whether under the U.S. or Nebraska Constitution, the reviewing court must first determine the standard by which the challenged statute's constitutional validity will be determined. If, in distinguishing between classes, the classifications involved in a statute do not create any suspect class or address any fundamental right, the court applies only minimal scrutiny under the equal protection analysis.
11. ____: ____. Under the rational basis test, the Equal Protection Clause is satisfied as long as (1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.
12. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act creates a single class of tort-feasors, consisting of all political subdivisions.
13. **Political Subdivisions: Legislature: Damages.** The Legislature had a rational basis for the legislative enactment of a damage cap applicable to political subdivisions.
14. **Due Process.** Substantive due process relates to the content of the statute specifying when a right can be lost or impaired.
15. **Constitutional Law: Due Process: Statutes.** In cases involving due process challenges under the Nebraska Constitution, when a fundamental right or suspect classification is not involved in the legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest.
16. **Legislature.** The Legislature is free to create and abolish rights so long as no vested right is disturbed.
17. **Constitutional Law.** No one has a vested right in any particular remedy.
18. **Constitutional Law: Statutes: Special Legislation.** A legislative act constitutes special legislation violative of the state Constitution if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
19. ____: ____: ____. The analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellant.

Edward F. Fogarty, of Fogarty, Lund & Gross, and G. Anne Evans for appellee.

William F. Austin, of Erickson & Sederstrom, P.C., for amicus curiae League of Nebraska Municipalities.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

STEPHAN, J.

Jimmie Joe Staley sustained serious injuries when a vehicle in which he was a passenger was struck by a vehicle operated by Michael Barnes, who was the subject of a vehicular pursuit by Omaha police. Staley brought this action against the City of Omaha (the City) under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Supp. 1999), alleging negligence on the part of the officer conducting the pursuit and strict liability under § 13-911. Following a bench trial, the district court for Douglas County found that the officer was not negligent but held that the City was strictly liable based on a finding that Staley's injuries and damages were proximately caused by the officer's actions during the vehicular pursuit. The court determined that Staley sustained damages in the amount of $2,933,402. The court rejected Staley's argument that the $1 million cap on damages recoverable under the Political Subdivisions Tort Claims Act imposed by § 13-926(1) was unconstitutional and entered judgment for Staley in that amount. The City appeals, contending that the court erred in its determination of proximate cause. Staley cross-appeals from the district court's determination that the statutory cap on damages was constitutional. We affirm the judgment of the district court.

## I. BACKGROUND

In the early morning hours of April 14, 2000, Barnes and four companions left an Omaha nightclub and proceeded north on 72d Street in a 1982 Buick, with Barnes at the wheel. After weaving through construction areas on 72d Street, Barnes brought the vehicle to an abrupt, sliding stop when he became aware of a red traffic signal at the intersection of 72d and Dodge Streets. Omaha Police Sgt. John Sears observed Barnes' erratic driving from his police cruiser, where Sears was also stopped at the same intersection, but in a southbound direction on 72d Street. When the light turned green and Barnes proceeded through the intersection, Sears made a U-turn and followed Barnes as he proceeded north on 72d Street and then turned east onto Cass Street. While

proceeding east on Cass Street between 72d and 69th Streets, Sears activated his cruiser's overhead red flashing lights in an attempt to signal Barnes to pull over. Barnes did not comply, but instead, accelerated and turned north onto 69th Street, at which point, Sears began pursuit and radioed for assistance from a police helicopter. Initially, and at several times during the pursuit, Sears attempted to activate the siren of his police cruiser, but he was never able to do so because a control knob was missing. Sears continued to pursue Barnes north on 69th Street at speeds ranging from 50 to 70 miles per hour.

As Barnes drove through the intersection of 69th and Blondo Streets, Sears was one to three blocks behind him. Sears observed that Barnes narrowly avoided colliding with a vehicle as Barnes drove through the intersection. Sears decided to slow his cruiser and terminate the pursuit at approximately 69th and Blondo Streets, where he turned off his cruiser's flashing lights. Sears lost sight of the Buick when it reached 69th and Lake Streets. Proceeding in "search mode," Sears turned right onto Lake Street and then turned left onto 68th Street with his cruiser's flashing lights turned off.

After turning right at 69th and Lake Streets, Barnes proceeded one block east and then turned south onto 68th Street. Barnes still saw the cruiser's flashing lights when he turned at Lake Street, and one of his passengers last saw the cruiser's flashing lights reflecting off nearby houses when Barnes was proceeding south between Lake and Grant Streets on 68th Street. After proceeding south on 68th Street for one block, Barnes turned left onto Grant Street, still believing the police were pursuing him and attempting to avoid police contact. Barnes proceeded east down a steep hill on Grant Street, reaching speeds exceeding 65 miles per hour. He did not stop for any of the stop signs between 68th and 65th Streets on Grant Street. As he proceeded east on Grant Street, Barnes' passengers told him they could no longer see the police cruiser. Within approximately 30 seconds of the last sighting of the cruiser's flashing lights, Barnes ran the stop sign at the intersection of 65th and Grant Streets and collided with a northbound pickup operated by Joshua McGrath, in which pickup Staley was a passenger. The collision tore the pickup in half, and the front section was propelled into a tree and exploded.

Staley was trapped in the vehicle, and both he and McGrath sustained severe burn injuries.

After complying with the notice provisions of the Political Subdivisions Tort Claims Act, Staley and McGrath filed separate actions against the City in the district court for Douglas County. The actions were consolidated for trial and discovery. Following trial, the district court made written findings of fact in which it determined that the vehicular pursuit was the proximate cause of the collision and resulting injuries to Staley and McGrath. In making these findings, the court rejected the City's argument that Barnes should have known that the pursuit had ended before he turned east onto Grant Street.

The district court found that Staley received third-degree burns over 70 percent of his body. He was hospitalized from April 14 to September 14, 2000, during which time he underwent painful debridement procedures. Following his hospitalization, Staley received therapy 5 days a week for 1 year. He incurred $575,378.06 in medical bills, and his estimated future medical bills are $25,024. He has permanent scarring over 70 percent of his body, limited mobility, and significant lung damage. His physician rated his injuries as a 53-percent impairment of the body as a whole. Staley is unable to perform manual labor and is unemployable unless he obtains further education. His lost earnings and lost earning capacity to age 65 were estimated at $433,000. After determining compensatory damages in the amount of $2,933,402 and reducing the award to $1 million in order to comply with the cap on damages imposed by § 13-926(1), the district court determined that the statutory cap on damages was constitutional for the reasons set forth in *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

## II. ASSIGNMENTS OF ERROR

The City assigns, restated, that the district court erred in concluding that the vehicular pursuit was the proximate cause of Staley's injury and damages under the provisions of § 13-911. In his cross-appeal, Staley contends that the district court erred in upholding the constitutionality of the cap on damages imposed by § 13-926(1), as applied to him.

## III. STANDARD OF REVIEW

[1,2] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005); *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 267 Neb. 958, 679 N.W.2d 198 (2004). 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. *Ptak v. Swanson, ante* p. 57, 709 N.W.2d 337 (2006); *Polikov v. Neth*, 270 Neb. 29, 699 N.W.2d 802 (2005).

## IV. ANALYSIS

### 1. Proximate Cause

The district court held the City liable to Staley under § 13-911, which provides in pertinent part:

> (1) In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.
>
> . . . .
>
> (5) For purposes of this section, vehicular pursuit means an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

This statute creates strict liability on the part of a political subdivision when (1) a claimant suffers death, injury, or property damage; (2) such death, injury, or property damage is proximately caused by the actions of a pursuing law enforcement officer employed by the political subdivision; and (3) the claimant is an innocent third party. *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), *disapproved on other grounds, Henery v. City*

*of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002). The City stipulated that Sears was engaged in a vehicular pursuit within the meaning of § 13-911 until he reached 69th and Blondo Streets, but the parties dispute whether the pursuit extended beyond that point. The parties also stipulated that both Staley and McGrath were innocent third parties within the meaning of the statute.

The City argues that the pursuit could not have been the proximate cause of the collision and Staley's injuries because it had ended almost one-half mile before the collision occurred, the fleeing driver should have known that the pursuit had ended, and the police officer would have reasonably concluded that the flight and any danger to innocent third parties had ended. This argument is based upon Sears' testimony regarding the point at which he terminated the pursuit and the opinions of Geoffrey Alpert, a professor of criminology who testified as an expert witness for the City. Alpert testified that based upon interviews which he conducted with motorists who had fled from police, the public is still at risk within a two- to four-block "zone of danger" between the time an officer discontinues a pursuit by turning off lights and sirens and the time a fleeing driver feels safe enough to adjust his or her driving. Alpert testified that the "zone of danger" is 2.2 blocks in an urban area, 2.3 miles in rural areas, and 2.5 miles on freeways. Alpert opined that because Barnes' reckless driving continued for one-half mile, or approximately six blocks, after Sears turned off his cruiser's lights in an urban area, Barnes' behavior fell outside of the norm, and thus, the danger to the public was unforeseeable. Based upon Alpert's testimony, the City argues that the only conclusion supported by the evidence is that the pursuit could not have been the proximate cause of Staley's injuries because Barnes had proceeded more than four blocks from the point where Sears had terminated the pursuit at the time of the accident.

[3] Determining the weight that should be given expert testimony is uniquely the province of the fact finder. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 267 Neb. 958, 679 N.W.2d 198 (2004); *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). As the finder of fact, the district court had the authority to determine what weight, if any, it would give to Alpert's testimony. See *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch., supra*. While it is apparent that the trial judge gave little weight to Alpert's

opinions, he was free to do so. We do not second-guess that decision, because in a bench trial under the Political Subdivisions Tort Claims Act, it is not the purview of an appellate court to reweigh the evidence. *Id.*

[4] Moreover, we reject the City's argument that the issue of proximate cause in the context of a vehicular pursuit case can be reduced to a rigid formula involving time and distance. The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. *Meyer v. State*, 264 Neb. 545, 650 N.W.2d 459 (2002). In *Meyer*, we held that the provisions of the State Tort Claims Act, see §§ 81-8,209 to 81-8,235 (Reissue 2003), which imposed strict liability for injuries to innocent third parties caused by a vehicular pursuit "require[d] that the actions of a law enforcement officer during a vehicular pursuit be merely a proximate cause of the damage, and not the sole proximate cause." *Meyer v. State*, 264 Neb. at 550, 650 N.W.2d at 463. See § 81-8,215.01. We reach the same conclusion here, inasmuch as the pertinent language of § 13-911 is the same as the provisions of the State Tort Claims Act considered in *Meyer*.

[5,6] A proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. *Meyer v. State, supra*; *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). The test of causation is not that the particular injury could be anticipated but whether after the occurrence, the injury appears to be the reasonable and probable consequence of the acts or omissions. *Meyer v. State, supra*; *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

In applying these well-established principles to the evidence in this case, the district judge properly took into consideration the actions and thought processes of both the pursuing officer, Sears, and the fleeing motorist, Barnes. The statutory definition of "vehicular pursuit" refers to an officer's "active attempt . . . to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension." § 13-911(5). Based on this definition, we held in *Meyer* that for the pursuit to have

been a proximate cause of the accident, the pursuit must have caused the motorist to resist apprehension by maintaining or increasing speed, or by attempting to elude the pursuing officer at unreasonable speeds. In determining that the trial court was clearly wrong in concluding that the fleeing motorist was motivated by a psychotic episode, rather than by the pursuit, we noted the undisputed fact that the motorist was aware of the pursuit and that at certain times, his actions while driving were "a result of his attempts to evade his pursuer." *Meyer v. State*, 264 Neb. at 555, 650 N.W.2d at 466.

[7] Although this case differs from *Meyer* in that Sears had terminated the pursuit prior to the accident in which Staley was injured, this fact does not automatically insulate the City from strict liability for injuries to an innocent third party. A law enforcement officer's decision and action to terminate a vehicular pursuit do not instantaneously eliminate the danger to innocent third parties contemplated in § 13-911. That danger continues until the motorist reasonably perceives that the pursuit has ended and has an opportunity to discontinue the hazardous, evasive driving behaviors contemplated in the statute. Thus, whether an injury to an innocent third party is "proximately caused by the action of a law enforcement officer . . . during vehicular pursuit" is a question of fact which must necessarily be determined on a case-by-case basis. See § 13-911(1).

In this case, there is ample evidence that the pursuit set in motion a series of events that resulted in Staley's injuries. See *Meyer v. State*, 264 Neb. 545, 650 N.W.2d 459 (2002), citing *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). The pursuit occurred during hours of darkness in a residential neighborhood. Because Sears was never able to activate his cruiser's siren, there was no audible signal that he had decided to terminate the pursuit. Barnes testified that he made hard right turns at 69th and Lake Streets and a block later at 68th and Lake Streets in an effort to evade the police pursuit. One of the passengers in Barnes' vehicle testified that she last saw the flashing lights of the cruiser reflecting off nearby houses as Barnes was proceeding on Lake Street between 69th and 68th Streets, approximately one-half mile from the scene of the accident. Barnes traveled this distance in approximately 30 seconds. After proceeding

south on 68th Street for one block, Barnes turned left onto Grant Street, still believing that he was being pursued. He drove east at a high rate of speed through several stop signs before colliding with the McGrath vehicle at 65th and Grant Streets. Barnes testified that he believed he was being pursued and was attempting to evade police from 69th and Cass Streets to 65th and Grant Streets. Under the totality of the circumstances, we cannot say that this belief was unreasonable. Accordingly, we conclude that the district court did not err in determining that the injuries to Staley were proximately caused by the actions taken by Sears during a vehicular pursuit.

### 2. Constitutionality of Damage Cap

The Political Subdivisions Tort Claims Act limits damages for which a political subdivision may be held liable to "[o]ne million dollars for any person for any number of claims arising out of a single occurrence." § 13-926(1). Pursuant to this statute, the district court entered judgment for Staley in the amount of $1 million, despite the fact that it determined his total damages to be $2,933,402. The district court rejected Staley's contention that the statutory damage cap was unconstitutional. In his cross-appeal, Staley assigns error with respect to this determination, claiming that the damage cap is unconstitutional under several alternative theories.

[8,9] We are guided by familiar general principles applicable to claims that a statute is unconstitutional. Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality. *Id.*

#### (a) Equal Protection

[10] Staley first contends that the statutory cap denies him equal protection in violation of article I, § 3, of the Nebraska Constitution because there is no similar damage cap under the State Tort Claims Act. He contends that the result is unequal treatment of city tort victims as compared to state tort victims and discrimination of catastrophically injured city tort victims. When a

statute is challenged on equal protection grounds, whether under the U.S. or Nebraska Constitution, the reviewing court must first determine the standard by which the challenged statute's constitutional validity will be determined. *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). If, in distinguishing between classes, the classifications involved in a statute do not create any suspect class or address any fundamental right, the court applies only minimal scrutiny under the equal protection analysis. *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000).

[11] The classification at issue here is between the State of Nebraska and all political subdivisions of the State of Nebraska. The tort liability of political subdivisions is subject to the statutory cap, whereas the tort liability of the state is not. Because there is no suspect class or fundamental right involved and the interests at issue are economic, we apply the rational basis test to Staley's equal protection challenge. See *Gourley v. Nebraska Methodist Health Sys., supra*. Under this most relaxed and tolerant form of judicial scrutiny of equal protection claims, the Equal Protection Clause is satisfied as long as (1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Id.*; *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

Staley relies upon three cases which held that statutes granting full or partial immunity for governmental entities were in violation of the Equal Protection Clause. In *Flax v. Kansas Turnpike Authority*, 226 Kan. 1, 596 P.2d 446 (1979), the court held that a statute which gave the state immunity with respect to tort claims involving defects on the Kansas turnpike violated equal protection because the state had no similar immunity with respect to claims involving defects on other state highways. In *Peddycoart v. City of Birmingham*, 354 So. 2d 808 (Ala. 1978) (superseded by statute as stated in *Freeman v. Purvis*, 400 So. 2d 389 (Ala. 1981)), the court applied the rational basis test to strike down a statute which granted tort immunity to the largest

city in the state where other cities enjoyed no such immunity. Similarly, in *Ryszkiewicz v. City of New Britain*, 193 Conn. 589, 479 A.2d 793 (1984), the court found no rational basis for a state statute which capped one city's liability for damages caused by ice and snow on its streets, where the liability of other cities was not similarly capped.

[12] *Flax*, *Peddycoart*, and *Ryszkiewicz* are distinguishable in that they address disparate treatment within a governmental classification. The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003); *Pfizer v. Lancaster Cty. Bd. of Equal., supra*. The Political Subdivisions Tort Claims Act creates a single class of tort-feasors, consisting of all political subdivisions. *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976). All members of the class are subject to the same damage cap, and thus, the reasoning of the cases relied upon by Staley is inapposite.

[13] The record reflects that the Political Subdivisions Tort Claims Act was amended in 1985 to include a damage cap because of legislative concern regarding the cost and availability of liability insurance for political subdivisions, and the perceived need of the state to protect the fiscal stability of its political subdivisions. There is no evidence of similar concerns with respect to the state. Because of differences in tax base and available taxing mechanisms, the ability of the State of Nebraska to respond to monetary judgments is quantitatively different from that of a single political subdivision of the state. Courts will not reexamine independently the factual basis on which a legislature justified a statute, nor will a court independently review the wisdom of a statute. Instead, courts inquire whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based. See *Gourley v. Nebraska Methodist Health Care Sys., supra*, and cases cited therein. On the record before us, we conclude that the Legislature had a rational basis for the legislative enactment of a damage cap applicable to political subdivisions which does not apply to the state.

(b) Substantive Due Process

[14,15] Alternatively, Staley argues that the statutory cap on damages violates his rights under article I, § 3, of the Nebraska Constitution by depriving him of substantive due process. Substantive due process relates to the content of the statute specifying when a right can be lost or impaired. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001). When a fundamental right or suspect classification is not involved in the legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997). As in our equal protection analysis, we conclude that the challenged cap on damages does not involve a fundamental right or suspect classification and, therefore, apply a rational basis analysis. See *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978) (holding rational basis test applicable to due process challenge of statute imposing limits on liability resulting from operation of federally licensed nuclear power plants).

[16,17] At common law, an innocent third party injured by a motorist fleeing from police had no right of recovery against the governmental entity employing the pursuing officer. The strict liability of a political subdivision in such circumstances did not exist until the enactment of the predecessor to § 13-911. See 1981 Neb. Laws, L.B. 273, § 31 (codified at Neb. Rev. Stat. § 25-21,183 (Cum. Supp. 1982)). The Legislature is free to create and abolish rights so long as no vested right is disturbed. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003); *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989). No one has a vested right in any particular remedy. *Id.* For the reasons discussed previously, the Legislature had a rational basis for limiting the amount of damages recoverable in claims under the Political Subdivisions Tort Claims Act, and the damage cap does not deprive Staley of substantive due process.

(c) Enjoyment of Property

Staley argues that the damage cap violates his rights under Neb. Const. article I, § 25, which provides in pertinent part: "There shall be no discrimination between citizens of the United

States in respect to the acquisition, ownership, possession, enjoyment or descent of property." This argument is based upon the premise, for which no authority is cited, that the "right to recover in tort is a property right." Brief for appellee on cross-appeal at 47. However, in rejecting a claim that damage caps constitute an unconstitutional taking of property under Neb. Const. art. I, § 21, this court has joined others in rejecting the argument that a cause of action and determination of damages are property. *Gourley v. Nebraska Methodist Health Sys., supra*. The damage cap at issue here does not violate Neb. Const. art. I, § 25.

(d) Special Legislation

Staley alleges that the damage cap specified in § 13-926 violates article I, § 16, of the Nebraska Constitution, which prohibits the passage of any law "making any irrevocable grant of special privileges or immunities," and article III, § 18, which provides: "The Legislature shall not pass local or special laws . . . . Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted." Staley contends that "[t]here is a substantial difference between the small political subdivisions and state and big city tort feasors" and that to the extent it provides a benefit to the City, the damage cap constitutes special legislation. Brief for appellee on cross-appeal at 49.

[18,19] A legislative act constitutes special legislation violative of the state Constitution if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class. *Gourley v. Nebraska Methodist Health Sys., supra*; *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). The analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. *Id.*

Here, there is neither an arbitrary or unreasonable method of classification nor a permanently closed class. The damage cap embodied in § 13-926 applies to all political subdivisions of the State of Nebraska, which together create a single class of tortfeasors to which the Legislature has chosen to apply uniform rules and procedures governing tort liability. See, *Campbell v.*

*City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976); § 13-902. By limiting the tort liability exposure of all political subdivisions in exactly the same manner, the Legislature has enacted a general law which does not contravene the constitutional prohibition of special legislation.

## V. CONCLUSION

For the reasons discussed above, we conclude that the district court did not err in finding that Staley's injuries were proximately caused by the nonnegligent actions of an Omaha police officer, Sears, during the vehicular pursuit, triggering the City's strict liability under § 13-911(1). We further conclude that the court did not err in upholding the constitutionality of § 13-926(1) or in entering judgment in favor of Staley in the amount of $1 million. We therefore affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

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JOHN H. ORDUNA, JR., APPELLEE, V. TOTAL CONSTRUCTION SERVICES, INC., APPELLANT.

713 N.W.2d 471

Filed May 5, 2006. No. S-05-101.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction given by a trial court is correct is 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. **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.
4. **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 discretion.
5. **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.
6. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.

7. **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.
8. **Negligence: Evidence.** In a negligence action brought by a nonemployee third party against a construction company, a violation of an Occupational Safety and Health Administration regulation, while not negligence as a matter of law, may nonetheless be evidence of negligence which may be considered with all the other evidence in the case.
9. ____: ____. The violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding the issue.
10. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
11. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
12. **Trial: Expert Witnesses: Custom and Usage.** Expert testimony as to the custom and practice of an industry, which may be of assistance to the trier of fact, is admissible even in areas where laypersons have competence to determine the facts.
13. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
14. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
15. **Damages: New Trial: Appeal and Error.** In order for an award to be so excessive as to warrant a new trial, it must be so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Danene J. Tushar and Jeremy B. Morris, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Robert M. Slovek, Gillian G. O'Hara, and Richard P. Jeffries, of Kutak Rock, L.L.P., for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

GERRARD, J.

After a fire damaged his home, John H. Orduna, Jr., was forced to move out while Total Construction Services, Inc. (Total), completed repairs to the house. Orduna visited the house after construction had commenced and, unaware that the basement stairs had been removed during construction, fell through the open stairwell, fracturing his ankle. Orduna filed a negligence action against Total and, following a jury trial, was awarded a $183,000 verdict. The district court entered judgment in accordance with the verdict and subsequently overruled Total's motion for new trial. Total appeals.

## FACTUAL AND PROCEDURAL BACKGROUND

On June 13, 2001, Orduna's home in Omaha, Nebraska, was damaged by fire. Orduna had been in his basement, transferring a combination of oil and gas from one container to another, when some of the substance spilled on the floor and was ignited by a hot water heater. The fire caused significant damage to Orduna's house, forcing him to move out while repairs were made.

Orduna hired Total to repair the damage to his home. Total employees conducted a walk-through of the house with Orduna on June 20, 2001, and on August 29, Total submitted a proposal for the work to be performed on Orduna's house. Construction began on September 4.

On the evening of September 11, 2001, Orduna visited his house, intending to remove some of his belongings from the basement. Although the evidence was in dispute, Orduna testified that a Total employee contacted him earlier that day and requested that he come to the house to remove his belongings from the basement. Orduna used his house key to unlock the front door and proceeded to the darkened basement stairwell. Unaware that the stairs had been removed during construction, Orduna fell through the open stairwell to the basement floor, fracturing his left ankle.

Orduna filed a complaint against Total, alleging, in part, that Total was negligent in failing to keep the premises safe and in failing to warn or notify Orduna of an unsafe and hazardous condition on the premises. The complaint was later amended to include an allegation that Total violated specific Occupational Safety and Health Administration (OSHA) regulations.

Prior to trial, Total filed a motion in limine, asking the district court to, in part, prohibit any reference to or evidence of OSHA regulations during trial, including evidence that such regulations were not complied with by Total or that the regulations set the applicable standard of care for Total. In addition, Total asked the court to exclude the testimony of Orduna's designated expert witness, Michael Downey, a construction safety consultant, on the ground that Downey's opinions in the case failed to meet the requirements of Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995). After a hearing on the motion, the court overruled Total's request to prohibit any reference to OSHA, stating:

> While OSHA was written to protect employees, an unsafe practice for an employee applies equally well to a person who legitimately finds himself in the same space as an employee. OSHA standards are certainly relevant to the safety of a work place, even if the injured party is not an employee. . . . A violation, however, is only evidence of negligence, and not negligence per se.

With respect to Downey's expert testimony, the court ordered that Downey be prohibited from interpreting OSHA regulations and from testifying that Total had violated OSHA regulations and that an alleged OSHA violation was negligence on the part of Total or that such an alleged violation was a proximate cause of Orduna's fall. The court stated that Downey could testify "as to what he observed and conclusions therefrom."

A jury trial was held in December 2004, after which the jury returned a verdict in favor of Orduna in the amount of $183,000. Subsequently, Total's motion for new trial was overruled by the district court. Total appeals the judgment of the district court.

## ASSIGNMENTS OF ERROR

Total assigns, summarized, restated, and renumbered, that the district court erred in (1) instructing the jury regarding OSHA regulations because such regulations only apply to employment relationships and, alternatively, the instructions contained incorrect statements of law; (2) admitting Downey's expert testimony because it was irrelevant, failed to meet the requirements of rule 702, and was unfairly prejudicial under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995); and (3) overruling Total's

motion for new trial because the verdict was excessive and not supported by the evidence.

## STANDARD OF REVIEW

[1,2] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005).

[3-5] 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. *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005). 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 discretion. *Shearer v. Shearer*, 270 Neb. 178, 700 N.W.2d 580 (2005). 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. *City of Lincoln, supra*.

[6,7] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005). 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. *Shipler v. General Motors Corp., ante* p. 194, 710 N.W.2d 807 (2006).

## ANALYSIS

### *Instructions Given to Jury Were Proper and Conveyed Correct Statements of Law.*

During the jury instruction conference, Total objected to instructions Nos. 10 and 11, among others. Instruction No. 10 stated:

> While [OSHA] regulations were written to protect employees, an unsafe practice for an employee applies equally

> well to a person who legitimately finds himself in the same space as an employee. OSHA standards are relevant to the safety of a work place, even if the injured party is not an employee.
>
> OSHA regulations provide in part as follows:
>
> a. A hole means a gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof, or other walking/working surface.
>
> b. Each employee on walking/working surfaces shall be protected from falling through holes more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

Instruction No. 11 stated:

> It is claimed that an OSHA safety regulation was violated. If you find that is was, that does not necessarily prove negligence. The violation of a safety regulation is evidence that you may consider, along with all of the other facts and circumstances in the case, in deciding whether or not there was any negligence.

The court overruled the objections.

On appeal, Total assigns that the district court erred in instructing the jury regarding OSHA regulations. Total argues that the instructions were irrelevant and highly prejudicial, because OSHA regulations only govern the duties between employers and employees and Orduna was not an employee of Total. Further, Total argues that even if the court concludes that OSHA regulations were relevant to the standard of care owed by Total to Orduna, instructions Nos. 10 and 11 presented incorrect statements of law that confused the jury as to the applicability of OSHA regulations in the case.

In contrast, Orduna asserts that the jury was properly instructed as to applicable OSHA regulations because such regulations are relevant in assessing an employer's safety obligations to third parties. Orduna also argues that the instructions were correct statements of law, consistent with established case law utilizing OSHA regulations in negligence actions filed against employers by nonemployees.

This court has previously determined that because the application of Nebraska's health and safety regulations is limited to

the relationship of employer and employee, the regulations do not establish a nondelegable duty to nonemployees. See *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004). However, we have yet to address whether such regulations or the federal OSHA regulations are *relevant as evidence* regarding the standard of care in negligence actions between employers and third parties. A substantial majority of other jurisdictions that have addressed the issue have concluded that OSHA regulations are relevant and admissible in negligence actions involving an employer and a nonemployee.

In *Thoma v. Kettler Bros., Inc.*, 632 A.2d 725, 730 (D.C. 1993), the court explained that

> OSHA regulations are "competent [and admissible], not in and of themselves as evidence of negligence, but as evidence of a standard of care by which the jury must measure the conduct of the defendants in determining whether they exercised that due care the law required in the situation." . . .
>
> At the same time, we recognize that "[a]n OSHA safety regulation . . . may impose a standard of conduct upon employers greater than that which would be considered reasonable in the industry." . . . In a suit brought by a nonemployee, therefore, the defendant must be permitted to point out this fact to the jury and argue that it weakens the evidentiary force of the regulation as applied to the plaintiff.

Similarly, in *Wiersgalla v. Garrett*, 486 N.W.2d 290, 293 (Iowa 1992), the court stated:

> [A]n employer's violation of an OSHA standard constitutes "negligence per se in an action *by an employee against [the] employer*." . . . In other cases, however, a violation of an OSHA standard is merely "evidence of negligence as to all persons who are likely to be exposed to injury as a result of the violation."

(Citing *Koll v. Manatt's Transp. Co.*, 253 N.W.2d 265 (Iowa 1977).) See, also, *Rolick v. Collins Pine Co.*, 975 F.2d 1009 (3d Cir. 1992); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981); *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 164 (1976); *Elsner v. Uveges*, 34 Cal. 4th 915, 102 P.3d 915, 22 Cal. Rptr. 3d 530 (2004); *Ball v. Melsur Corp.*, 161 Vt. 35, 633 A.2d 705 (1993).

Total cites several cases in support of its argument. However, most of those cases merely support the proposition that OSHA regulations do not establish a duty between employers and nonemployees—a proposition not disputed in this case. Such cases fail to reach the specific question whether OSHA regulations, despite the fact that they only establish a duty between employers and employees, can be relevant in actions between employers and nonemployees. See, *Banovetz v. King*, 66 F. Supp. 2d 1076 (D. Minn. 1999); *Marshall v. Hale-Halsell Co.*, 932 P.2d 1117 (Okla. 1997); *Burnett v. A. Bottacchi S.A. de Navegacion*, 882 F. Supp. 1050 (S.D. Fla. 1994); *Murphy v. Stuart M. Smith, Inc.*, 53 Md. App. 640, 455 A.2d 69 (1983). Although these cases are not inconsistent with Total's argument that OSHA regulations are irrelevant to negligence actions brought by nonemployees, they do not necessarily support that argument.

Two cases cited by Total appear to support a determination that OSHA regulations are irrelevant and inadmissible in actions other than those between employers and employees. *Minichello v. U.S. Industries, Inc.*, 756 F.2d 26 (6th Cir. 1985), was a products liability case brought by the plaintiff after he was injured on the job by a machine manufactured by the defendant. The court held that OSHA regulations were not relevant to the issue of the defendant's liability to the plaintiff because such regulations pertain only to the conduct of employers. In *Trowell v. Brunswick Pulp and Paper Co.*, 522 F. Supp. 782 (D.S.C. 1981), the plaintiff was injured while touring the defendant company's chip mill. The court determined that admitting evidence of OSHA violations in the case would be prejudicial to the defendant and that even with appropriate instructions to the jury, the prejudicial effect of the evidence would outweigh its probative value in the case, where the regulations were not determinative of the standard of care owed to the plaintiff. We are not persuaded by this reasoning.

[8,9] We hold that in a negligence action brought by a nonemployee third party against a construction company, a violation of an OSHA regulation, while not negligence as a matter of law, may nonetheless be evidence of negligence to be considered with all the other evidence in the case. Our holding is consistent with this court's prior law providing that the violation of

a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding the issue. Similarly, the violation of a statute is not negligence per se, but is evidence of negligence. See, *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989); *Clark Bilt, Inc. v. Wells Dairy Co.*, 200 Neb. 20, 261 N.W.2d 772 (1978).

In some instances, it may be that an OSHA regulation would impose a standard of conduct upon an employer greater than that which would be considered reasonable in the industry with respect to nonemployee third parties. In such an instance, in a suit brought by a nonemployee, the defendant could make that argument to the fact finder as part of the overall circumstances in its determination of negligence. But in this case, given the evidence that was presented and our reasoning above, we conclude that the district court did not err in instructing the jury as to the effect of a possible violation of an OSHA regulation.

Total argues that even if we find no error in the court's instruction of the jury regarding OSHA regulations, instructions Nos. 10 and 11 presented incorrect statements of law. Specifically, Total argues that instruction No. 10, stating in part that "[w]hile [OSHA] regulations were written to protect employees, an unsafe practice for an employee applies equally well to a person who legitimately finds himself in the same space as an employee," was equivalent to stating that OSHA regulations govern employers' duties to employees *and* third persons, which is inconsistent with the scope of OSHA. We, however, disagree with Total's reading of instruction No. 10. Rather than stating that OSHA regulations apply or govern employers' duties to third persons, instruction No. 10 states that *unsafe practices* for an employee are equally unsafe for nonemployee third parties who are in the same place as employees. The instruction does not indicate that OSHA regulations impose a statutory duty on employers to protect third parties in such situations.

[10,11] Furthermore, read together, instructions Nos. 10 and 11 convey the appropriate principle—that OSHA regulations and violations may be considered as evidence of negligence in the case. In reviewing a claim of prejudice from instructions given or

refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Borley Storage & Transfer Co. v. Whitted, ante* p. 84, 710 N.W.2d 71 (2006). In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005). We conclude that instructions Nos. 10 and 11 accurately conveyed the law and that Total failed to show any prejudice resulting from the instructions.

*Downey's Expert Testimony Was Properly Admitted at Trial.*

At trial, Downey, a construction safety consultant, gave expert testimony as to the safety precautions necessary to guard the danger posed by an open stairwell such as the opening through which Orduna fell and was injured. Downey testified that simply locking the front door of Orduna's home was not an adequate safety measure to prevent injuries in the stairwell. In addition, Downey stated:

> In my opinion what constitutes an adequate guardrail system for the prevention of falls would be a system of rail or rails, if you will, that would include a guardrail, top rail at 42 inches above the floor and a mid rail at approximately 21 inches above the floor. And this is seen as being adequate in preventing persons from unintentionally falling into open holes.

Total objected to Downey's testimony and later moved to strike his testimony in its entirety, but the court overruled the objections.

On appeal, Total assigns that the district court abused its discretion in admitting Downey's testimony because it was irrelevant, contrary to rule 702, and unfairly prejudicial under rule 403. Total argues that Downey's testimony that Total failed to adequately guard the open stairwell by locking Orduna's front door and that Total could have adequately guarded the stairwell by securing rails across the opening was neither helpful to the jury nor did it require special skill, knowledge, or experience. Further, Total asserts that Downey's testimony exceeded the scope of the court's order, which permitted Downey to testify

only about his observations and conclusions. Total argues that Downey essentially testified to OSHA regulations without specifically mentioning OSHA. Orduna argues that Downey's testimony was properly admitted and was within the parameters set by the court in its order on Total's motion in limine.

Downey's testimony did not exceed the specifications of the court's order regarding Total's motion in limine. Downey did not interpret OSHA regulations during his testimony or testify that Total violated OSHA regulations. Further, Downey did not testify that Total's alleged violation of the regulations proximately caused Orduna's fall or was negligence on Total's part. Downey testified within the scope of the court's order by setting forth observations based on his review of depositions and photographs in the matter and by making conclusions, based on his experience as a safety consultant, as to the safety precautions needed to guard the open stairwell and the inadequacy of the method used by Total.

[12] Total also argues that Downey's opinion was not helpful to the jury in this case. However, Downey's testimony regarding the use of rails to block open stairwells and the industry's general acceptance of that method as a sufficient safety precaution was within the realm of admissible expert testimony. Expert testimony as to the custom and practice of an industry, which may be of assistance to the trier of fact, is admissible even in areas where laypersons have competence to determine the facts. See *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994). Although some people's understanding or experience might indicate that locking the front door of Orduna's house was possibly an adequate safety measure, expert testimony regarding the general practice in the industry, i.e., guarding the open stairwell with rails, provided specialized knowledge and experience to the jury regarding the standard safety practices in a construction zone, which may have helped the jury assess the actions of Total. Thus, the district court did not abuse its discretion in allowing Downey's testimony.

*District Court Did Not Err in Overruling Total's Motion for New Trial.*

Finally, Total assigns that the district court erred in overruling its motion for new trial. Total asserts that it was entitled to a new

trial because the jury verdict was not supported by the evidence and was contrary to Nebraska law. Total argues that the jury's failure to find any contributory negligence on the part of Orduna was inconsistent with the evidence presented at trial and with Nebraska case law holding that "one who absent special circumstances requiring him or her to act, proceeds into a place in the dark with awareness of potential dangers is guilty of contributory negligence." Brief for appellant at 33. In contrast, Orduna argues that the jury was presented with sufficient evidence from which to conclude that Orduna was not responsible for his injury.

[13] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005). A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Shipler v. General Motors Corp., ante* p. 194, 710 N.W.2d 807 (2006).

Viewing the evidence most favorably to Orduna, as we must, we determine that there certainly was evidence from which a jury could find in favor of Orduna, with no assessment of comparative negligence, and against Total. Orduna testified that on the morning of his fall, a Total employee contacted him and requested that he come to the house to remove his belongings from the basement. He arrived at his house at approximately 6:50 p.m., and the sun had not yet set. Orduna testified that he could see his way through the house to the stairs, but that the stairs were dark because the windows in the basement had been covered with boards during construction. Orduna had visited the house the previous week and had discovered a light in the basement that had been installed for use by Total. Orduna had planned to use the same light upon his visit to the house on September 11, 2001. However, he was unaware that workers had removed the basement stairs. When Orduna went to step down, he fell to the basement floor, hitting and breaking the light in the process. Orduna testified that he had used the stairs after the fire and that he was never concerned about the safety of himself or others using the

stairs. He stated that the stairs seemed to hold his weight and did not seem weak or wobbly. In addition, Orduna testified that Total never notified him that the stairs would need to be removed or warned him of the danger when they contacted him to request that he remove his belongings from the basement.

[14] Although there was conflicting evidence at trial regarding visibility on the evening of Orduna's fall and Orduna's knowledge of Total's plan to remove the stairs, the jury was entitled to listen to the testimony and make a determination as to the credibility of the witnesses and the truth of their testimony. It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003). We cannot say that the jury's verdict was clearly wrong in that regard.

Total also argues that a new trial should have been granted because the damages awarded to Orduna are excessive, unsupported by the evidence, and appear to have been made under the influence of passion and prejudice. Total asserts that the award of $183,000 was disproportionate to the evidence presented regarding the nature and extent of Orduna's injury. Orduna argues that the award of damages was fair and reasonable based upon the evidence presented.

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. *Shipler v. General Motors Corp., ante* p. 194, 710 N.W.2d 807 (2006). There was sufficient evidence to support the jury's verdict, and the evidence did bear a reasonable relationship to the elements of the damages that were proved. At trial, Orduna testified in detail regarding his fractured ankle, the physical pain and mental suffering he endured, and the two surgeries he underwent to repair the injury. In addition, Orduna presented evidence of medical expenses resulting from the injury, totaling over $23,000, and lost wages attributable to the injury, totaling over $5,000. Further, Orduna's orthopedic surgeon testified that Orduna suffers from a permanent physical impairment of 17 percent of his foot and 12 percent of his lower body, which translated to a 5-percent

whole person impairment. This permanent impairment has negatively affected Orduna's day-to-day activities.

[15] In order for an award to be so excessive as to warrant a new trial, it must be so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Shipler, supra*. Based on our review of the evidence, we conclude that the jury's award of damages was neither excessive nor inconsistent with the evidence presented at trial, and therefore, the district court did not abuse its discretion in overruling Total's motion for new trial.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

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TODD WILLET, APPELLANT, V. COUNTY OF LANCASTER, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

713 N.W.2d 483

Filed May 5, 2006. No. S-05-204.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. **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 it is entitled to judgment as a matter of law.
4. **Political Subdivisions Tort Claims Act: Negligence: Proof.** To recover under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), a claimant must prove all four of the basic elements of negligence: duty, breach of duty, proximate causation, and damages.

5. **Negligence: Proximate Cause: Proof.** Three basic requirements establish proximate cause. First, the negligence must be such that without it, the injury would not have occurred, commonly known as the "but for" rule. Second, the injury must be the natural and probable result of the negligence. Third, there can be no efficient intervening cause.
6. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury.
7. ____: ____: ____. The causal connection is broken if between the defendant's negligent act and the plaintiff's injury, there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.
8. **Negligence: Tort-feasors: Liability.** An intervening act cuts off a tort-feasor's liability only when the intervening cause is not foreseeable.
9. **Motor Vehicles: Highways.** One traveling on a favored street protected by a traffic signal of which one has knowledge may properly assume that oncoming traffic will obey it.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Peter C. Wegman and Brian S. Kruse, of Rembolt Ludtke, L.L.P., for appellant.

William R. Johnson and Kyle Wallor, of Lamson, Dugan & Murray, L.L.P., for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

CONNOLLY, J.

Appellant, Todd Willet, sued Lancaster County (County) to recover for injuries he received as a result of a two-vehicle collision. Ronald P. McMackin, the other driver, ran a stop sign and struck Willet's vehicle at the intersection of McKelvie Road and North First Street (the intersection). Willet argues that a private landowner constructed a berm at that corner, which encroached into the right-of-way and obstructed the two drivers' views, preventing them from avoiding the collision. He claims that the County breached its duty by ignoring the risk the berm created. The trial court granted summary judgment to the County, and Willet appeals. We affirm the trial court's dismissal because no

genuine issue of material fact shows that the County's actions proximately caused the collision. Even if the County breached its duty to Willet, McMackin's negligence was an efficient intervening cause.

## BACKGROUND

On April 18, 1999, Willet was returning from a shopping trip with his son and his son's friend, driving west on McKelvie Road. At the same time, McMackin was running late for work and heading south on North First Street. The roads are gravel with a 50-m.p.h. speed limit and stop signs for drivers on North First Street. Drivers on McKelvie Road had no stop sign.

The collision occurred when McMackin ran the stop sign and Willet's vehicle struck McMackin's vehicle near the front driver's-side door. According to Joseph W. Gehr, an accident reconstructionist and deputy sheriff, the vehicles impacted again from another angle before Willet's vehicle launched into the air, flipped over, and ended up on its top in a field on the southwest corner of the intersection. McMackin's vehicle also ended up in the field. Willet's son and McMackin died at the scene, Willet's son's friend died later at the hospital, and Willet survived the collision, but sustained serious injuries to his head, back, and legs.

Willet settled with McMackin's estate. Willet then sued the County, alleging that the berm on the northeast corner of the intersection encroached on the right-of-way and obstructed the drivers' view, contributing to the collision. The County moved for summary judgment.

On the motion for summary judgment, the following evidence was submitted. Gehr and Deputy Young investigated conditions at the scene after the collision. Gehr concluded that McMackin ran the stop sign at "a good speed." Gehr noted that the berm presented "a slight visual obstruction," stating that "[i]t does cause some visual obstruction, however it is in my opinion there is still plenty of sight distance when a person is stopped at the stop sign." Gehr also conducted an experiment to determine visibility. He explained:

> With the assistance of Deputy Young, I did do some type measurements with Deputy Young using his patrol vehicle I had him go east of the accident scene. I stood at the imaginary stop line approximately the area that . . . McMackin

> would have been had he stopped for the stop sign. I then had Deputy Young travel his vehicle down McKelvie Road and had him stop at the point where I could first see his vehicle. I then measured that distance, came up with a distance of 600 feet. I then moved up a little bit still not in the intersection yet but to the imaginary shoulder line of McKelvie Road and from there I had a sight distance of 952 feet which was to the top of that hill with full visibility.

Gehr explained in his deposition that by sight distance and visibility, he meant "[f]or a southbound vehicle if [it] were to make a stop at the stop sign."

Another accident reconstructionist, Ted Sokol, submitted an affidavit. Sokol stated that the berm "limited the view of both southbound and westbound motorists." Sokol conducted a computer analysis of the vehicles' speeds, which indicated that at the time of impact, Willet's vehicle was traveling between 37 and 43 m.p.h., and McMackin's vehicle was traveling between 41 and 50 m.p.h. Sokol ultimately concluded that McMackin ran the stop sign on North First Street, entering the intersection at approximately 45 m.p.h., and presented the "sole cause" of the collision.

A friend of Willet who lives within 5 miles of the intersection submitted an affidavit explaining that a private landowner built the berm in the 1980's. This witness considered it a hazard, stating that the berm "created a blind intersection, obstructing the vision of westbound motorists on McKelvie Road and southbound motorists on [North First] Street, literally 'hiding' vehicles behind the berm."

A heavy equipment operator for the County's engineering department also noted in his deposition that the berm concerned him. He explained that the berm obstructed motorists' vision. Specifically, he stated:

> Basically that when you pull up to the stop sign when you're southbound there, that you had to be very careful that somebody wasn't coming westbound.
>
> . . . .
>
> . . . In particular for my part of the job as a road grader because you have that long front end on there, and I had to carefully poke the front end out there. Not that I had to poke it into the road, but just slowly because of the berm.

A former road maintenance superintendent for the County stated in his deposition that he is familiar with the intersection because he used to drive through it on his way to and from work. He stated that he saw the berm as it was gradually built over time, but he was not concerned about the berm's interfering with drivers' vision because drivers can see when they are stopped at the stop sign.

In Willet's deposition, he also testified about the berm. He recalled telling his wife before the collision that it "was a terrible setup for an intersection." He elaborated that the intersection had limited visibility and that it was "[b]lind" when traveling westbound on McKelvie Road because you could not see southbound traffic on North First Street. Willet also explained that because of the hazardous intersection, he "paid as close . . . attention as possible" and drove slower when using that route. But Willet also admitted in his deposition that if McMackin had stopped at the stop sign, the collision would not have occurred.

The district court granted the summary judgment to the County on numerous alternate grounds. Willet appeals.

## ASSIGNMENTS OF ERROR

Willet assigns, rephrased, that the district court erred in finding that (1) the County is entitled to immunity under the Political Subdivisions Tort Claims Act, § 13-901 et seq. (Reissue 1997), or discretionary function immunity for failure to maintain roadways and failure to warn of known defects; (2) the County owed no duty to Willet because the condition of the intersection was obvious to the public; (3) the berm did not obstruct or interfere with vision for vehicles at the intersection and was not a proximate cause of the collision; (4) McMackin's actions were an efficient intervening cause and unforeseeable by the County; (5) the County's negligence was passive and not active, creating a condition and not a cause, and that the range of vision rule bars Willet's recovery; and (6) Willet failed to exercise reasonable care under the circumstances when he approached the intersection.

## STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005).

[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. See *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[3] 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 it is entitled to judgment as a matter of law. See *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

## ANALYSIS

Willet essentially argues that the County was negligent in failing to properly maintain the intersection and failing to warn him about the dangerous condition of the intersection. He contends that the County waived its sovereign immunity under § 13-910(12) and *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). He also objects to the trial court's individual findings on his claims. But we need not address all of his claimed errors because the dispositive issue is whether the County's conduct proximately caused the collision.

[4] Willet filed his claim under the Political Subdivisions Tort Claims Act. To recover under the act, a claimant must prove all four of the basic elements of negligence: duty, breach of duty, proximate causation, and damages. See *Scholl v. County of Boone*, 250 Neb. 283, 549 N.W.2d 144 (1996). Thus, even if we assume that the County waived its immunity and breached its duty to maintain the intersection or warn drivers about its condition, Willet cannot recover unless the County's conduct was a proximate cause of the collision.

[5] Three basic requirements establish proximate cause. First, the negligence must be such that without it, the injury would not have occurred, commonly known as the "but for" rule. Second, the injury must be the natural and probable result of the negligence. Third, there can be no efficient intervening cause. See

*Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988) (citing *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986)).

The court found that no genuine issue of material fact existed whether the berm proximately caused the collision. The court alternately premised that conclusion on several grounds. However, we do not address each ground because we agree with the court that *even if* the County failed to maintain the intersection or warn drivers about its condition, McMackin's actions constitute an efficient intervening cause, which broke the causal connection between the County's wrongdoing and the collision.

[6-8] An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury. See *Zeller v. County of Howard, supra*.

> " ' " 'The causal connection is broken if between the defendant's negligent act and the plaintiff's injury "there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff." ' " ' "

*Id*. at 673-74, 658-59 (quoting *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982)). In other words, an intervening act cuts off a tort-feasor's liability only when the intervening cause is not foreseeable. See *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987).

Willet concedes that McMackin's failure to obey the stop sign was a proximate cause of the collision. And no one disputes that McMackin acted negligently by disobeying the stop sign. Thus, the only question is whether the County should have foreseen McMackin's decision to run the stop sign and enter an obstructed intersection at high speed. In *Delaware v. Valls, supra*, we addressed the foreseeability of another driver's negligence. There, the passenger on a dirt bike that collided with a vehicle in a visually obstructed intersection sued the private landowner responsible for the obstruction. We concluded that the landowners

> were not bound to anticipate and cannot be said to have contemplated that [the other driver] would negligently attempt to traverse the intersection when he could not see what he needed to see in order to do so safely or that [the dirt bike driver] would . . . fail to see [the other driver] in time to avoid the collision.

*Id*. at 145, 409 N.W.2d at 624.

Similarly, in *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988), the passenger in a truck which was struck while driving 15 m.p.h. through an unprotected and obstructed intersection sued Howard County for failing to replace a stop sign at the site. We held that despite the low rate of speed, the driver of the truck unreasonably disregarded the obvious danger of the intersection, failing to take appropriate measures to avoid the collision. And because the driver's behavior was unforeseeable to the county, his conduct constituted an efficient intervening cause of the collision.

We reasoned that the driver

> had complete control over the situation because he could have avoided the collision by exercising reasonable care while driving the [truck] toward and into the intersection. Howard County, even if negligent regarding the absent stop sign in question, was not bound to anticipate, and could not have contemplated, that [the truck's driver] would totally and unreasonably disregard the obvious danger inherent in vehicular travel into a visually obstructed intersection of public roads and fail to take appropriate measures to avoid the collision.

*Id*. at 675, 419 N.W.2d at 659.

[9] Moreover, we have held that one traveling on a favored street protected by a traffic signal of which one has knowledge may properly assume that oncoming traffic will obey it. See, *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995); *Paddack v. Patrick*, 163 Neb. 355, 79 N.W.2d 701 (1956).

The undisputed facts show that (1) McMackin approached a blind intersection when he could not see westbound traffic until almost in the intersection, (2) he had to realize that any vehicle approaching on his left could not see him until it was almost in

the intersection, and (3) he disregarded the stop sign and entered the intersection traveling approximately 45 m.p.h.—a speed that limited his ability to avoid collision with any oncoming vehicle that might become visible once he cleared the obstruction.

Willet concedes that McMackin disobeyed the stop sign and that the collision would not have occurred had McMackin stopped. Further, testimony indicated that when stopped at the stop sign, drivers could adequately see approaching vehicles. Thus, McMackin could have prevented the collision by exercising reasonable care in obeying the stop sign or reducing his speed so that he could react appropriately; nonetheless, he failed to do so.

The record is undisputed that if McMackin would have stopped at the stop sign and proceeded cautiously, he would have seen Willet's vehicle approaching the intersection. The County was not bound to anticipate—and could not have contemplated—that McMackin would disregard the obvious danger inherent in disobeying a stop sign and entering an obstructed intersection at high speed. Thus, McMackin's negligent behavior was unforeseeable to the County and constituted an efficient intervening cause of the collision.

## CONCLUSION

Willet failed to prove a genuine issue of material fact exists whether the County's actions proximately caused the collision, because even if the County breached its duty to Willet, McMackin was an efficient intervening cause of the collision. Thus, we affirm the trial court's summary judgment.

AFFIRMED.

WRIGHT, J., not participating.

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SPEAR T RANCH, INC., A NEBRASKA CORPORATION, APPELLEE, V. MELVIN G. KNAUB ET AL., APPELLEES, AND CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

713 N.W.2d 489

Filed May 5, 2006. No. S-05-759.

1. **Interventions.** Whether a party has a right to intervene in a proceeding is 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. **Interventions.** As a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004), the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
4. ____. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.
5. **Interventions: Pleadings.** A person seeking to intervene must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.
6. ____: ____. For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the complaint are true.

Appeal from the District Court for Morrill County: PAUL D. EMPSON, Judge. Affirmed.

Michael C. Klein, of Anderson, Klein, Swan & Brewster, for appellant.

Harriet M. Hageman and Kara Brighton, of Hageman & Brighton, P.C., for appellees George A. Davis and Loretta L. Davis.

John F. Simmons, of Simmons & Olsen Law Firm, P.C., for appellees John Gifford and Roger Gifford.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellees Max Olsen, Olsen Ranches, Inc., Melvin G. Knaub, Melvin G. Knaub Farms, Inc., Knaub, Inc., Melvin G. Knaub Grand Kids, L.P., and Special K, Inc.

Daniel M. Placzek, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellee Olsen Ranches, Inc.

John H. Skavdahl, of Skavdahl & Edmund Law Office, for appellee Gifford Circle Diamond Ranch, Inc.

Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee XL Farms, L.L.C.

Philip M. Kelly, of Douglas, Kelly, Ostdiek, Bartels & Neilan, P.C., for appellees Richard Van Pelt and Margaret Van Pelt.

Paul E. Hofmeister, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., for appellees Hoehn Farms, Mark Hoehn, Krista Hoehn, and Allison Hoehn.

James M. Mathis and Leland K. Kovarik, of Kovarik, Ellison, Mathis & Weimer, P.C., for appellees Leeray Edens and Beverly Edens.

Albert M. Engles and Timothy J. Wollmer, of Engles, Ketcham, Olson & Keith, P.C., for appellee Donahue & Rutledge, Inc.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellee Darnall Ranch, Inc.

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

MCCORMACK, J.

## NATURE OF CASE

The Central Nebraska Public Power and Irrigation District (Central) appeals the district court's order denying its motion to intervene. Central sought to intervene in the present matter following our remand of the cause to the district court in *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

## BACKGROUND

Spear T Ranch, Inc. (Spear T), a surface water appropriator, filed this action against numerous ground water irrigators seeking an injunction and damages for the loss of surface water from Pumpkin Creek. In *Spear T Ranch v. Knaub, supra*, we adopted the Restatement (Second) of Torts § 858 (1979) to govern conflicts between users of hydrologically connected surface water and ground water. We specifically held:

> "A proprietor of land or his [or her] grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another, unless . . . the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water."

269 Neb. at 194, 691 N.W.2d at 132. Applying the Restatement standard to Spear T's complaint, we determined that although Spear T alleged that it had suffered a harm, it did not allege that the defendants unreasonably caused that harm. We further determined, however, that Spear T should be granted leave to amend

its complaint. We therefore reversed the district court's order and remanded the matter for further proceedings.

Following our remand of this action, Central moved to intervene as a plaintiff pursuant to Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004). In its initial complaint, Central set forth, inter alia, the following allegations:

> The Defendants are diverting the water of Pumpkin Creek . . . without appropriations permitting such diversions, water which would otherwise be available for diversion pursuant to Central's appropriations . . . .
>
> . . . .
>
> . . . The Defendants' diversions are unreasonably causing harm to Central by reducing flow in Pumpkin Creek, and have reduced the flow available for diversion and for storage, as permitted by Central's appropriations.
>
> . . . The Defendants' diversions exceed their reasonable share of the annual supply, and exceed their reasonable share of the total store of water.
>
> . . . Each of Defendants' diversions is causing a direct and substantial effect on streamflow, and unreasonably causing harm to Central.
>
> . . . .
>
> . . . The Defendants' uses are causing direct and substantial depletions of flow of Pumpkin Creek, a tributary of the North Platte River, depletions which have caused Pumpkin Creek to go dry; Central's uses have no effect on Pumpkin Creek.

As its sole remedy, Central seeks a permanent injunction, which it maintains is the only means of avoiding the harm caused by the defendants' depletions of Pumpkin Creek.

Objections to Central's intervention were filed by the numerous defendants. Following a hearing on the matter, the district court denied Central's motion to intervene. Specifically, the district court found that Central failed to show an interest in this action of such character that it would gain or lose by direct operation and legal effect of any judgment which may be rendered, that Central's complaint fails to allege the requisite legal interest in the subject matter of this action, and the injury alleged by Central does not have a sufficient nexus to this action to

allow intervention. Central appeals the denial of its motion to intervene.

## ASSIGNMENT OF ERROR

Central assigns, rephrased and consolidated, that the district court erred by denying its motion to intervene.

## STANDARD OF REVIEW

[1,2] Whether a party has a right to intervene in a proceeding is a question of law. *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005). 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.*

## ANALYSIS

Central argues that they have a direct legal interest in the proceedings that entitle them to intervene pursuant to § 25-328.

Section 25-328 provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

[3-5] As a prerequisite to intervention under § 25-328, the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. *Douglas Cty. Sch. Dist. 0001 v. Johanns, supra*; *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002). An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right. *Douglas Cty. Sch. Dist. 0001 v. Johanns, supra*; *In re Change of Name of Davenport, supra*. Therefore, a person seeking to intervene must allege facts showing that he or she possesses the

requisite legal interest in the subject matter of the action. *Douglas Cty. Sch. Dist. 0001 v. Johanns, supra*; *In re Change of Name of Davenport, supra*.

[6] For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the complaint are true. See *In re Change of Name of Davenport, supra*. Central's complaint seeking intervention has as its sole prayer for relief that the defendants "be permanently enjoined, and for such other and further relief as may be just and equitable."

A review of the respective operative complaint of Spear T as well as Central reveals the following:

(1) Spear T claims damages against the defendants for losses Spear T allegedly suffered as a result of the defendants' use of ground water underlying their lands. These damages are for destroying Spear T's crops, denying water to its livestock, and destroying the beauty and value of its property. Central, on the other hand, makes no claim at all for damages.

(2) Spear T asks for injunctive relief seeking to protect its claimed interest in and ownership of the water that the defendants are pumping. This claim is specific as to water that would reach Spear T but for the actions of the defendants. Central claims that the water being used by the defendants would otherwise be available to it for principally storage use in Lake McConaughy.

(3) The decision in *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005), shows that the focus of that case was on that portion of the water used by the defendants that could be considered unreasonable. Central, however, asks for all uses upstream from it by the defendants to be permanently enjoined.

(4) Spear T's complaint is against specific defendants. Central attempts, by its complaint in intervention, to convert this action into a global dispute between ground water and surface water users. This is directly contrary to our holding in *Spear T Ranch v. Knaub, supra*, where we held that whether a ground water user has unreasonably caused harm to a surface water user is to be decided on a case-by-case basis.

Central's complaint claims that the defendants' alleged diversion of water from Pumpkin Creek will affect its uses for irrigation; hydroelectric production; recreation in the operation of

Lake McConaughy, Lake Ogallala, Jeffrey Lake, Johnson Lake, Elwood Reservoir, and numerous smaller lakes; environmental protection and enhancement; protection of threatened and endangered species; power plant cooling; and incidental underground water storage and recovery. Except for irrigation, none of these water uses by Central are common to Spear T.

The subject matter of this action is a claim that Spear T sustained harm as a result of alleged unreasonable withdrawal of ground water by the named defendants. The Restatement rule adopted in our previous opinion reflects the need to balance the competing equities and hardships of Spear T, a surface water appropriator, and the defendant ground water users. See *Spear T Ranch v. Knaub, supra*. Central's interests do not factor into this equation. Central would gain or lose nothing by a damage award in favor of Spear T or a judgment in favor of the defendants. Because any injunctive relief would be tailored to redress a specific injury proved by Spear T, Central has nothing more than an indirect, remote, or conjectural interest in one possible result of the litigation between Spear T and the defendants. Indeed, the factual allegations of Central's motion to intervene would introduce an entirely new subject matter into this action: a claim by Central that the actions of ground water users caused harm to its own interests for which it would be entitled to injunctive relief. While it is free to pursue this claim in a separate action, Central has not shown that it has a direct and legal interest in the subject matter of the action asserted by Spear T, which is a prerequisite to intervention under § 25-328.

## CONCLUSION

For the reasons discussed above, we affirm the order of the district court denying Central's motion to intervene.

AFFIRMED.

WRIGHT, J., not participating.

# ROBERT S. HILLABRAND, APPELLANT, V. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, APPELLEE.

713 N.W.2d 494

Filed May 12, 2006. No. S-05-049.

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. **Insurance: Contracts.** An insurance policy is a contract.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
4. **Insurance: Contracts.** Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous.
5. **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.
6. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
7. **Insurance: Contracts.** The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
8. **Insurance: Contracts: Intent.** A court shall seek to ascertain the intention of the parties from the plain meaning of an insurance policy.
9. **Insurance: Contracts.** An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions. If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced.
10. **Insurance: Contracts: Motor Vehicles.** An automobile insurance policy issued to a corporation is not rendered ambiguous merely because the body of the policy refers to the corporation using the personal pronoun "you" when the word "you" is clearly defined to be the named insured and the corporation is clearly designated as the named insured.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Jerome A. Merwald for appellant.

Jane D. Hansen for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

HANNON, Judge, Retired.

## NATURE OF CASE

The plaintiff was seriously injured in an automobile collision while driving a personal vehicle in the course of the business of a corporation of which he was an owner, officer, director, and employee. The other driver was at fault, and that driver's insurance company paid the $25,000 limits of its liability policy. The company insuring the plaintiff's personal vehicle paid the limits of the $25,000 of underinsured motorist (UIM) coverage on that vehicle. The plaintiff's corporation had several vehicles which were insured by the defendant for UIM coverage with limits of $100,000, and the plaintiff sued the defendant to recover on these policies for the damages he suffered in the collision, praying for judgment of $100,000. The defendant denied coverage.

Both parties filed motions for summary judgment to raise the issue of whether the UIM coverage provisions in the insurance contracts issued by the defendant covered injuries suffered by the plaintiff while he was driving a personal vehicle on company business. The trial court concluded that the defendant's policy did not provide UIM coverage for the plaintiff under the circumstances of this collision, overruled the plaintiff's motion, sustained the defendant's motion, and dismissed the plaintiff's petition. We find there is a split among the jurisdictions on this issue, but we conclude that the majority and better view is that the defendant's policy provided no coverage. Therefore, we affirm.

## FACTS

The plaintiff, Robert S. Hillabrand, was an owner, officer, director, and employee of Hillabrand, Inc., doing business as Parker Heating & Cooling (Parker Heating). At the time of the accident, Robert was driving a vehicle that was owned by him and his wife, and he was making a service call to a customer's home to repair a furnace. The collision occurred when another vehicle crossed the centerline and struck Robert's van head on. As a result of the accident, Robert sustained severe and permanent injuries.

Each of Parker Heating's seven motor vehicles was covered by a policy issued by American Family Mutual Insurance Company (American Family) and provided for UIM coverage up to a limit of $100,000 for injury to any one person and to a limit of

$300,000 per accident. The seven policies were identical, and we will therefore refer to the policies as if there was one policy. The parties do not dispute that Robert suffered sufficient damage to be entitled to recovery if the UIM coverage provisions of the policy covered the accident in which he was injured.

## ASSIGNMENTS OF ERROR

In summary, Robert assigns as error that the trial court erred in determining that he was not covered under American Family's insurance policy, in sustaining American Family's motion for summary judgment, and in denying his motion for summary judgment.

## STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

## ANALYSIS

The issue in this case is whether the insurance policy issued by American Family insuring the motor vehicles owned by Parker Heating provided UIM coverage for Robert, who was an owner, officer, director, and employee of that closely held corporation, when he was injured in the course of the corporation's business while driving a vehicle he owned personally.

[2,3] We begin with the familiar proposition that an insurance policy is a contract. See *Molina v. American Alternative Ins. Corp.*, 270 Neb. 218, 699 N.W.2d 415 (2005). 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. *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

The UIM coverage endorsement of the policy at issue provided in significant part:

> **We** will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**.

> The **bodily injury** must be sustained by an **insured person** and must be caused by accident and arise out of the **use** of the **underinsured motor vehicle**.

(Quoted language that is in bold-face type throughout this opinion reflects the appearance of the original insurance policy.)

The endorsement defined the term "insured person" as follows:

> 1. **Insured person** means:
> a. **You** or a **relative**.
> b. Anyone else **occupying your insured car**.
> c. Anyone, other than a person or organization claiming by right of assignment or subrogation, entitled to recover damages due to **bodily injury** to **you**, a **relative** or another occupant of **your insured car**.

The general definitions section of the policy stated: "**You** and **your** mean the policyholder named in the declarations." The declaration page identified the policyholder and named insured as "Parker Heating & Cooling." The policy defined a relative as "a person living in **your** household, related to **you** by blood, marriage or adoption." The UIM coverage endorsement also provided that UIM coverage did not apply for bodily injury to a person "[w]hile **occupying**, or when struck by, a motor vehicle that is not insured under this policy, if it is owned by **you** or any resident of **your** household."

[4-6] Robert asserts that he was an insured under the UIM coverage endorsement because the policy is ambiguous. Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003). 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. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005). When the terms of the 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. *Guerrier, supra.*

Robert argues that the section of the UIM coverage endorsement defining an insured person as "[**y**]**ou** or a **relative**" is

ambiguous. He admits that the definitions of these terms are not ambiguous on the surface, but he argues that they become ambiguous when applied to Parker Heating. Robert asserts that the UIM coverage endorsement applied to "**bodily injury** which an **insured person** is legally entitled to recover" and that, of course, Parker Heating cannot suffer bodily injury. He argues, "Hence, if these provisions were to be interpreted literally, there could never be any coverage afforded under the underinsured motorist provisions of this policy." Brief for appellant at 17. In view of the fact that Robert and other Parker Heating employees would clearly be covered when driving the vehicles named in the policy in the course of Parker Heating's business, this assertion is simply incorrect. We realize that under the policy definition of an insured person, no one individual would be covered, but it cannot be said that the policy did not afford any UIM coverage.

Because the policy was issued to a corporation, the policy's terminology which applies only to individuals seems likely to lead to unnecessary litigation. The definitions in the policy, however, leave no doubt as to the meaning of these terms, and the fact that the named insured is a corporation does not change the meaning of these terms. We recognize that some language in the definitions may be surplus when the named insured is a corporation.

The volume of litigation we have found nationally convinces this court that the use of such terminology by insurance companies is problematic. A few courts have adopted a variation of Robert's argument. In support of his position, Robert relies on *Hawkeye-Sec. Ins. v. Lambrecht & Sons*, 852 P.2d 1317 (Colo. App. 1993), and *Scott-Pontzer v. Liberty Mut. Fire*, 85 Ohio St. 3d 660, 710 N.E.2d 1116 (1999).

In *Hawkeye-Sec. Ins.*, the policy at issue named a corporation as the insured. The spouse of the corporation's owner was injured while in a vehicle not owned by the corporation. The policy provided coverage for only the named insured or a family member related to the named insured by blood, marriage, or adoption. Unlike the situation in the case at bar, the opinion in *Hawkeye-Sec. Ins.* did not mention whether the policy provided any coverage for persons injured while in the insured vehicle. The court found coverage because without such, under the terms as stated

in the opinion, the insurance company would have no liability under a provision for which it charged a separate premium.

In *General Ins. Co. of America v. Smith*, 874 P.2d 412 (Colo. App. 1993), another division of the same court refused to follow *Hawkeye-Sec. Ins.* because the policy in *General Ins. Co. of America* provided family member coverage only if the named insured was an individual. Under the policy in *General Ins. Co. of America*, the court also observed, as we observe in this case, that while the corporation could not suffer bodily injury, there would still be liability under the policy because UIM coverage was extended to anyone occupying the insured vehicle. Hence, the *General Ins. Co. of America* court found that the policy provided coverage to the corporation notwithstanding that "family members" of the corporation were not covered.

In *Scott-Pontzer*, the Ohio Supreme Court found that the language in a policy issued to a corporation was subject to various interpretations and that the policy covered an employee who was killed while driving a vehicle owned by his wife. Although the employee was not acting within the scope of his employment at the time of the accident, his employer's commercial automobile liability insurance policy contained coverage for UIM liability. The UIM coverage endorsement defined the term "insured" as including "[y]ou," "any family member," and "[a]nyone else occupying a covered auto." *Id.* at 663, 710 N.E.2d at 1118. The court found it reasonable to conclude that "you" included employees because "naming the corporation as the insured is meaningless unless the coverage extends to some person or persons—including to the corporation's employees." *Id.* at 664, 710 N.E.2d at 1119. The Ohio court also found that the policy did not contain language restricting coverage to employees acting within the scope of employment, so the employee was entitled to UIM coverage even though he was not within the scope of his employment at the time of the accident.

We are not persuaded by the logic of *Scott-Pontzer*, and a study of subsequent cases demonstrates its errors. *Scott-Pontzer* has not specifically been overruled by the Ohio Supreme Court, but in *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 217, 797 N.E.2d 1256, 1260 (2003), the court limited its application to "uninsured and underinsured motorist coverage issued to a

corporation to employees only while they are acting within the course and scope of their employment, unless otherwise specifically agreed."

The aftermath of *Scott-Pontzer v. Liberty Mut. Fire*, 85 Ohio St. 3d 660, 710 N.E.2d 1116 (1999), was recounted by the Ohio court in *Westfield Ins. Co., supra*, in which the court noted that other courts had labeled *Scott-Pontzer* as follows: an anomaly for departing from the tenet that the intent of the parties controls the interpretation of a contract (*Seaco Ins. Co. v. Davis-Irish*, 300 F.3d 84 (1st Cir. 2002)); "beguiling" and with "distracting internal inconsistencies" (*Szabo v. CGU Intern. Ins., PLC*, 227 F. Supp. 2d 820, 833-34 (S.D. Ohio 2002)); a "mystery" and a "preposterous" conclusion (*Gibson v. New Hampshire Ins. Co.*, 178 F. Supp. 2d 921, 922-23 nn.2 & 3 (S.D. Ohio 2001)); and a "distortion" of the law (*Lawler v. Fireman's Fund Ins. Co.*, 163 F. Supp. 2d 841, 843 (N.D. Ohio 2001)). The *Seaco Ins. Co.* court noted that *Scott-Pontzer* was a 4-to-3 decision and that the Ohio Legislature "lost little time in superseding it due to its destabilizing effect on the automobile insurance market. *See* Ohio Rev.Code Ann. § 3937.18 (Anderson 2002)." 300 F.3d at 87.

The *Westfield Ins. Co.* court also noted that the *Scott-Pontzer* rationale "stands in stark contrast with decisions of the vast majority of states that have considered similar issues." 100 Ohio St. 3d at 221, 797 N.E.2d at 1263. Therefore, the Ohio court limited the holding of *Scott-Pontzer* to exclude UIM coverage for employees who were injured outside the scope of their employment.

In the case at bar, since Robert was within the scope of his employment, *Scott-Pontzer, supra*, and *Hawkeye-Sec. Ins. v. Lambrecht & Sons*, 852 P.2d 1317 (Colo. App. 1993), would support his position. Courts in many states have considered whether policies issued to small closely held corporations grant UIM coverage to the individual owners of the corporations, the owners' family members, or employees of the corporation. The fact patterns vary: Some cases involve situations in which injuries were sustained while in the course of the corporation's business, while other cases arose from injuries sustained while on family business or while on personal business and driving a vehicle not owned by the corporation. Most courts have held there is no UIM coverage in these and related situations.

The Supreme Court of Oklahoma reviewed decisions from a number of other jurisdictions in considering whether the use of the term "you" to refer to a corporation as a named insured creates an ambiguity. See *American Economy Ins. Co. v. Bogdahn*, 89 P.3d 1051 (Okla. 2004). The court stated:

> Next, the [defendants] argue that we must find the policy ambiguous because this issue has been litigated throughout the United States with some jurisdictions finding an ambiguity and some finding no ambiguity. We reject the notion that because there is a split of authority we must find an ambiguity. The vast majority of jurisdictions conclude as a matter of law that similar policy language is not ambiguous: Arizona, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Washington. Only a small handful of jurisdictions find the language ambiguous and allow coverage: Connecticut, Mississippi, Montana, New Jersey, Ohio, and Vermont.
>
> We agree with the vast majority of jurisdictions and reject the notion that the use of the term "family member" in a commercial automobile insurance policy renders the policy ambiguous.

*Id.* at 1056-57. (We note that the Oklahoma court listed Ohio as a jurisdiction in both categories above. We believe the Oklahoma court was referring to *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 797 N.E.2d 1256 (2003), as the Ohio case that concluded the language was not ambiguous, and to *Scott-Pontzer v. Liberty Mut. Fire*, 85 Ohio St. 3d 660, 710 N.E.2d 1116 (1999), as the Ohio case that concluded the language was ambiguous.)

We have studied the following cases, and those jurisdictions all agree, for various reasons, that the view taken by the Oklahoma court is correct: *Guarantee Ins. Co. v. Anderson*, 585 F. Supp. 408 (E.D. Pa. 1984); *Nicks v. Hartford Insurance Group*, 291 So. 2d 673 (Fla. App. 1974); *Hogan v. Mayor &c. of Savannah*, 171 Ga. App. 671, 320 S.E.2d 555 (1984); *Economy Preferred v. Jersey Cty. Const.*, 246 Ill. App. 3d 387, 615 N.E.2d 1290, 186 Ill. Dec. 233 (1993); *Peterson v. Universal Fire and Cas. Ins.*, 572 N.E.2d

1309 (Ind. App. 1991); *Bryant v. Protective Cas. Ins. Co.*, 554 So. 2d 177 (La. App. 1989); *Andrade v. Aetna Life & Cas. Co.*, 35 Mass. App. 175, 617 N.E.2d 1015 (1993); *Kaysen v. Federal Ins. Co.*, 268 N.W.2d 920 (Minn. 1978); *Cutter v. Maine Bonding & Cas. Co.*, 133 N.H. 569, 579 A.2d 804 (1990); *Buckner v MVAIC*, 66 N.Y.2d 211, 486 N.E.2d 810, 495 N.Y.S.2d 952 (1985); *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991); *Meyer v. American Economy Ins. Co.*, 103 Or. App. 160, 796 P.2d 1223 (1990); *Dixon v. Gunter*, 636 S.W.2d 437 (Tenn. App. 1982); *General Ins. v. Icelandic Builders*, 24 Wash. App. 656, 604 P.2d 966 (1979).

The UIM coverage endorsement in the policy in the case at hand defines an insured person as "[**y**]**ou** or a **relative**." The policy also clearly defines the term "you" to mean "the policyholder named in the declarations." The endorsement expands the coverage to include a "**relative**." Since a corporation cannot have relatives, that term adds no coverage and it is clearly a surplus term. We fail to see how this term would mislead an insured.

[7,8] This court has held that the language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004). A court shall seek to ascertain the intention of the parties from the plain meaning of the policy. *Boutilier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 681 N.W.2d 746 (2004).

[9,10] An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions. See *Cornhusker Cas. Co. v. Farmers Mut. Ins. Co.*, 268 Neb. 168, 680 N.W.2d 595 (2004). If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced. See *id.* We conclude that an automobile insurance policy issued to a corporation is not rendered ambiguous merely because the body of the policy refers to the corporation using the personal pronoun "you" when the word "you" is clearly defined to be the named insured and the corporation is clearly designated as the named insured.

In addition, Robert argues that he should not be excluded from coverage under the American Family policy because its

UIM exclusion is more restrictive than allowed by state law. As we understand Robert's argument, he believes that use of the phrase "under this policy" in the American Family policy makes it more restrictive than Neb. Rev. Stat. § 44-6413 (Reissue 2004) and that, therefore, the exclusion in the UIM coverage endorsement is void.

This exclusion states that "coverage does not apply for **bodily injury** to a person: 1. [w]hile **occupying**, or when struck by, a motor vehicle that is not insured *under this policy*, if it is owned by **you** or any resident of **your** household." (Emphasis supplied.) Robert argues that the phrase "under this policy" makes the UIM coverage more restrictive than allowed by § 44-6413, which states in relevant part:

> (1) The uninsured and underinsured motorist coverages provided in the Uninsured and Underinsured Motorist Insurance Coverage Act shall not apply to:
>
> . . . .
>
> (b) Bodily injury, sickness, disease, or death of an insured while occupying a motor vehicle owned by, but not insured by, the named insured or a spouse or relative residing with the named insured.

The American Family policy covered the vehicles owned by Parker Heating, not a vehicle owned by Robert. Robert was not in a vehicle owned by Parker Heating, the named insured, when he was injured. Earlier in this opinion, we rejected Robert's argument that he could be deemed a named insured under the Parker Heating policy. If this court had somehow found that Robert could be a named insured under the Parker Heating policy, perhaps the issue of whether the policy was more restrictive than the statute could have arisen, but because we have held he was not a named insured, the issue is irrelevant. Robert was not in a vehicle owned by Parker Heating, or a relative of Parker Heating, when he was injured.

## CONCLUSION

Robert has not shown that any genuine issue of material fact exists concerning whether he is entitled to coverage under the insurance policy issued to the corporation, Parker Heating. The district court's order was correct, and summary judgment was

properly granted to American Family. The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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DOUGLAS D. KLUVER, IN HIS CAPACITY AS TRUSTEE OF THE RONALD B. ROOTS IRREVOCABLE TRUST, ET AL., APPELLANTS AND CROSS-APPELLEES, V. RICHARD P. DEAVER AND CLARA E. DEAVER, HUSBAND AND WIFE, AND RESOURCE RECYCLING, INC., APPELLEES, AND WASTE MANAGEMENT OF NEBRASKA, INC., APPELLEE AND CROSS-APPELLANT.

714 N.W.2d 1

Filed May 12, 2006. No. S-05-104.

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. **Contracts.** A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous.
4. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
5. **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.
6. **Contracts.** A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.
7. ____. A latent ambiguity exists when collateral facts make the meaning of a contract uncertain.
8. ____. Because the parties to a document have or suggest opposing interpretations does not necessarily, or by itself, compel a conclusion that the document is ambiguous.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Steven E. Achelpohl for appellant Douglas D. Kluver.

Thomas J. Guilfoyle, of Erickson & Sederstrom, for appellant Timothy J. McReynolds.

Dana C. Bradford III and Richard J. Coenen, of Bradford & Coenen, L.L.C., for appellant FRB Partnership.

John R. Douglas and Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Waste Management of Nebraska, Inc.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

CONNOLLY, J.

Douglas D. Kluver, Timothy J. McReynolds, and FRB Partnership (collectively the appellants) appeal the district court's order granting summary judgment for the appellees, Richard P. Deaver and Clara E. Deaver; Resource Recycling, Inc.; and Waste Management of Nebraska, Inc. (Waste Management). This appeal involves a contract for royalties that was previously before this court concerning different issues. See *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997), *modified* 254 Neb. 118, 575 N.W.2d 354 (1998). FRB Partnership holds the rights of Fred H. and Dorothy L. Bauermeister and their son, Robert A. Bauermeister (collectively the Bauermeisters), who were parties to the initial contract at issue. Kluver is the trustee of the Ronald B. Roots Irrevocable Trust. Ronald Roots was a joint venture partner with the Bauermeisters. The appellants argue that the contract is ambiguous and that parol evidence would resolve the ambiguity to show that Waste Management owes royalties to them under the contract. We determine that the contract is unambiguous and that there are no issues of material fact preventing summary judgment. Accordingly, we affirm.

## BACKGROUND

This action concerns a purchase agreement for land used as the Douglas County, Nebraska, landfill. In 1988, Douglas County announced that it would accept bids for private ownership and operation of the landfill. Before 1988, Roots and Fred and Robert Bauermeister entered into a joint venture agreement for submitting a bid for operation and ownership of the landfill. Waste Management then contacted McReynolds and expressed an interest in collaborating with members of the joint venture in making a bid.

Waste Management entered into a purchase agreement to purchase property from Fred and Dorothy Bauermeister and the

Deavers to make a bid. Waste Management, under the contact, agreed to pay a monthly base payment of $3,000 plus a $1 per ton royalty fee. The contract incorporated an earlier lease agreement and was subject to an assignment agreement. The relevant portions of the contract are as follows:

> 1. AWARD OF LANDFILL CONTRACT: This Agreement is contingent upon the award from Douglas County, Nebraska ("County") to [Waste Management] of a contract ("Contract") to operate a sanitary landfill ("Landfill") within Douglas County, Nebraska, on the Premises . . . .
>
> 2. PROPERTY DESCRIPTION: Seller agrees to sell to [Waste Management] and [Waste Management] agrees to purchase certain real estate containing approximately two hundred eighty (280) acres of land and situated in Douglas County, Nebraska, more particularly described on Schedule A attached . . . .
>
> 3. TERMS OF SELLER BENEFITS: Seller shall have and hold all benefits granted pursuant to this Agreement for a term commencing on the date upon which [Waste Management] commences construction of the Landfill at the Premises ("Commencement Date"), and continuing for a term of twenty-five (25) years from the Commencement Date or until the Premises has reached the total capacity provided for in the Contract or any renewals, extensions, enlargements or modifications thereof whether by bid, change order or otherwise, unless earlier terminated as provided hereunder ("Term"). . . .
>
> . . . .
>
> 22. NO JOINT VENTURE: The relationship of the parties hereunder is that of Seller and [Waste Management] and nothing contained herein shall be construed to make the parties hereto partners or joint venturers, nor shall either party hereto be entitled to bind the other in any manner by its actions, except as otherwise expressly provided herein.

Waste Management then entered into a contract with Douglas County for operation of the landfill, known as the Douglas County Recycling and Disposal Facility (RDF Landfill). In December 1998, the Department of Environmental Quality (DEQ) sent Waste

Management a letter regarding a modification allowing Waste Management to increase capacity by 3 million cubic yards. The modification was granted in February 1999, and the record contains an affidavit averring that the additional amount was placed in the RDF Landfill before November 19, 2003.

On November 19, 2003, the RDF Landfill ceased operation because it had reached its permitted final elevations under its permit from the DEQ. Immediately thereafter, Waste Management began operation of a second Douglas County landfill, the Pheasant Point Landfill, on a site directly east of the Bauermeister land. Waste Management had purchased the Pheasant Point Landfill from Papio Development Co., L.L.C. The Pheasant Point Landfill was operated under a separate contract with Douglas County. At that time, Waste Management stopped paying royalties to the appellants under the contract.

The appellants filed a complaint alleging that they were also entitled to royalties on the Pheasant Point Landfill. According to one of two affidavits submitted by McReynolds, appellants and Waste Management agreed that "the written agreement reflecting our joint and collaborative efforts would provide for our participation in expansions and modifications of the landfill to adjacent properties." The appellants moved to take discovery depositions, and Waste Management filed a motion to quash.

Waste Management moved for summary judgment. The district court determined that the contract was unambiguous and that there was no issue of material fact that the term had run under the contract. Thus, the appellants were not entitled to royalties on the Pheasant Point Landfill. Therefore, the court granted Waste Management's motion for summary judgment and ruled that the appellants' discovery motion was moot. The appellants filed an appeal, and Waste Management cross-appeals the decision of the court to allow McReynolds' affidavits into evidence.

## ASSIGNMENTS OF ERROR

The appellants assign, rephrased and consolidated, that the district court erred by (1) granting summary judgment because the contract contained a patent or latent ambiguity allowing for parol evidence and because the contract must be read in conjunction with the lease agreement and assignments, (2) granting

summary judgment when there was an issue of material fact whether the landfill had reached capacity before it ceased operation, and (3) prohibiting discovery. On cross-appeal, Waste Management assigns that the court erred by accepting into evidence two affidavits from McReynolds.

## STANDARD OF REVIEW

[1] The meaning of a contract and whether a contract is ambiguous are questions of law. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

[2] 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

The appellants contend that the contract is ambiguous because a question exists whether the Pheasant Point Landfill located on adjoining property was part of the "premises" under the contract. They argue that the contract involved a business opportunity and that the Pheasant Point Landfill is a " 'renewal, extension, enlargement or modification by bid, change order or otherwise' " under paragraph 3 of the contract. Brief for appellants at 17.

[3-6] A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous. See *Hillabrand v. American Fam. Mut. Ins. Co., ante* p. 585, 713 N.W.2d 494 (2006). A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Gary's Implement v. Bridgeport Tractor Parts, supra*. 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. *Hillabrand v. American Fam. Mut. Ins. Co., supra*. Also, a contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract. See *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993).

Reading the contract as a whole, it is unambiguous. The contract specifically states the location of land at issue and defines the "premises" as consisting of that specific land. The contract then provides that it terminates after 25 years or when the landfill

reached capacity. The record shows that capacity was reached on November 19, 2003. The appellants, however, argue that there is an issue of material fact concerning whether capacity was reached, but the record contains no evidence to dispute that the permit levels authorized by the DEQ had been reached by November 19, 2003, and no evidence to dispute an affidavit averring that all additional permitted amounts had been deposited in the landfill by that date. Therefore, there is no issue of material fact that the contract expired on November 19, 2003.

The appellants also argue that an issue of material fact exists whether Waste Management's operation of the Pheasant Point Landfill constituted "renewals, extensions, enlargements or modifications thereof whether by bid, change order or otherwise" under paragraph 3 of the contract. We disagree.

When considering the contract as a whole, it contemplates a specific, legally described parcel of land and a specific landfill to be operated on that land. Thus, any renewals, enlargements, extensions, or modifications of the landfill subject to the contract would occur on that specific land. Here, the Pheasant Point Landfill opened after the contract expired. Further, it is on entirely separate land not owned by the appellants and is subject to a separate contract between Waste Management and Douglas County. If separate landfills created by Waste Management on nearby, but separate properties, constituted an enlargement or extension of the "premises," the appellants could demand royalties in perpetuity from Waste Management for landfills on adjoining land it now owns or would purchase in the future—something that is contrary to a reasonable construction when considering the contract as a whole.

The appellants next contend that the contract was not just for the sale of land, but was also for a business opportunity. Thus, they argue that it contemplated an enlargement or extension to adjoining properties. The appellants cite to *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997), *modified* 254 Neb. 118, 575 N.W.2d 354 (1998), to argue that we have previously recognized the contact as a "joint venture." But *Bauermeister* did not concern the relationship between the appellants and Waste Management, nor did it require consideration of the terms of the contract that are at issue in this appeal.

Instead, we look to paragraph 22 of the contract which states that no joint venture was created.

Finally, the appellants contend that there is a latent ambiguity in the contract about the intention of the parties when they defined the term "premises" and the effect of renewals, enlargements, extensions, or modifications. They argue that they should be allowed to present evidence to show that an ambiguity exists and to conduct further discovery to present their case. We disagree.

[7] A latent ambiguity exists when collateral facts make the meaning of the contract uncertain. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). In *Plambeck*, citing to a contested will case, we gave an example of the type of latent ambiguity that would justify the use of extrinsic evidence to show the intent of the parties, stating: "For example . . . if two or more persons satisfy a description of one devisee, there is a latent ambiguity, and extrinsic evidence is admissible to disclose and remove that ambiguity." 244 Neb. at 784, 509 N.W.2d at 20. In such a case, extrinsic evidence becomes necessary to properly construe the contract.

[8] Here, there is not a latent ambiguity that makes extrinsic evidence necessary. Instead, the appellants are disputing the interpretation of the terms within the contract and the plain language of the contact controls. Because the parties to a document have or suggest opposing interpretations does not necessarily, or by itself, compel a conclusion that the document is ambiguous. See *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). Thus we determine that under the plain language of the contract, it expired before the Pheasant Point Landfill opened, the Pheasant Point Landfill was not part of the "premises" under the contract, and it did not constitute an enlargement or extension of the landfill. Because extrinsic evidence could not be used to interpret the contract, the court did not err when it granted summary judgment and when it did not grant further discovery. Accordingly, we affirm. Because we affirm, we do not reach Waste Management's cross-appeal.

AFFIRMED.

WRIGHT, J., not participating.

# JOHN F. MCLEAY, M.D., APPELLANT AND CROSS-APPELLEE, V. BERGAN MERCY HEALTH SYSTEMS CORP., DOING BUSINESS AS BERGAN MERCY MEDICAL CENTER, APPELLEE AND CROSS-APPELLANT.

714 N.W.2d 7

Filed May 19, 2006. No. S-04-117.

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.** 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. **Federal Acts: Health Care Providers: Immunity.** Immunity under the Health Care Quality Improvement Act of 1986 is a question of law that may be resolved whenever the record is sufficiently developed.
4. **Federal Acts: Health Care Providers: Presumptions: Appeal and Error.** The Health Care Quality Improvement Act of 1986 creates a presumption that a professional review action meets the standards of the act unless the presumption is rebutted by a preponderance of the evidence.
5. **Summary Judgment: Federal Acts: Health Care Providers.** When considering summary judgment based on immunity under the Health Care Quality Improvement Act of 1986, a court asks whether a reasonable jury, viewing the facts in the best light for the physician, might conclude that he or she has shown, by a preponderance of the evidence, that the hospital's actions are outside the scope of 42 U.S.C. § 11112(a) (2000).
6. **Federal Acts: Health Care Providers: Presumptions: Proof: Appeal and Error.** The presumption that a professional review action meets the standards of the Health Care Quality Improvement Act of 1986 means that the plaintiff bears the burden of proving that the review process was not reasonable.
7. **Federal Acts: Health Care Providers: Appeal and Error.** In a factual challenge to a professional review action under the Health Care Quality Improvement Act of 1986, the facts have to be so obviously mistaken or inadequate as to make reliance on them unreasonable.
8. ____: ____: ____. When reaching the determination about the reasonableness of the actions of a review board under the Health Care Quality Improvement Act of 1986, the court looks at the totality of the process leading up to the professional review action.
9. **Federal Acts: Health Care Providers: Presumptions: Appeal and Error.** A physician's showing that the standard of care was met, or that the professional review board reached the wrong conclusion, does not meet the burden of overcoming the presumption under the Health Care Quality Improvement Act of 1986 of a reasonable belief that the hospital was furthering quality health care.

10. **Federal Acts: Health Care Providers: Libel and Slander: Immunity: Damages.** A defamation action seeking damages is subject to immunity under the Health Care Quality Improvement Act of 1986.
11. **Federal Acts: Health Care Providers: Immunity: Equity.** The immunity provisions of the Health Care Quality Improvement Act of 1986 do not include actions seeking equitable relief.
12. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. On motion for rehearing, reargument granted. See 270 Neb. 693, 708 N.W.2d 592 (2005), for original opinion. Original opinion withdrawn. Affirmed in part, and in part reversed and remanded for further proceedings.

David S. Houghton, J.P. Sam King, and Robert W. Mullin, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

CONNOLLY, J.

John F. McLeay, M.D., sued Bergan Mercy Health Systems Corp. (Bergan) after a peer review board suspended his privileges. The district court granted Bergan's motion for summary judgment, determining that Bergan was immune from liability under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101 et seq. (2000). We reversed in part and affirmed in part, because Bergan failed to show that the presumption applied. *McLeay v. Bergan Mercy Health Sys.*, 270 Neb. 693, 708 N.W.2d 592 (2005). Bergan moved for rehearing, which we granted, and we ordered the appeal to be reargued.

We now withdraw our original opinion in *McLeay* and substitute this opinion in which we determine that Bergan, in its review of McLeay's performance, acted with a reasonable belief that it was promoting quality care. Therefore, McLeay's actions for damages are immune under the HCQIA. His request for reinstatement, however, is not subject to HCQIA immunity, and

we remand the cause for a determination whether there is an issue of material fact, whether McLeay waived his claim for reinstatement, and whether he is entitled to reinstatement. Accordingly, we affirm in part, and in part reverse and remand for further proceedings.

## BACKGROUND

Bergan suspended McLeay's surgical privileges. McLeay filed an action seeking damages and reinstatement that resulted in a jury award of $451,000. Bergan appealed. The Nebraska Court of Appeals reversed and ordered a new trial. In its opinion, the court stated that although it did not decide the issue, the facts were such that the immunity provisions of the HCQIA were likely "implicated in a substantial way." *McLeay v. Bergan Mercy Health Sys.*, No. A-99-474, 2001 WL 185263 at *6 (Neb. App. Feb. 27, 2001) (not designated for permanent publication). McLeay then filed a new petition seeking damages and reinstatement for breach of contract, fraudulent representation, fraudulent concealment, mutual mistake, and defamation, relating to the suspension of his surgical privileges and Bergan's filing of reports to the National Practitioner Data Bank (NPDB). A portion of the defamation cause of action was dismissed based on the statute of limitations.

Bergan filed an answer alleging that McLeay waived claims by failing to exhaust administrative remedies. It also alleged that it was immune from liability for its actions under the HCQIA and moved for summary judgment.

Evidence presented at the summary judgment hearing consisted of the record from the first trial. The record shows that in 1992, McLeay was informed by letter that because of concerns about the quality of care he provided, he would be monitored during certain surgical procedures. McLeay met with an ad hoc committee and entered an agreement for monitoring. McLeay disputed some terms of the agreement, but he signed the ad hoc committee meeting minutes stating that he accepted and agreed to them.

In January 1993, McLeay's privileges were further restricted. Minutes from a meeting of the ad hoc review committee that considered the matter stated:

> The members reviewed all of the information made available to the Committee through its investigative process. It was determined significant evidence was present in order to justify a recommendation for action. This evidence included two concern reports from nursing staff on the floors, two concern reports from nursing staff in the Surgery department, two concern reports from Anesthesiologists, and a number of cases identified as having inappropriate or substandard care.

Bergan filed a report with the NPDB. McLeay filed a response stating that the report was incorrect.

In December 1993, McLeay wrote a letter requesting reinstatement and acknowledged that "1992 was an aberration of my surgical care" and stated that he had his " 'wake-up call.' " Bergan denied the request.

In 1994, Bergan notified McLeay of further specific concerns, and at McLeay's request, a hearing was scheduled. Bergen informed McLeay that it was concerned about his surgical judgment or techniques in eight cases. Bergan informed McLeay of a report from a monitoring physician concerning the care of three patients, an internal medicine physician's concerns about a patient, and documentation regarding two patients. Bergan's record numbers relating to the cases were listed in a letter sent to McLeay providing notice of a hearing on the matter. McLeay stated that he did not go back to Bergan to look at the records because he believed that it would not be allowed. He also stated, however, that he did not want to go back to Bergan. Bergan's president at the time testified that McLeay was never denied access to the records and could have viewed them.

According to Bergan, McLeay did not attend the hearing. Bergan then informed him that he was suspended. McLeay stated that there was a "meeting" or "hearing" on the matter. The record shows that McLeay was informed of his right to a hearing before the medical executive committee and that he requested one. Bergan scheduled a hearing, but then postponed it at McLeay's request, and it was never rescheduled. Bergan informed the NPDB of the suspension in a report that stated that McLeay was summarily suspended for incompetence, negligence, and malpractice. McLeay filed statements disputing the

accuracy of the report and stated that it was false, but did not provide any details.

According to McLeay, the committee's actions came without warning and surprised him. He stated that before receiving the letters from the committee, Bergan had not discussed with him the issues regarding his patients. He disputes that he acted negligently or incompetently when treating patients. He contends that he was deprived of a hearing at times, but the record as a whole shows that Bergan informed him of the review committee's actions. He spoke with members of the committee on several occasions, and he was afforded an opportunity for a hearing. Yet, McLeay conceded that he understood how the peer review process worked and that he knew he was entitled to a hearing.

Dr. Dwaine J. Peetz, Jr., who was chairman of the department of surgery during the time McLeay was suspended, described the peer review process that led to the suspension. According to Peetz, the outpatient surgical advisory committee initiated the peer review process by reporting an incident involving one or two patients. Regarding the suspension, Peetz explained that a summary suspension occurs only when the hospital and physicians are concerned that harm might come to patients.

The record does not contain specific information about the cases under review because the incidents reported to the committee were viewed as confidential. Although Peetz did not provide details of the cases that led to McLeay's suspension, he stated that two cases had caused concern within a short timeframe. According to Peetz, five to seven of the eight cases listed as being problematic involved "specialties" and had "significant concerns."

Dr. Richard J. Feldhaus, who was involved in the peer review process, testified about reports concerning the care of patients and that the surgery department believed the evidence justified a review. Feldhaus also testified that he was concerned about a case and that it was one of the eight cases that were listed when McLeay's privileges were suspended.

McLeay presented deposition testimony from two physicians. Dr. Anthony Pantano, a surgeon, testified that he had assisted McLeay in surgery and was familiar with the standard of care,

but did not provide details about the standard of care. Pantano was present at some of the cases used in the peer review and reviewed the file in others. He testified about seven of the eight cases and stated that McLeay acted "appropriately" and that he had no questions about McLeay's skills or judgment. He did not provide specifics about how the standard of care was met or what the standard of care was.

Dr. James A. Mailliard also testified. Mailliard did consultations with McLeay about patient care, but did not assist in surgery. Mailliard did not testify about the surgical standard of care. He did testify, however, that he reviewed the files in two of the eight cases and did not have any concern about McLeay's judgment, skills, or technique.

The court granted Bergan's motion for summary judgment, concluding there was no issue of material fact that disputed that the peer review action was taken in the reasonable belief that it was furthering quality care. Therefore, Bergan was immune from suit under the HCQIA. The court did not fully address whether McLeay had waived his claims by failing to reschedule a hearing concerning the revocation of privileges.

## ASSIGNMENTS OF ERROR

McLeay assigns, rephrased and consolidated, that the district court erred by (1) determining that Bergan was immune under the HCQIA; (2) failing to find that there were issues of material fact about the requirements to report and the falsity of the reports or malice in submitting them, which issues affected immunity; (3) failing to determine that immunity did not apply to equitable claims; and (4) determining that McLeay had waived his claims against Bergan. On cross-appeal, Bergan contends that allegations of defamation were barred by the statute of limitations.

## 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. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

[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. *Merz v. Seeba, ante* p. 117, 710 N.W.2d 91 (2006).

## ANALYSIS

### IMMUNITY

McLeay argues that Bergan was not acting within the scope of the HCQIA and was not entitled to immunity under it. According to McLeay, issues of material fact exist whether Bergan acted in the reasonable belief that its actions were in the furtherance of quality care and whether there were reasonable efforts to obtain the facts. Bergan, in its answer, alleges that its actions were a part of a professional review action that is entitled to immunity under the HCQIA.

[3] Immunity under the HCQIA is a question of law that may be resolved whenever the record is sufficiently developed. See, e.g., *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994); *Meyer v. Sunrise Hosp.*, 117 Nev. 313, 22 P.3d 1142 (2001). " 'Congress passed the [HCQIA] to improve the quality of medical care by encouraging physicians to identify and discipline physicians who are incompetent or who engage in unprofessional behavior.' " *Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064, 1070 (8th Cir. 2005). " 'Congress believed that effective peer review would be furthered by granting limited immunity from suits for money damages to participants in professional peer review actions.' " *Id.*

The HCQIA defines the term "professional review action" to mean

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges . . . of the physician.

42 U.S.C. § 11151(9). Under the HCQIA, a professional review body is cloaked with immunity from suits for damages:

> If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section—
>
> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body,
>
> (C) any person under a contract or other formal agreement with the body, and
>
> (D) any person who participates with or assists the body with respect to the action,
>
> shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

42 U.S.C. § 11111(a)(1).

Section 11112(a) of the HCQIA sets out the immunity standards. To be immune from suits for money damages, a professional peer review action must be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

[4] Further, the HCQIA creates a presumption that a professional review action meets the standards of the act "unless the presumption is rebutted by a preponderance of the evidence." § 11112(a). Accord *Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999). See *Lee, supra*. Courts agree that the reasonableness requirements contained in § 11112(a) necessitate an objective inquiry. See, e.g., *Sugarbaker, supra*.

[5] When discussing the presumption, courts have repeatedly commented on the interplay of the presumption and the summary judgment standard. Thus, courts have stated:

> "The statutory presumption included in section 11112(a) adds a rather unconventional twist to the burden of proof in our summary judgment standard of review, but the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case."

*Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064, 1070 (8th Cir. 2005). Therefore, the courts ask, " 'Might a reasonable jury, viewing the facts in the best light for [the physician], conclude that [he or she] has shown, by a preponderance of the evidence, that [the hospital's] actions are outside the scope of [§ 1]1112(a)?' " *Lee*, 408 F.3d at 1070-71.

[6] Stated differently, a court must determine whether the physician satisfied his or her burden of producing evidence that would allow a reasonable jury to conclude that the hospital's peer review process failed to meet the standards of the HCQIA. *Lee, supra*. See, *Brader v. Allegheny General Hosp.*, 167 F.3d 832 (3d Cir. 1999); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992); *Fox v. Parma Community Gen. Hosp.*, 160 Ohio App. 3d 409, 827 N.E.2d 787 (2005); *Manzetti v. Mercy Hosp. of Pittsburgh*, 741 A.2d 827 (Pa. Commw. 1999). The Nebraska Court of Appeals has addressed the matter, noting that the presumption means that the plaintiff bears the burden of proving that the review process was not reasonable. See, *Babcock v. Saint Francis Med. Ctr.*, 4 Neb. App. 362, 543 N.W.2d 749 (1996), citing *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994).

Here, McLeay argues that Bergan failed to present evidence that it was entitled to immunity. According to McLeay, Bergan failed to show any evidence of how McLeay failed to perform adequately and, thus, failed to meet an initial burden to show that the committee acted reasonably. McLeay also distinguishes the case law by pointing out that in most cases applying the presumption, the record contains detailed facts about the physician's errors or incompetence, while here, the record reflects no such details.

McLeay's argument fails for several reasons. First, the parties do not dispute that a peer review process was at issue. Under § 11112(a), once a peer review process is at issue, those participating in the process are presumed to be immune from damages

unless the plaintiff overcomes the presumption by showing that the factors in § 11112(a)(1) to (4) were not met. In addition, the plaintiff carries the burden of showing by a preponderance of the evidence that the peer review process was not reasonable.

Therefore, for Bergan to initially raise the issue that it was immune from liability, it would simply need to show that the dispute arose out of a professional review action. Issues concerning Bergan's reasonable belief that it was acting to further quality care and the other factors in § 11122(a)(1) to (4) are expressly presumed under the HCQIA.

That a professional review action was at play is undisputed. Accordingly, Bergan was presumed to be immune from actions for damages under the HCQIA unless McLeay satisfied his burden of producing evidence to allow a reasonable jury to conclude that the peer review process failed to meet the provisions of the HCQIA. See, e.g., *Lee, supra*.

### McLeay's Evidence to Rebut Presumption

We next address whether McLeay presented evidence to rebut the presumption that would make summary judgment inappropriate.

[7,8] One court described a factual challenge to the professional review action, stating that the facts would have to be " 'so obviously mistaken or inadequate as to make reliance on them unreasonable.' " *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 471 (6th Cir. 2003). Also, when reaching the determination, the court looks at the totality of the process leading up to the professional review action. *Joshi v. St. Luke's Episcopal*, 142 S.W.3d 862 (Mo. App. 2004).

Although McLeay alleges that he was not afforded adequate notice and hearing, the record does not support that assertion. Nor is there a meaningful dispute about a reasonable effort to obtain facts in the matter. Thus, we focus on the reasonable belief that the action was in the furtherance of quality care. McLeay contends that the testimonies of Pantano and Mailliard show that he acted competently and thus raise an issue of material fact whether Bergan had a reasonable belief that it was acting in the furtherance of quality care. He also argues the record reflects very little evidence about the eight cases that led to the termination of his privileges.

[9] McLeay's argument falls short. Courts have overwhelmingly held that a physician's showing that the standard of care was met, or that the professional review board reached the wrong conclusion, does not meet the burden of overcoming the presumption of a reasonable belief that the hospital was furthering quality health care. See, *Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064 (8th Cir. 2005); *Meyers, supra*; *Brader v. Allegheny General Hosp.*, 167 F.3d 832 (3d Cir. 1999). The focus is on whether the hospital acted in a reasonable belief that it was furthering quality health care, with the information available to the professional review board when it acted, and if the reviewers would have reasonably concluded that their actions would restrict incompetent behavior or protect patients at that time. See, generally, *id.*

Only one court has held that expert testimony about the standard of care could be used to rebut the presumption. *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324 (10th Cir. 1996). There, the expert testified not only about the standard of care, but stated that the review panel reviewed only two charts before revoking privileges, which was unreasonably narrow at that time. *Brown* has been distinguished by other courts because of its unique facts that focus on the information available to the review board. See, e.g., *Manzetti v. Mercy Hosp. of Pittsburgh*, 741 A.2d 827 (Pa. Commw. 1999). One court that distinguished *Brown* described it as follows:

> While *Brown* does discuss the use of expert testimony in evaluating issues of immunity under HCQIA, the decision in *Brown* centered upon the fact that Dr. [Arlene] Brown was able to produce significant evidence to support her allegations that information submitted by the defendants in her medical review process was false or misleading. Indeed, Dr. Brown produced evidence that the individuals who investigated her actions were involved in encouraging another doctor to move his practice so as to be in direct competition with her. In other words, the defendants in *Brown* had conspired to manufacture allegations of improper behavior by Dr. Brown so as to put Dr. Brown out of business. In this setting, Dr. Brown's expert concluded that the defendants were not acting to further quality health

> care. Neither were their actions reasonable under the facts of the case. It was for this reason that the federal district court in *Brown* refused to grant summary judgment on the basis of HCQIA immunity, a decision that was affirmed by the United States Court of Appeals for the Tenth Circuit.

*Meyer v. Sunrise Hosp.*, 117 Nev. 313, 324, 22 P.3d 1142, 1150 (2001). Instead of applying *Brown*, the *Meyer* court stated: "Expert testimony is irrelevant to our consideration of immunity under HCQIA because we focus solely on the reasonableness of the peer reviewer's belief, not on whether the peer review action ultimately proved to be medically sound or actually furthered quality care." 117 Nev. at 323, 22 P.3d at 1149, citing *Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999), and *Manzetti, supra*.

Although *Brown* allowed the use of expert testimony, that case also involved the use of experts to testify about the review process itself. *Brown, supra*. In cases involving the use of expert testimony after the fact to show that the standard of care was actually met, courts uniformly hold that the testimony will not rebut the presumption. See, e.g., *Lee, supra*; *Brader, supra*; *Mathews v. Lancaster General Hosp.*, 87 F.3d 624 (3d Cir. 1996); *Manzetti, supra*.

Here, Pantano's and Mailliard's testimonies cannot rebut the presumption. The presumption is focused on what the review board knew when it acted. Therefore, later expert testimony that McLeay acted appropriately in the cases reviewed cannot be used to rebut the presumption.

Although the record is sparse on details of the eight cases reviewed, McLeay signed his agreement to the meeting minutes of the committee when it imposed monitoring. When the committee later imposed further restrictions, it reviewed the cases, including two reports from nursing staff on the floors, two reports from nursing staff in the surgery department, two reports from anesthesiologists, and a number of cases identified as having substandard care. In a letter, McLeay acknowledged that "1992 was an aberration of my surgical care" and stated that he had his "'wake-up call.'" When McLeay's privileges were suspended, Bergan stated that it was troubled by the eight cases. In addition, Peetz testified that several cases were close together in time and

that a suspension would not occur unless the review board believed that harm might come to patients. Finally, Feldhaus testified that he personally was concerned about one of the eight cases that were listed when McLeay's privileges were suspended.

Although the evidence is not overwhelming as to the specific details of the cases reviewed, the record shows that a review was justified, and McLeay failed to present evidence to overcome the presumption to show that Bergan reasonably believed that it was acting in the furtherance of quality care. Accordingly, McLeay failed to meet his burden to present evidence that would allow a reasonable jury to conclude that Bergan's peer review process failed to meet the standards of the HCQIA.

### False Reports

McLeay argues that no immunity exists for false databank reports when made with the knowledge they are false. He argues that Bergan never made a finding that he was incompetent or negligent or that he had committed malpractice, and he contends the evidence shows that Bergan knew the NPDB reports were false.

As previously discussed, all actions for damages are subject to immunity under the HCQIA. Section 11137(c), however, provides: "No person or entity . . . shall be held liable in any civil action with respect to any report made under this subchapter . . . without knowledge of the falsity of the information contained in the report." Reporting of peer review actions is mandated by the HCQIA.

[10] Here, McLeay sought damages for several causes of action, including defamation. A defamation action seeking damages is subject to HCQIA immunity. See, generally, *Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064 (8th Cir. 2005); *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994). The record shows that the Bergan representative who filed the reports lacked personal knowledge of their accuracy and was relying on the actions of the review board and reporting its findings. Nor does the record indicate knowledge by Bergan that the reports were false. They simply reported the findings of the committee. See *Odom v. Fairbanks Memorial Hosp.*, 999 P.2d 123 (Alaska 2000).

We determine that McLeay's claims about false reporting are subject to the immunity provisions of the HCQIA and that McLeay failed to present evidence sufficient to overcome the presumption for summary judgment.

### Equitable Claims and Waiver

McLeay argues that his claims for equitable relief are not subject to immunity under the HCQIA. For example, in his petition, McLeay sought reinstatement of his privileges.

[11] A few cases have applied HCQIA immunity to claims seeking reinstatement without analyzing the issue. See, e.g., *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461 (6th Cir. 2003). The HCQIA, however, specifically states that it applies to suits for money damages. See § 11111. It does not include actions seeking equitable relief. See, *Babcock v. Saint Francis Med. Ctr.*, 4 Neb. App. 362, 543 N.W.2d 749 (1996); *Lipson v. Anesthesia Services, P.A.*, 790 A.2d 1261 n.14 (Del. Super. 2001). See, generally, *Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999). Here, McLeay, in addition to seeking damages, also sought reinstatement of his privileges as a remedy. To the extent he sought equitable relief that did not involve an award of damages, those remedies are not subject to HCQIA immunity.

Bergan, however, argues that McLeay waived his claims because he failed to exhaust administrative remedies when he did not reschedule the hearing before the medical executive committee. In the alternative, it contends that the primary jurisdiction doctrine applies.

The district court analyzed the waiver issue only in determining that McLeay's false reporting claims were immune under the HCQIA. Because the court determined that Bergan was immune from liability under all of McLeay's claims, it did not specifically reach the waiver issue on the remaining claims, examine the record for issues of material fact concerning waiver of claims, or consider the legal arguments presented concerning waiver.

[12] Because the district court did not consider whether McLeay waived his equitable claims, we do not consider the issue. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. See *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262

(2006). Accordingly, we reverse, and remand for further proceedings to determine whether McLeay is entitled to equitable remedies.

## CONCLUSION

We determine that Bergan was immune from liability for damages on all of McLeay's causes of action because it undertook a peer review action and McLeay failed to rebut the presumption that the review committee acted reasonably. Accordingly, we affirm the district court's grant of summary judgment on claims for damages. We also determine, however, that McLeay's claims for equitable relief are not subject to HCQIA immunity, and he may be able to proceed on those claims if they were not waived. Because the district court did not pass on that topic, we reverse the summary judgment to the extent it affects claims for equitable relief and remand the cause for further proceedings. Because we conclude that Bergan was immune from McLeay's defamation claims for damages, we do not discuss Bergan's cross-appeal.

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

WRIGHT, J., not participating.

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SMEAL FIRE APPARATUS CO., A NEBRASKA CORPORATION, APPELLEE, V. ROBERT KREIKEMEIER AND R. K. MANUFACTURING, INC., APPELLANTS.

ROBERT KREIKEMEIER AND R. K. MANUFACTURING, INC., RELATORS, V. SMEAL FIRE APPARATUS CO., RESPONDENT.

715 N.W.2d 134

Filed May 26, 2006. Nos. S-03-354, S-05-407.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is a matter of law that requires an appellate court to reach an independent conclusion irrespective of the determination made by the court below.
2. **Contempt: Words and Phrases.** There is a distinction between contempt sanctions which are coercive in nature and those which are punitive in nature; that is to say, between those which aim to compel future obedience to the court's orders and decrees and are therefore coercive, and those which punish past disrespectful or contumacious conduct and vindicate the court's authority.

3. **Contempt: Final Orders: Words and Phrases: Appeal and Error.** In a coercive sanction, the contemner holds the keys to his or her jail cell, in that the sentence is conditioned upon the contemner's continued noncompliance. The punitive sanction is much like the sentence in a criminal case, in that it is absolute and not subject to mitigation if the contemner alters his or her future conduct toward the court, and takes on the aspects of a final order or of an order affecting a substantial right issued in a special proceeding, both of which are reviewable on appeal.
4. **Contempt: Final Orders.** A coercive sanction is always subject to modification by the contemner's conduct; that sanction is not final in any sense.
5. **Contempt: Collateral Attack: Habeas Corpus: Appeal and Error.** Punitive sanctions are reviewable by appeal; whereas coercive sanctions can only be attacked collaterally by habeas corpus.
6. **Contempt: Final Orders: Appeal and Error.** The imposition of a coercive sanction is never final and may not be attacked by direct appeal.
7. **Contempt: Damages.** An award of damages is unavailable in a civil contempt proceeding.
8. ____: ____. Civil contempt is available to enforce the decree actually rendered, not to afford a remedy for the recovery of subsequent damage.
9. **Contempt: Equity.** A civil contempt proceeding cannot be the means to afford equitable relief to a party.
10. ____: ____. In imposing a sanction for civil contempt, a court cannot use, as a requisite to purge contempt, a condition that, if fulfilled for compliance with a court's order, affords equitable relief to a party.
11. **Contempt.** In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered.
12. **Judgments: Jurisdiction: Final Orders: Appeal and Error.** Though an extrajudicial act of a lower court cannot vest the appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed.
13. **Contempt: Costs: Attorney Fees.** Costs, including reasonable attorney fees, can be awarded in a contempt proceeding.
14. **Costs: Attorney Fees.** Attorney fees are awarded as costs.
15. **Judgments: Costs: Attorney Fees.** Costs are considered part of the judgment; therefore, an award of attorney fees should also be considered part of the judgment.
16. **Judgments: Final Orders: Attorney Fees: Appeal and Error.** Where an order is appealed from when the issue of attorney fees is unresolved, a portion of the judgment is unresolved, and the order from which the appeal was taken is not final.
17. ____: ____: ____: ____. In the absence of an underlying final judgment, an award of attorney fees, as costs, is not a final, appealable order.
18. **Contempt.** Sanctions, in a contempt proceeding, consist of the consequences imposed if the contemner fails to purge his or her contempt by complying with the plan imposed by the trial court.
19. **Contempt: Appeal and Error.** A contempt order entered in a postjudgment proceeding that does not terminate that proceeding is not appealable.

20. ____: ____. A finding of contempt alone, without a noncontingent order of sanction, is not appealable.
21. **Habeas Corpus: Jurisdiction: Appeal and Error.** The Nebraska Supreme Court has original jurisdiction to consider habeas corpus proceedings.
22. **Supreme Court: Appeal and Error.** The Nebraska Supreme Court does not ordinarily entertain original actions, unless some good reason is shown why the application was not made to a county or district court.
23. **Habeas Corpus.** Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.
24. ____. A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
25. ____. A writ of habeas corpus is available only when the release of the petitioner from the deprivation of liberty being attacked will follow as a result of a decision in the petitioner's favor.
26. **Habeas Corpus: Proof.** Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.

Petition for further review in No. S-03-354 from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Dodge County, F.A. GOSSETT III, Judge. Order vacated in part, opinion vacated, and appeal dismissed. Original action in No. S-05-407. Petition dismissed.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellants/relators.

Paul R. Elofson, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., for appellee/respondent.

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

GERRARD, J.

## NATURE OF CASE

This is a procedurally complicated civil contempt case, in which the Nebraska Court of Appeals dismissed the appeal with respect to the district court's finding of contempt, but nonetheless affirmed the allowance of $73,500 in attorney fees and costs. For reasons that will be explained more fully below, we conclude that the district court lacked jurisdiction to order equitable relief as a condition to purging its finding of contempt and that the

remaining condition of the purge plan was not accompanied by a threatened sanction and was not reviewable on appeal. For those reasons, we vacate the equitable elements of the purge plan, vacate the related award of fees and costs, and dismiss the appeal in its entirety.

## BACKGROUND

The underlying dispute is between Robert Kreikemeier and R. K. Manufacturing (collectively RKM) and Smeal Fire Apparatus Co. (Smeal). Both businesses manufacture aerial firefighting equipment. Kreikemeier was a former employee of Smeal before leaving to found RKM in 1988, and in 1989, Smeal sued RKM alleging use of a trade secret. The case was settled pursuant to an injunction agreed to by the parties, which prohibited RKM from using a particular manufacturing process developed by Smeal.

In 2001, Smeal filed an application for an order to show cause why RKM should not be held in contempt of court for violating the injunction, based on RKM's alleged use of the prohibited manufacturing process. On June 21, 2002, the district court entered an order finding RKM in willful contempt of the injunction. In an order entered February 28, 2003, the district court stated that RKM could purge its contempt by complying with the following conditions: notify the district court of all units found to be in violation of the injunction, notify all the owners in writing within 60 days advising them that the use of the units was in violation of an injunction, make a good faith effort to secure the cooperation of the owners of the units, and get permission from them to exchange the parts of the units manufactured in violation of the injunction within 2 years of the date of the court's order. The district court also ordered RKM to pay Smeal $73,500 to offset attorney fees, court costs, and expert witness fees.

RKM appealed, arguing, inter alia, that the district court erred in finding contempt, because there had not been a violation of the injunction. Smeal argued that the Court of Appeals lacked appellate jurisdiction because the finding of contempt was not a final, appealable order. The Court of Appeals agreed in part, concluding that the finding of contempt, without a noncontingent order

of sanction, was not a final, appealable order. However, the Court of Appeals did find that the allowance of fees and costs was appealable, because RKM could not avoid paying them. The Court of Appeals affirmed the allowance of fees and costs, but only considered the amount of the allowance, and not the underlying finding of contempt that formed the basis for the award of fees. See *Smeal Fire Apparatus Co. v. Kreikemeier*, 13 Neb. App. 21, 690 N.W.2d 175 (2004).

RKM filed a petition for further review, which we granted. After its appeal was dismissed by the Court of Appeals, RKM filed an application for leave to commence an original proceeding in this court; specifically, a petition for writ of habeas corpus directed at the underlying finding of contempt. We granted RKM's application for leave to commence an original proceeding and consolidated the original proceeding, case No. S-05-407, with the appeal on petition for further review in case No. S-03-354. We dispose of both cases in this opinion.

## ASSIGNMENTS OF ERROR

In its petition for further review, in case No. S-03-354, RKM assigns, as consolidated and restated, that the Court of Appeals erred in (1) finding that the order of the district court was not a final order for the following reasons: (a) the order contained a sanction which afforded equitable relief to Smeal, (b) the order contained a noncontingent sanction not subject to mitigation and therefore punitive, and (c) the order awarded a money judgment to Smeal; (2) failing to determine that RKM was not in contempt of the injunction and affirming an award of attorney fees based on an erroneous finding of contempt; and (3) not considering RKM's other assignments of error.

In its brief in the original proceeding, case No. S-05-407, RKM assigns, as consolidated and restated, that the district court erred in (1) granting equitable relief to Smeal, (2) finding RKM in contempt, and (3) failing to consider extrinsic evidence relevant to the meaning of the injunction that would have shown RKM was not in violation of the injunction or in contempt.

## STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is a matter of law that requires an appellate court to

reach an independent conclusion irrespective of the determination made by the court below. *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006).

## ANALYSIS

### Power of Trial Court to Enter Contempt Order

[2-6] The foundation of our current law regarding appealability of a civil contempt order is *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984). In that case, the contemner was jailed for contemptuously refusing to testify at a hearing. We dismissed the contemner's appeal, stating:

> The first question which then presents itself is whether the district court's order . . . is appealable. It is not. We have . . . distinguished between contempt sanctions which are coercive in nature and those which are punitive in nature; that is to say, between those which aim to compel future obedience to the court's orders and decrees and are therefore coercive, and those which punish past disrespectful or contumacious conduct and vindicate the court's authority. In the coercive sanction, the type involved here, the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance. The punitive sanction is much like the sentence in a criminal case, in that it is absolute and not subject to mitigation if the contemner alters his future conduct toward the court, and takes on the aspects of a final order or of an order affecting a substantial right issued in a special proceeding, both of which are reviewable on appeal. . . . The coercive sanction, on the other hand, is always subject to modification by the contemner's conduct; that sanction is not final in any sense. Therefore, punitive sanctions are reviewable by appeal; whereas coercive sanctions can only be attacked collaterally by habeas corpus.

(Citations omitted.) *Id.* at 534, 344 N.W.2d at 628-29. Simply stated, "the imposition of a coercive sanction is never final and may not be attacked by direct appeal." *Maddux v. Maddux*, 239 Neb. 239, 244, 475 N.W.2d 524, 529 (1991).

This principle was illustrated in a series of cases beginning with *State ex rel. Kandt v. No. Platte Baptist Ch.*, 216 Neb. 684,

345 N.W.2d 19 (1984). In *Kandt*, we affirmed the trial court's injunction of the defendants from operating a religious school in violation of state law. The defendants reopened the school, and the State brought a motion for contempt. The trial court entered a coercive contempt order, fining the defendants $200 per day and ordering the defendants to be confined during school hours on each day that the injunction was violated. The defendants appealed, and we dismissed the appeal for lack of a final, appealable order. *State ex rel. Kandt v. North Platte Baptist Church*, 219 Neb. 694, 365 N.W.2d 813 (1985). We found that the sanction was day-to-day and coercive and, therefore, not appealable pursuant to *In re Contempt of Liles, supra*.

After 95 days, the trial court assessed the amount of fines due at $19,000. An appeal was taken, which we found to be proper. *State ex rel. Kandt v. North Platte Baptist Church*, 225 Neb. 657, 407 N.W.2d 747 (1987). We reasoned that the fines were no longer subject to mitigation and that the judgment possessed the indicia of finality. Because the trial court had erred with regard to the burden of proof in the proceeding, we reversed the judgment. *Id.*

The question presented here is how the contempt order imposed in this case fits into that distinction between coercive and punitive sanctions. The Court of Appeals concluded that the order in this case was coercive, because the order did not specify what, if anything, would occur if RKM failed to comply with the requirements of the purge plan. Thus, the Court of Appeals concluded that any sanction which would be imposed is subject to modification by RKM's conduct in complying with the purge plan. RKM, on the other hand, argues that the requirements of the purge plan are *themselves* sanctions, akin to a criminal sentence, because they are not subject to mitigation.

The difficulty the parties and Court of Appeals have had in determining whether the order at issue here is coercive or punitive is illustrated by the fact that they cannot seem to agree on what aspects of the district court's order compose the purge plan, and what, if anything, is the threatened sanction. This order simply does not fit neatly into the coercive or punitive categories. But the most fundamental reason that the district court's order is difficult to classify is that it is inconsistent with our established

jurisprudence regarding a trial court's jurisdiction in a contempt proceeding.

In *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993), the contemner was found to be in contempt of a noncompetition agreement that had been included in the property settlement agreement of her divorce. After finding her to be in contempt, the trial court imposed a $20,000 fine, but set out a purge plan in which the contemner could purge the contempt and avoid the fine by complying with the terms of the noncompetition agreement for a year *after* the noncompetition agreement, by its terms, would otherwise have expired. In other words, the trial court extended the noncompetition agreement for an additional year and conditioned the fine on the contemner's compliance with the extended agreement. The contemner rejected the purge plan, the trial court made the fine an unconditional, final judgment, and the contemner appealed. See *id.*

[7-10] We held that the fine, insofar as it had been coercive, was within the trial court's power. However, we concluded that the trial court erred in conditioning the fine on an award of equitable relief, because an award of damages is unavailable in a civil contempt proceeding. See *id.* " 'Civil contempt is available to enforce the decree actually rendered, not to afford a remedy for the recovery of subsequent damage.' " *Id.* at 11, 504 N.W.2d at 93, quoting *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963). By extension, we concluded that a civil contempt proceeding cannot be the means to afford equitable relief to a party. *Dunning, supra*. "[I]n imposing a sanction for civil contempt, a court cannot use, as a requisite to purge contempt, a condition that, if fulfilled for compliance with a court's order, affords equitable relief to a party." *Id.* at 11, 504 N.W.2d at 93. Accord *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997). Thus, we concluded that "the trial court lacked jurisdiction or power to require" the contemner to comply with the trial court's equitable order. *Dunning*, 244 Neb. at 11, 504 N.W.2d at 93.

[11] In this case, as previously discussed, the district court's "purge plan" ordered RKM to notify the district court of all units found to be in violation of the injunction, notify the owners of those units that their use was in violation of an injunction,

and attempt to exchange the parts of the units that violated the injunction. This relief went well beyond the terms of the original injunction—it did not simply enforce the decree actually rendered, but also afforded a remedy for the recovery of subsequent damage. See *id*. This was beyond the jurisdiction of the district court in this proceeding. See *id*. "'In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered.'" *Meisinger v. Meisinger*, 230 Neb. 37, 38, 429 N.W.2d 721, 722 (1988), quoting *Malec v. Malec*, 196 Neb. 533, 244 N.W.2d 82 (1976).

[12] Thus, the reason that the district court's order cannot be easily classified as coercive or punitive is that it is *neither*—it is an award of equitable relief that is not available in a civil contempt proceeding. The parties and the Court of Appeals have, essentially, been disagreeing about what size of square peg best fits into a round hole. Because the district court exceeded its jurisdiction in ordering equitable relief, those aspects of the order must be vacated. Though an extrajudicial act of a lower court cannot vest the appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed. *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004). While the Court of Appeals reached the right result in concluding that the district court's contempt order was not final and appealable, it erred by not also vacating the aspects of the contempt order that are ultra vires.

## Attorney Fees

In *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993), we concluded that the trial court's order was final and appealable because, once the impermissible conditions of the purge plan were removed from the order, what was left was an unconditional fine that was punitive, not coercive. Because the removal of the impermissible conditions left the contemner with no means of purging her contempt, the fine had become unavoidable. See *id*. This case presents a different problem. Once the impermissible

equitable relief is excised from the district court's order, what remains is only the district court's award of costs and fees. However, we conclude that the Court of Appeals erred in finding that award, standing alone, to be final and appealable.

[13-16] Costs, including reasonable attorney fees, can be awarded in a contempt proceeding. See *id*. However, it is clear that attorney fees are awarded as costs. See, *id*.; *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963). Costs are considered part of the judgment; therefore, an award of attorney fees should also be considered part of the judgment. See *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999). Thus, we have held that where an order is appealed from when the issue of attorney fees is unresolved, a portion of the judgment is unresolved, and the order from which the appeal was taken is not final. See *id*.

[17] The situation in this case is reversed, in that the court has entered an order with respect to attorney fees, but not an underlying final judgment. Nonetheless, the same principles apply. In the absence of an underlying final judgment, an award of attorney fees, as costs, is not a final, appealable order.

[18] The Court of Appeals' conclusion that the award of fees here was final and appealable is based in the same confusion discussed previously as to whether the conditions imposed by the district court were sanctions. They were not. Sanctions, in a contempt proceeding, consist of the consequences imposed if the contemner fails to purge his or her contempt by complying with the plan imposed by the trial court. Here, the costs and fees were an element of the purge plan, along with the equitable conditions discussed above. The district court's order contained no sanction for failure to comply with the purge plan. Simply put, the order did not state what, if anything, would happen to RKM if it failed to purge its contempt.

[19,20] A contempt order entered in a postjudgment proceeding that does not terminate that proceeding is not appealable. *Kandt v. North Platte Baptist Church*, 225 Neb. 657, 407 N.W.2d 747 (1987); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995). A finding of contempt alone, without a noncontingent order of sanction, is not appealable. *Meisinger v. Meisinger*, 230 Neb. 37, 429 N.W.2d 721 (1988); *Hammond, supra*. What we are presented with here, even limited to the

award of fees and costs, is a finding of contempt and a means to purge that contempt, but no order of sanction, noncontingent or otherwise. Because the district court in this case did not impose an order of sanction, let alone a noncontingent order of sanction, the proceedings were not terminated in the court below, and the order is not appealable. See *Hammond, supra*.

However, while we do not have jurisdiction to review the merits of the district court's award of attorney fees and costs, we are unable to sever that award from the district court's extrajurisdictional order awarding equitable relief to Smeal. We view the award of attorney fees and costs as being inextricable from the other relief purportedly awarded by the order, and we conclude that the award of fees and costs must also be vacated as part of that extrajurisdictional order. Should further proceedings support an award of fees and costs, upon the entry of a proper contempt order, or commencement of a separate action in which Smeal can pursue damages for RKM's alleged use of Smeal's trade secrets, then the district court can revisit the issue of attorney fees and costs at that time.

## Original Proceeding for Habeas Corpus

[21,22] The same logic that requires dismissal of RKM's appeal also requires dismissal of RKM's petition for writ of habeas corpus. Although this court has original jurisdiction to consider habeas corpus proceedings, see Neb. Const. art. V, § 2, we do not ordinarily entertain original actions, unless some good reason is shown why the application was not made to a county or district court. See *Williams v. Olson*, 143 Neb. 115, 8 N.W.2d 830 (1943). We granted RKM leave to commence an original proceeding because its petition for further review was already pending on our docket, and judicial economy was served by consolidating RKM's various attempts to obtain relief from the district court's contempt order. However, RKM has failed to demonstrate that it is entitled to the benefit of the writ.

[23-26] Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained. *Glantz v. Hopkins*, 261 Neb. 495, 624 N.W.2d 9 (2001); *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999). A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention,

imprisonment, or custodial deprivation of liberty. *Id*. Even assuming that a fine would be a "deprivation of liberty" for which habeas corpus could issue, see *In re Caldwell*, 82 Neb. 544, 118 N.W. 133 (1908), the writ is available only when the release of the petitioner from the deprivation of liberty being attacked will follow as a result of a decision in the petitioner's favor. See *Glantz, supra*. Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ. *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994).

In the absence of a sanction, obviously, there is no deprivation of liberty against which the writ of habeas corpus could issue. RKM's petition for writ of habeas corpus does not state a claim for relief.

## CONCLUSION

We vacate those aspects of the district court's order affording equitable relief to Smeal, because they exceed the district court's jurisdiction in a contempt action. The remaining condition of the purge plan, payment of attorney fees and costs, is not subject to a sanction for noncompliance and is not appealable, but we also vacate the award of attorney fees and costs, as it is inextricable from the court's order affording equitable relief.

In the absence of appellate jurisdiction, we vacate the Court of Appeals' opinion and dismiss the appeal in case No. S-03-354. Because the district court's contempt order does not contain a sanction, there is no basis for issuing a writ of habeas corpus, and we also dismiss RKM's petition for writ of habeas corpus in case No. S-05-407.

ORDER VACATED IN PART, OPINION VACATED,
AND APPEAL IN NO. S-03-354 DISMISSED.
PETITION IN NO. S-05-407 DISMISSED.

# In re Estate of Opal B. Mousel, deceased. Margie Gaines Bagley and Jerry Gaines, Copersonal Representatives of the Estate of Opal B. Mousel, deceased, appellants, v. Richard P. Mousel et al., appellees.

715 N.W.2d 490

Filed May 26, 2006. No. S-05-329.

1. **Wills.** When a patent ambiguity exists in a will, a court must resolve such ambiguity as a matter 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. **Wills: Words and Phrases.** Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
4. **Parol Evidence: Wills: Intent.** Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain.
5. **Decedents' Estates: Wills.** A latent ambiguity exists when the testator's words are susceptible of more than one meaning, and the uncertainty arises not upon the words of the will as looked at in themselves, but upon those words when applied to the object or subject which they describe.
6. **Wills: Words and Phrases.** A patent ambiguity is one which exists on the face of an instrument.
7. **Wills: Intent.** A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will.
8. **Trial: Evidence: Records: Appeal and Error.** The erroneous admission of evidence in a bench trial is not reversible error if other relevant evidence, properly admitted, sustains the trial court's necessary factual findings; in such case, reversal is warranted only if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.
9. **Wills: Intent.** The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law.
10. **Decedents' Estates: Wills: Intent.** To arrive at a testator's intention expressed in a will, a court must examine the will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will, and assume that the maker of the will understood words stated in the will.

Appeal from the County Court for Furnas County: Cloyd Clark, Judge. Affirmed.

James H. Dodson, of Dodson & Dodson, for appellants.

Kevin D. Urbom, and, on brief, David W. Urbom, of Urbom Law Offices, P.C., for appellees.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

MILLER-LERMAN, J.

## NATURE OF CASE

This case involves the proper distribution of certain interests in ranch real estate included in the estate of Opal B. Mousal. Margie Gaines Bagley and Jerry Gaines, copersonal representatives of the estate (Appellants), appeal the order of the county court for Furnas County which construed Opal's will to leave the contested interests in the ranch real estate to several relatives of Opal's husband, George A. Mousel. Appellants are two of the children of Opal's deceased brother, Orville Gaines. Appellants assert that because George died within 60 days after Opal's death, the will should have been construed as leaving the ranch real estate, along with the rest of Opal's estate, to the children of Orville Gaines. We conclude that the county court did not err in its construction of the will. We affirm.

## STATEMENT OF FACTS

Opal died on December 18, 2003, leaving a last will and testament dated October 27, 1986. Opal was survived by George, but George died on January 6, 2004, which was within 60 days of Opal's death. Opal's will was admitted to probate on May 24, 2004. The will includes seven numbered paragraphs. The will named Appellants as personal representatives and contained the following relevant provisions:

> Second, after the payment of such debts and funeral expenses, I give, devise and bequeath our home residence, family automobile, household goods and personal effects to my husband, George A. Mousel, together with a life estate in my ranch real estate.
>
> THIRD, My interests in my ranch real estate I devise in the following shares: to George's brothers Paul – 1/5th interest; to Charles – 1/5th interest; to sister Madelene Coder – 1/5th interest; to brother Ashur – 1/5th interest and to the two children of George's deceased sister, Lucille

> Haas: each a 1/10th interest in nephew Walter Haas and niece, Carolyn Knehans.
>
> FOURTH, I give devise and bequeath my interest in the West Half of the Southeast Quarter of 30-14-25 in Roger Mills County, Oklahoma to the children of my deceased brother, Orville Gaines, in equal shares who are Margie Gaines Bagley, Jerry Gaines, Jon Gaines and Susan Gaines subject to the life estate in my husband, George Mousel.
>
> FIFTH, in the event that my husband and I meet simultaneous death in an accident or if he does not survive me for 60 days, I direct that the provisions for him shall lapse and my estate shall pass under paragraph Four, together with my residuary estate.

On September 16, 2004, Appellants filed a petition for construction of the will. They asserted that the heirs named in paragraph "THIRD" (known hereinafter as George's relatives) and the heirs named in paragraph "FOURTH" (known hereinafter as Orville's children) were unable to agree as to the proper distribution of the interests in the ranch real estate described in paragraph THIRD. George's relatives filed a response to the petition, in which they asserted that paragraph THIRD showed Opal's intent that the ranch real estate pass to them, whether or not George survived 60 days after her death. Orville's children argued that because George died within 60 days after Opal's death, paragraph "FIFTH" controlled and that paragraph FIFTH provided that Opal's entire estate, including the ranch real estate, was to pass to them as the heirs named in paragraph FOURTH.

The county court held a hearing on the petition on January 24, 2005. At the hearing, the court received certain pieces of evidence offered by George's relatives, including deeds to the ranch real estate, George's will, notes written by Opal, and the testimony of the attorney for George's estate. Following the hearing, on February 28, the court entered an order in which it noted that paragraph FIFTH created an ambiguity as to whether, in the event George died prior to Opal or within 60 days of her death, Opal intended the ranch real estate to be distributed to George's relatives pursuant to paragraph THIRD or to Orville's children pursuant to paragraph FOURTH. The court explicitly

stated in its order that it relied solely on the language of the will in resolving the ambiguity and that the testimony and the other exhibits received at the hearing were not considered. The court concluded that Opal intended that the ranch real estate was to pass to George's relatives and that the balance of her estate was to pass to Orville's children. The court directed that Appellants distribute the estate property in accordance with the court's conclusions. Appellants filed this appeal.

## ASSIGNMENTS OF ERROR

Appellants assert that the county court erred in (1) receiving extrinsic evidence offered by George's relatives to resolve a patent ambiguity in Opal's will and (2) finding that Opal intended the interests in the ranch real estate to pass to George's relatives and failing to find that she intended the interests in the ranch real estate to pass to Orville's children.

## STANDARDS OF REVIEW

[1,2] When a patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law. *In re Estate of Johnson*, 260 Neb. 91, 615 N.W.2d 98 (2000). 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

### *The County Court Did Not Consider Extrinsic Evidence in Its Order.*

Appellants argue that the county court erred by admitting extrinsic evidence to resolve a patent ambiguity in the will. We conclude that Appellants' assignment of error is without merit, because although the court received such evidence, it considered only the will itself in resolving the patent ambiguity.

[3-7] Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings. *In re Estate of Matthews*, 13 Neb. App. 812, 702 N.W.2d 821 (2005). Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain. *Id.* A latent ambiguity exists when the testator's words are

susceptible of more than one meaning, and the uncertainty arises not upon the words of the will as looked at in themselves, but upon those words when applied to the object or subject which they describe. *In re Estate of Smatlan*, 1 Neb. App. 295, 501 N.W.2d 718 (1992). Case law distinguishes latent ambiguities from patent ambiguities. A patent ambiguity is one which exists on the face of an instrument. *In re Estate of Matthews, supra*. A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will. *Youngblood v. American Bible Soc.*, 227 Neb. 472, 418 N.W.2d 554 (1988), *abrogated on other grounds, Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994).

As discussed in greater detail later in this opinion, we conclude that Opal's will contained an ambiguity and that such ambiguity was a patent ambiguity. Parol evidence was therefore inadmissible to determine Opal's intent, and the additional evidence offered by George's relatives should not have been admitted for the purpose of determining Opal's intent. However, the court explicitly stated in its order that in resolving the ambiguity, it relied solely on the language of the will, and that the testimony and the other exhibits received at the hearing were not considered.

[8] We have stated that the erroneous admission of evidence in a bench trial is not reversible error if other relevant evidence, properly admitted, sustains the trial court's necessary factual findings; in such case, reversal is warranted only if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000).

In the present case, the will was properly admitted evidence, and the court stated that it considered only the will in resolving the patent ambiguity. The record does not contradict the court's statement and does not show that the court resolved the ambiguity through the use of the erroneously admitted evidence. Reversal on the basis of the improperly admitted evidence is therefore not warranted in the present case. We find no merit to this assignment of error.

*The County Court Did Not Err in Its Ruling Regarding the Proper Distribution of Interests in the Ranch Real Estate.*

Appellants argue generally that the county court erred in finding that in the event George did not survive Opal for more than 60 days, Opal intended the ranch real estate to pass to George's relatives, and in failing to find that she intended the ranch real estate to pass with the rest of the estate to Orville's children. Appellants argue more specifically that the use of "my estate" in paragraph FIFTH evidenced an intent by Opal that the entire estate pass to Orville's children under paragraph FOURTH. Appellants argue in effect that the ranch real estate should pass to Orville's children by virtue of the language naming Orville's children as the beneficiaries of "my estate" and of "my residuary estate." We reject Appellant's construction of the will and conclude that the county court did not err in its construction of Opal's will.

[9,10] The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law. *In re Estate of Johnson*, 260 Neb. 91, 615 N.W.2d 98 (2000). To arrive at a testator's intention expressed in a will, a court must examine the will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will, and assume that the maker of the will understood words stated in the will. *Id.*

With respect to residuary matters, we have noted that the Nebraska Probate Code does not define "residue" or "residuary devise." *Id.* We have further noted that generally, a residuary clause of a will disposes of property not usually specifically described and which has not been disposed of by the other provisions of the will. *Id.* That is, a residuary clause disposes of any estate property remaining after the satisfaction of specific bequests and devises. *Id.*

The county court determined that Opal's will contained an ambiguity, and we conclude that the court was correct in so ruling. The patent ambiguity in Opal's will arose in paragraph FIFTH in which Opal directed that if George did not survive her for more than 60 days, "the provisions for him shall lapse and my estate shall pass under paragraph Four, together with my

residuary estate." The ambiguity raised by paragraph FIFTH is whether, in the event George did not survive Opal for more than 60 days, Opal intended that her entire estate, including the ranch real estate, should pass to Orville's children, or whether she intended that the ranch real estate would still pass to George's relatives under paragraph THIRD.

Examining the will in its entirety and considering every provision, we conclude that Opal intended the interests in the ranch real estate should pass to George's relatives under paragraph THIRD whether or not George survived her for more than 60 days. Paragraph THIRD indicates a specific devise of the ranch real estate to George's relatives. Because the will makes a specific devise of the ranch real estate, the ranch real estate is not part of the residuary estate.

Although in isolation a reference to "my estate" might, as urged by Appellants, indicate the entire estate, we conclude that in the context of the entire will and giving consideration to all provisions of the will, Opal intended the interests in the ranch real estate to pass under paragraph THIRD to George's relatives and that her reference to "my estate" in paragraph FIFTH excluded this specific devise of the ranch real estate to George's relatives. We therefore conclude that the county court did not err in its construction of the will, and we find no merit to Appellants' assignment of error.

## CONCLUSION

We determine from our reading of the will that in the event George did not survive Opal for more than 60 days, Opal intended that her interests in the ranch real estate would pass to George's relatives under paragraph THIRD. We therefore conclude that the county court did not err in so construing the will. We further conclude that the record does not indicate that the county court considered extrinsic evidence in construing the will and that therefore, the county court's erroneous admission of such evidence does not warrant reversal. We affirm the order of the county court.

AFFIRMED.

WRIGHT, J., not participating.

# GARY WISE, APPELLANT, V. OMAHA PUBLIC SCHOOLS AND RICHARD E. KELLEY, APPELLEES.

714 N.W.2d 19

Filed May 26, 2006. No. S-05-491.

1. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) provides that when a matter outside of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2004).
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Statutes.** The meaning of a statute is a question of law.
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.
6. **Political Subdivisions Tort Claims Act: Notice.** The issue of noncompliance with the notice provisions of the Political Subdivisions Tort Claims Act must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance.
7. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
8. **Political Subdivisions Tort Claims Act.** The exceptions set forth in Neb. Rev. Stat. § 13-910 (Cum. Supp. 2002) are affirmative sovereign immunity defenses to claims brought pursuant to the Political Subdivisions Tort Claims Act.
9. **Political Subdivisions Tort Claims Act: Public Officers and Employees.** Where a claim against an employee of a political subdivision is based upon acts or omissions occurring within the scope of employment, it is governed by the provisions of the Political Subdivisions Tort Claims Act.

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

Andrew J. Hilger, of Greul & Hilger, L.L.C., for appellant.

Ronald F. Krause and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

STEPHAN, J.

Gary Wise filed this action against Omaha Public Schools (OPS) and Richard E. Kelley. Wise alleged that Kelley, while driving an OPS van in the course and scope of his employment with OPS, "skidded on the rain-slick street surface" and collided with a vehicle operated by Wise. Kelley and OPS moved to dismiss the action for failure to state a claim upon which relief could be granted due to Wise's failure to allege compliance with provisions of the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Cum. Supp. 2002). Alternatively, Kelley and OPS moved for summary judgment on the same theory. After receiving evidence, the district court determined that the claims were subject to the PSTCA and entered summary judgment in favor of OPS and Kelley, dismissing the action with prejudice. Wise filed 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). We affirm the judgment of the district court.

## ASSIGNMENTS OF ERROR

Wise assigns, restated and consolidated, that the district court erred in granting summary judgment and dismissing the action. He contends that this action is not governed by the PSTCA and that he was therefore not required to comply with its notice provisions.

## STANDARD OF REVIEW

[1] OPS and Kelley moved for dismissal or, in the alternative, summary judgment. The court received evidence on the motion. Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) provides that when a matter outside of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2004). *Carruth v. State, ante* p. 433, 712 N.W.2d 575 (2006).

[2,3] 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. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005); *City of Columbus v. Swanson*, 270 Neb. 713, 708 N.W.2d 225 (2005). 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. *Andres v. McNeil Co., supra*; *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

[4,5] The meaning of a statute is a question of law. *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006); *City of Columbus v. Swanson, supra*. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Merz v. Seeba, ante* p. 117, 710 N.W.2d 91 (2006); *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 703 N.W.2d 887 (2005).

## ANALYSIS

Wise specifically alleged that at the time of the 2001 motor vehicle accident from which this suit arises, Kelley was acting in the course and scope of his employment with OPS, a political subdivision of the State of Nebraska. It is undisputed that the action involves a tort claim, as defined by the PSTCA. See § 13-903(4). The PSTCA provides that "no political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees . . . on any tort claim except to the extent, and only to the extent, provided by the [PSTCA]." § 13-902. The PSTCA requires that all tort claims must initially be filed with "the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision" within 1 year after the claim accrued and that no suit may be brought "unless the governing body of the political subdivision has made final disposition of the claim." §§ 13-905 and 13-906. If there has been no disposition of a claim within 6 months after it is filed, then "the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit" under the PSTCA. §§ 13-919(1) and 13-920(2).

[6,7] The issue of noncompliance with the notice provisions of the PSTCA must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance. *Kuchar v. Krings*,

248 Neb. 995, 540 N.W.2d 582 (1995). It is not one of the enumerated defenses which can be asserted by a motion to dismiss pursuant to rule 12(b), as OPS and Kelley incorrectly sought to do in this case. However, in response to the motion, Wise argued in the district court that the PSTCA did not apply to his claim. This is confirmed by his brief on appeal, in which he states that "[i]n bringing his claim against both OPS and its employee, [he] proceeded at all times outside of the [PSTCA]." Brief for appellant at 1. As a general rule, an appellate court disposes of a case on the theory presented in the district court. *Borley Storage & Transfer Co. v. Whitted*, *ante* p. 84, 710 N.W.2d 71 (2006); *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004). Accordingly, the issue presented by this appeal is whether Wise may assert a tort claim against either OPS or Kelley which is not subject to the PSTCA.

Wise concedes that his claim against OPS is barred, but he argues that his claim against Kelley is not governed by the PSTCA and remains viable. Wise argues that because he alleged that the vehicle operated by Kelley "skidded on the rain-slick street surface" before colliding with his vehicle, his claim falls within § 13-910(10), which provides in relevant part that the PSTCA shall not apply to

> [a]ny claim arising out of snow or ice conditions or other temporary conditions caused by nature on any highway . . . bridge, public thoroughfare, or other public place due to weather conditions. Nothing in this subdivision shall be construed to limit a political subdivision's liability for any claim arising out of the operation of a motor vehicle by an employee of the political subdivision while acting within the course and scope of his or her employment by the political subdivision.

[8] Wise's argument misapprehends both the language and legal effect of this statute. Section 13-908, which provides that in suits brought pursuant to the PSTCA, "the political subdivision shall be liable in the same manner . . . as a private individual under like circumstances," sets forth a general waiver of sovereign immunity subject to certain limited exceptions stated in § 13-910. *McCormick v. City of Norfolk*, 263 Neb. 693, 641

N.W.2d 638 (2002); *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998). The exceptions set forth in § 13-910 are affirmative sovereign immunity defenses to claims brought pursuant to the PSTCA. *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005). If a claim falls within one of the exceptions stated in § 13-910, it fails based upon sovereign immunity. *Id.*

Wise argues that because his claim falls within § 13-910(10), it is barred by sovereign immunity as to OPS but not as to Kelley, whom Wise contends "does not possess a political subdivision's sovereign immunity and accordingly remains individually liable for his own acts." Brief for appellant at 4. The initial premise of this argument disregards the second sentence of §13-910(10), which clearly states that the exception to the waiver of sovereign immunity for claims based upon "temporary conditions caused by nature on any highway" does not apply to claims arising out of the operation of a motor vehicle by an employee of a political subdivision while acting within the course and scope of his or her employment. Because Wise's claim clearly arises out of Kelley's operation of an OPS vehicle while acting in the scope of his employment, § 13-910(10) is inapplicable on its face.

[9] Even if § 13-910(10) were applicable, it would not provide a basis for a claim against OPS or Kelley independent of the PSTCA. In *Harris v. Omaha Housing Authority, supra*, we specifically rejected an argument that the requirements of the PSTCA do not apply to claims that fall within one or more of the exceptions stated in § 13-910. We reasoned that because the exceptions were affirmative sovereign immunity defenses to claims brought pursuant to the PSTCA, a finding that a claim fell within one or more of the exceptions would require dismissal of the complaint. Wise attempts to distinguish *Harris* by noting that it did not involve a claim against an individual employee of a political subdivision. However, this argument ignores language in § 13-920 which clearly provides that "[n]o suit shall be commenced against any employee of a political subdivision" for a tort committed while acting in the course and scope of employment unless the notice provisions of the PSTCA are met. We have held that where a claim against an employee

of a political subdivision is based upon acts or omissions occurring within the scope of employment, it is governed by the provisions of the PSTCA. *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995).

## CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in granting summary judgment in favor of OPS and Kelley, and we affirm the judgment of dismissal.

AFFIRMED.

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NORA J. EPP, APPELLANT, V. MARK E. LAUBY, APPELLEE.

715 N.W.2d 501

Filed June 2, 2006. No. S-04-990.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
2. **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.
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. **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. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
6. **Trial: Courts: Expert Witnesses.** 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), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
7. **Courts: Expert Witnesses.** In determining the admissibility of an expert's testimony, a trial court may consider nonexclusive criteria in evaluating the reliability of a particular theory to include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within the relevant scientific community.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded.

John M. Lefler for appellant.

William E. Gast, P.C., L.L.O., and Michael D. McClellan, of Nelson McClellan, for appellee.

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

MCCORMACK, J.

## I. NATURE OF CASE

Nora J. Epp brought the present action for damages allegedly sustained in a motor vehicle accident. Among other injuries, Epp claimed that she developed fibromyalgia and depression as a proximate result of the accident and sought to present expert testimony at trial substantiating that claim. Epp also sought to present expert testimony regarding the loss of earnings and loss of earning capacity she allegedly suffered as a proximate result of the accident. The trial court conducted a *Daubert* hearing with regard to Epp's expert testimony that her fibromyalgia was caused by the accident. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). After the hearing, the trial court specifically excluded such evidence and, based on its *Daubert* ruling, it also excluded expert testimony regarding Epp's alleged loss of earnings and loss of earning capacity. Following a jury verdict on the amount of damages, Epp filed a motion for new trial based on, inter alia, the exclusion of the expert testimony. Epp's motion was denied, and she appeals.

## II. BACKGROUND

In June 1999, Epp was involved in a three-vehicle collision, wherein Epp's vehicle was struck from the rear by an automobile driven by Brad A. Webb, whose vehicle was struck from the rear by a vehicle driven by Mark E. Lauby. In July, Epp began treating with Dr. Lane Handke for tissue spasms in her neck and a tingling sensation in her left arm and leg that she experienced after the accident. Handke initially diagnosed Epp with a cervical strain, thoracic sprain, lumbar sprain, and a history of asthma. In

followup visits, Handke also determined that Epp was suffering from high personal stressors and major depression.

In January 2000, Epp suffered a severe asthma attack which required hospitalization. In February, Epp sought treatment from Handke for constant, severe headaches and radiating pain down her left arm. Handke testified by deposition that this was the first time Epp had complained of headaches. He further testified that he found myofascial trigger points at the base of Epp's skull, base of her neck, and interscapular area. Based on Epp's symptomatology, Handke diagnosed Epp with chronic sinusitis, chronic neck pain with left arm radicular symptoms, and tension headaches. He testified, however, that he also considered at that time fibromyalgia as a possible diagnosis. Thereafter, in March, Epp was diagnosed by Handke with fibromyalgia. Fibromyalgia is described as

> a syndrome of widespread pain, decreased pain threshold, and characteristic symptoms, including non-restorative sleep, fatigue, stiffness, mood disturbance, irritable bowel syndrome, headache, paresthesias, and other less common features. Widespread pain has generally been defined by the number of body regions involved . . . or by a pattern of pain complaint that involves both sides of the body, upper and lower body, and axial skeleton. Decreased pain threshold (tenderness) is indicated by the proportion of specific sites that elicit complaints of pain on palpation.

Frederick Wolfe et al., *The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability*, 23 J. Rheumatology 534 (1996). In his deposition, Handke testified that Epp suffered from the following symptoms of fibromyalgia: chronic fatigue, irritable bowel syndrome, intermittent tension headaches, insomnia, and paired trigger points in the head and back.

## III. PROCEDURAL HISTORY

Epp sued Lauby and Webb for damages allegedly sustained in the accident. Among other injuries, Epp sought to recover damages for fibromyalgia and depression, which she claimed developed as a result of the accident. Epp also sought to recover for loss of earnings and loss of earning capacity.

Epp designated Handke as an expert to testify that the accident was the proximate cause of her fibromyalgia and depression. Epp also designated as expert witnesses Alfred J. Marchisio, Jr., M.S., and David I. Rosenbaum, Ph.D. Marchisio, a vocational rehabilitation counselor, was identified by Epp to testify that she sustained a complete loss of earning capacity as a proximate result of the automobile accident. Rosenbaum, an economist, was identified by Epp to testify regarding the loss of earnings and loss of earning capacity Epp alleged she suffered as a result of the accident. The opinions of Marchisio and Rosenbaum were premised in part on the assumption that Epp's fibromyalgia and depression were directly related to her accident.

Lauby filed a motion in limine to exclude the testimony of Handke as it related to the causation of Epp's fibromyalgia and depression. Lauby alleged in his motion that the reasoning and methodology underlying Handke's opinions that Epp's fibromyalgia and depression were caused by the accident have not been tested or validated in the medical scientific community and could not be properly applied to the facts of the case. Lauby also filed a motion in limine to exclude the testimony of Marchisio and Rosenbaum. With regard to Marchisio's testimony, Lauby argued that there was no reliable medical expert opinion that Epp suffered permanent impairment as a result of the injuries she suffered in the accident. With regard to Rosenbaum's testimony, Lauby argued that there was no medical opinion available to tie Epp's loss of earning capacity to the injuries she allegedly suffered in the accident.

A *Daubert* hearing was scheduled regarding the testimony of Handke, and the trial court granted Epp 30 days to name another physician as an expert witness. Pursuant to the court's order, Epp identified Dr. Robert M. Bennett as an additional expert regarding the relationship between physical trauma and fibromyalgia. At the *Daubert* hearing, the deposition of Handke was admitted into evidence, as well as a number of medical articles and cases discussing the causation of fibromyalgia. Following the *Daubert* hearing, Lauby filed with the trial court a motion captioned "Motion to Exclude Expert Testimony of Dr. Bennett in Plaintiff's Case in Chief and Motion in Limine to Exclude

Opinion Testimony of Dr. Bennett Related to Fibromyalgia." Lauby argued that the testimony of Bennett should be excluded to the extent it suggested a causal relationship between Epp's fibromyalgia and the accident.

The trial court entered an order granting Lauby's motion in limine as to the testimony of Handke and Bennett as it related to the causal connection between physical trauma and the onset of fibromyalgia. In its order, the court referenced a number of studies and cases discussing the causal relationship between trauma and fibromyalgia and concluded that at the current time, medical science did not link trauma to fibromyalgia. Epp filed an amended motion for reconsideration and a renewal of her amended motion for reconsideration, which were overruled.

Prior to trial, the court granted Lauby's motion in limine with regard to the testimony of Marchisio and Rosenbaum. From the record, it appears that the motion in limine was granted with regard to Marchisio and Rosenbaum because Epp's fibromyalgia was not causally connected to the accident in this case. The court also granted summary judgment in favor of Webb, and liability was admitted by Lauby.

A jury trial was held on the nature and extent of damages sustained by Epp as a result of the accident. At trial, Epp made an offer of proof with regard to the evidence which was excluded by the court's November 10, 2003, *Daubert* ruling. Encompassed in Epp's offer of proof was testimony by Handke, outside the presence of the jury, that Epp suffers from fibromyalgia as a result of the accident and that Epp's depression was a complex symptom of her fibromyalgia. Epp also made an offer of proof with regard to the testimony of Marchisio and Rosenbaum, which Epp stated would have been presented absent the court's *Daubert* ruling on the testimony of Handke and Bennett.

A verdict was returned in Epp's favor in the amount of $36,410. Thereafter, Epp filed a motion for new trial on the ground that the trial court erred, inter alia, in granting Lauby's motions in limine with regard to the testimony of Handke, Bennett, Marchisio, and Rosenbaum. The motion was overruled, and Epp filed the present appeal.

## IV. ASSIGNMENTS OF ERROR

Epp assigns that the trial court erred in (1) refusing to allow Handke and Bennett to testify that the accident was the proximate cause of Epp's fibromyalgia; (2) refusing to allow Handke and Bennett to testify that the accident was the proximate cause of Epp's depression; (3) refusing to allow Jeffrey Creal, a physical therapist, to testify that Epp sustained a functional capacity loss, physical restrictions, and work restrictions as a proximate result of the accident; (4) refusing to allow Marchisio to testify that Epp suffered a total loss of earning capacity as a proximate result of the accident; and (5) refusing to allow Rosenbaum to testify regarding the amount of past lost earnings Epp suffered as a result of the accident and the value of her loss of earning capacity.

[1] Epp failed to argue her second assignment of error in her brief on appeal. Therefore, we will not address it on appeal. See *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005) (errors that are assigned but not argued will not be addressed by appellate court).

## V. STANDARD OF REVIEW

[2] 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. *Kant v. Altayar*, 270 Neb. 501, 704 N.W.2d 537 (2005).

[3-5] 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. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). 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. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Hartman v. Hartman*, 265 Neb. 515, 657 N.W.2d 646 (2003); *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

## VI. ANALYSIS

### 1. Exclusion of Expert Testimony Regarding Fibromyalgia Causation

Epp alleges that as a result of the automobile accident, she developed fibromyalgia. To establish the causal connection at trial, Epp sought to present the expert testimony of Handke and Bennett. Following a *Daubert* hearing on the matter, the trial court granted Lauby's motion in limine excluding their testimony on the ground that the theory underlying their opinions, i.e., that physical trauma can cause fibromyalgia, "lack[s] scientific support." On appeal, Epp contends the trial court erred when it excluded the opinion testimony of Handke and Bennett regarding the causation of her fibromyalgia.

Before entering into our analysis, we note that we are not deciding whether Epp suffers from symptoms of fibromyalgia. There appears to be no dispute that she does. We are also not deciding as a general proposition whether trauma can cause fibromyalgia. Rather, under our abuse of discretion standard, we are deciding whether there was sufficient evidence presented to allow Epp's experts, Handke and Bennett, to opine that physical trauma was the cause of Epp's fibromyalgia.

[6] 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. *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). See, also, *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). Most recently, we described a trial court's evaluation of the admissibility of expert testimony as essentially a four-step process. *State v. Mason, ante* p. 16, 709 N.W.2d 638 (2006). First, the court must determine whether the witness is qualified to testify as an expert. If the expert is and it is necessary for the court to conduct a *Daubert* analysis, the court must next 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 next determine whether the methodology was properly applied to the facts in issue. Finally, the court determines whether the evidence and opinions related thereto

are more probative than prejudicial, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). *State v. Mason, supra*.

The expert qualifications of Handke and Bennett are not at issue. Consequently, we must determine whether the testimony of Handke and Bennett was otherwise admissible under our *Daubert/Schafersman* framework. Based upon our review of the evidence before the trial court, we conclude that the trial court's determination that the testimony was not admissible was an abuse of discretion.

(a) Admissibility of Handke's Testimony

Handke concluded that Epp's fibromyalgia was caused by the physical trauma of the accident after conducting a differential diagnosis.

In *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004), we addressed the reliability of a differential diagnosis. We stated that differential diagnosis is a technique which generally has widespread acceptance in the medical community, has been subjected to peer review, and does not frequently lead to incorrect results. We emphasized, however, that an expert's opinion is not admissible simply because he or she conducted a differential diagnosis. To the contrary, in order for an expert's opinion to be reliable, the court must determine whether the expert conducted a *reliable* differential diagnosis. *Id.*

In *Carlson*, we set forth a two-step process for determining whether an expert conducted a reliable differential diagnosis.

> The first step in conducting a reliable differential diagnosis is to "compile a comprehensive list of hypotheses that might explain the set of salient clinical findings under consideration." . . . If the expert "rules in" a potential cause that is not capable of causing the patient's symptoms, the expert's opinion is of questionable reliability. . . . Similarly, if the expert *completely* fails to consider a cause that could explain the patient's symptoms, the differential diagnosis is not reliable. . . .
>
> Once the expert has ruled in all plausible causes for the patient's condition, the next step is to "engage in a process of elimination, eliminating hypotheses on the basis of a

> continuing examination of the evidence so as to reach a conclusion as to the most likely cause of the findings in that particular case." . . . In analyzing the second step of a differential diagnosis under the *Daubert/Schafersman* framework, the question is whether the expert had a reasonable basis for concluding that one of the plausible causative agents was the most likely culprit for the patient's symptoms. In other words, the expert must be able to show good grounds for eliminating other potential hypotheses.

(Citations omitted.) (Emphasis in original.) *Id.* at 414, 675 N.W.2d at 105-06.

In *Carlson*, the parties did not dispute that trauma was capable of causing the condition suffered by the plaintiff or whether the expert had properly ruled in potential causes of the plaintiff's injury. It was therefore unnecessary for us to determine whether the first step of the differential diagnosis was properly performed. Here, however, Epp's appeal concerns whether trauma can be a possible cause of fibromyalgia. We must therefore determine whether Handke properly ruled in trauma as a potential cause of Epp's fibromyalgia.

[7] We have noted with approval nonexclusive criteria which the trial court may consider in evaluating the reliability of a particular theory. These include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within the relevant scientific community. See, *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). These 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.*

The trial court was presented with voluminous materials to assist it in its determination of whether the theory underlying the opinions of Handke and Bennett was reliable. A review of these materials reveals the existence of a professional controversy regarding the causal relationship between physical trauma and

fibromyalgia. A number of experts in the field of fibromyalgia believe that an association exists between physical trauma and the onset of fibromyalgia. See, e.g., A.W. Al-Allaf et al., *A Case-Control Study Examining the Role of Physical Trauma in the Onset of Fibromyalgia Syndrome*, 41 Rheumatology 450 (2002) (suggesting association between physical trauma and onset of fibromyalgia); Robert M. Bennett, *A Multidisciplinary Approach to Treating Fibromyalgia*, in Progress in Fibromyalgia and Myofascial Pain 393 (H. Vaeroy & H. Merskey eds., 1993) (stating musculoskeletal pain experienced by fibromyalgia patients arises as result of microtrauma); Dan Buskila et al., *Increased Rates of Fibromyalgia Following Cervical Spine Injury*, 40 Arthritis & Rheumatism 446 (1997) (noting association between diagnosis of fibromyalgia and cervical spine injury); Stuart Greenfield et al., *Reactive Fibromyalgia Syndrome*, 35 Arthritis & Rheumatism 678 (1992) (explaining that study to determine frequency of precipitating event occurring prior to onset of fibromyalgia revealed that 23 percent of patients with primary rheumatologic diagnosis of fibromyalgia reported having trauma, surgery, or other medical illness before onset of fibromyalgia); George W. Waylonis et al., *A Profile of Fibromyalgia in Occupational Environments*, 73 Am. J. Phys. Med. Rehab. 112 (1994) (noting association between onset of fibromyalgia symptoms and traumatic event); Muhammad B. Yunus et al., *Fibromyalgia Consensus Report: Additional Comments*, 3 J. Clinical Rheumatology 324, 325 (1997) (stating that "[i]n the context of a legal setting (where the Consensus Report is likely to be used), causality entails only 51% certainty . . . it seems more than 51% likely that trauma does play a causative role in some [fibromyalgia] patients"). This view is also held by Handke and Bennett, and was conceded by Lauby's expert, who stated that physical trauma may be a precipitating cause of fibromyalgia, though at present there is no way to determine the cause of fibromyalgia outside the clinical setting.

Other experts, however, believe that the connection has not been sufficiently established and that additional studies are needed to confirm it. See, e.g., Al-Allaf et al., *supra* (concluding that further studies are needed to confirm association between trauma and fibromyalgia and to determine whether trauma has

causal role); Buskila et al., *supra* (noting that data from literature is insufficient to indicate whether causal relationships exist between trauma and fibromyalgia); Frederick Wolfe et al., *The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability*, 23 J. Rheumatology 534 (1996) (noting that epidemiologic studies of trauma and fibromyalgia needed to address potential or predictive causality are currently not available).

After reviewing the evidence and applying the *Daubert/Schafersman* standards, the trial court found that the theory of a causal link between physical trauma and fibromyalgia has not been verified by sufficient testing, has not been subject to peer review, and does not enjoy general acceptance within the medical community. Consequently, the court excluded Handke's testimony on the cause of Epp's fibromyalgia. Upon our review, we determine that the court abused its discretion by excluding Handke's testimony.

Although important, general acceptance of the causal link between physical trauma and fibromyalgia is not determinative of the admissibility of expert testimony under *Daubert/Schafersman* standards. See *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). So long as the expert's opinion is based on reliable methodology, his or her opinion is admissible, whether or not the court agrees with the expert's conclusion. *Reichert v. Phipps*, 84 P.3d 353 (Wyo. 2004). In the instant case, Handke arrived at the conclusion that Epp's fibromyalgia was caused by physical trauma after conducting a reliable differential diagnosis, as we will determine later in this opinion. Handke's conclusion is supported by medical literature in evidence which supports the theory that fibromyalgia may be caused by physical trauma.

The *Daubert* test does not stand for the proposition that scientific knowledge must be absolute or irrefutable. See *State v. Dahood*, 148 N.H. 723, 814 A.2d 159 (2002). "[I]t would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). While a theory or technique that has attracted only " 'minimal support' " within the relevant scientific community "may properly be viewed with skepticism," a reliability assessment does not

require an express determination of a particular degree of acceptance within the scientific community. See 509 U.S. at 594. Thus,

> " '[c]ontroversy within the scientific community is not necessarily a ground for exclusion of scientific evidence. In deciding whether to admit scientific evidence, a court need not resolve disputes between reputable experts; the evidence may be admissible even though a dispute exists. . . . [T]he witness who testifies to an expert opinion is subject to cross-examination concerning how he or she arrived at that opinion, and . . . in eliciting testimony to vitiate the opinion.' "

*State v. Sampson*, 167 Or. App. 489, 502-03, 6 P.3d 543, 553 (2000), quoting *State v. Lyons*, 324 Or. 256, 924 P.2d 802 (1996).

Although the issue is disputed, there is support in the medical literature for the theory that physical trauma can cause fibromyalgia. That support, while controverted, is the result of peer-reviewed research conducted pursuant to appropriate methods of scientific inquiry. While there is not a sufficient scientific consensus to say that the theory is generally accepted, nor has a rate of error been established, the theory that trauma can cause fibromyalgia has been the subject of empirical research, the results of which have been subjected to peer review and publication. See *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra*. We cannot conclude that Handke and Bennett's reliance on this research, instead of literature to the contrary, was methodologically unreliable. If proffered scientific evidence rests on sound scientific reasoning or methodology and properly can be applied to the facts in issue, it meets the *Daubert* requirements for admissibility, even if the conclusion is novel or controversial. See *State v. Dahood, supra*. Despite the existence of "spirited dissent," see *State v. Sampson*, 167 Or. App. at 503, 6 P.3d at 553, the lack of a scientific consensus on the link between trauma and fibromyalgia was not sufficient to render reliance upon that literature methodologically unreliable. We, therefore, conclude that the evidence was sufficient to support the theory of a causal relationship between physical trauma and fibromyalgia and that the trial court abused its discretion in concluding otherwise.

Having determined that Handke properly ruled in physical trauma as a cause of Epp's fibromyalgia, we must next determine whether Handke properly ruled in and ruled out other causes.

Because there appears to be no disagreement between the parties regarding whether Handke properly ruled in other potential causes of Epp's fibromyalgia, we determine that Handke correctly conducted the first part of his differential diagnosis. We similarly conclude that Handke properly ruled out other potential causes of Epp's fibromyalgia. Handke testified that known causes of fibromyalgia include trauma, infection, stress, idiopathy, chronic pain diagnosis, and diseases such as degenerative arthritis and rheumatoid arthritis. Handke further testified that he eliminated causes other than trauma. Handke based this elimination upon repeated clinical examinations; the fact that Epp did not suffer from any of the other known causes of fibromyalgia prior to the accident, and soon thereafter developed symptoms of fibromyalgia. Ruling out decisions based on the results of physical examinations provides a well-accepted diagnostic technique which generally provides a valid basis for discarding hypotheses during the "ruling out" portion of a differential diagnosis. See *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). Under these circumstances, we cannot say that Handke's differential diagnosis was unreliable. Consequently, we conclude that the trial court abused its discretion in not allowing the jury to determine the weight given to Handke's opinion testimony on the cause of Epp's fibromyalgia.

(b) Admissibility of Bennett's Testimony

Bennett's opinion that Epp's fibromyalgia was caused by the accident was based upon Bennett's own extensive experience in the field of rheumatological conditions, including fibromyalgia, Epp's self-reported symptoms, a physical examination of Epp, and a review of Epp's extensive medical records.

Having already determined that the trial court's basis for excluding Handke's testimony on the causation of Epp's fibromyalgia was an abuse of discretion, we conclude that under the circumstances presented in the instant case, Bennett's testimony was reliable and the trial court's exclusion of Bennett's testimony was also an abuse of discretion.

2. Remaining Assignments of Error

In her final assignments of error, Epp contends that the testimony of Creal, Marchisio, and Rosenbaum was improperly

excluded because their opinions were predicated on Epp's fibromyalgia. As we read the record, the testimony of these witnesses was excluded as a result of the trial court's exclusion of Handke's and Bennett's opinion testimony causally relating Epp's fibromyalgia to the accident. Because we have determined that the trial court's rationale for excluding this testimony was erroneous, we remand for further consideration the question of the admissibility of this testimony, which question goes to the issue of damages only.

## VII. CONCLUSION

Liability in this case was admitted, and it is not affected by our disposition of this appeal. We affirm the district court's judgment to that extent, and remand the cause for a new trial to be limited to the issue of damages.

REVERSED AND REMANDED.

WRIGHT, J., participating on briefs.

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# IN RE ESTATE OF HAZEL L. REED, DECEASED.
# COUNTY OF LANCASTER, NEBRASKA, APPELLANT, V. JACQUELINE L. LEONARD, APPELLEE.

715 N.W.2d 496

Filed June 2, 2006. No. S-05-032.

1. **Decedents' Estates: Taxation: Appeal and Error.** The scope of review in an appeal of an inheritance tax determination is review for error appearing 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. **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 conclusions reached by the trial court.
4. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
6. **Statutes: Legislature: Intent: Appeal and Error.** 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.

7. **Decedents' Estates: Taxation: Liens.** Neb. Rev. Stat. § 77-2003 (Reissue 2003) provides that personal representatives and recipients of property are liable for the payment of inheritance tax on transfers upon death and that there is a lien on the real property subject to the tax until it is paid or terminated by Neb. Rev. Stat. § 77-2039 (Reissue 2003).
8. **Decedents' Estates: Taxation: Liens: Time.** Neb. Rev. Stat. § 77-2037 (Reissue 2003) provides, inter alia, that an inheritance tax lien ceases 10 years from the date of death if no proceeding is started within that 10-year period.

Appeal from the County Court for Lancaster County: JACK B. LINDNER, Judge. Reversed and remanded with directions.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellant.

Thomas M. Davies, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

HANNON, Judge, Retired.

## NATURE OF CASE

The probate of Hazel L. Reed's estate was commenced more than 10 years after her death. During probate of the estate, the county court determined that no inheritance tax was due, holding the action was barred by Neb. Rev. Stat. § 77-2037 (Reissue 2003), which provides, inter alia, that the lien of the inheritance tax shall cease 10 years from the death of the decedent unless a determination of the tax has been made by that time. The appellant, Lancaster County, argues that notwithstanding § 77-2037, Neb. Rev. Stat. § 77-2003 (Reissue 2003) provides that the recipient of property subject to inheritance tax shall be liable for the tax and that there is no time limitation on the collection of such tax. For the reasons set forth below, we conclude the appellant is correct. We therefore reverse the judgment and remand the cause with directions.

## FACTS

Reed died on August 17, 1992. An application for informal probate of her will and appointment of a personal representative

was not filed until November 7, 2002. Jacqueline L. Leonard, who is Reed's daughter, the sole devisee, and the appellee herein, was appointed personal representative. The institution of probate proceedings was delayed because the appellee did not believe Reed owned any property requiring probate. However, in approximately November 2002, the appellee learned that Reed had a safe-deposit box which contained stocks, bonds, certificates of deposit, and other miscellaneous property with a total value of $217,467.33.

On March 4, 2004, the appellee filed a petition to determine inheritance tax. The petition asserted that the lien of the inheritance tax and the right to maintain any action for the assessment or collection of such tax had ceased under § 77-2037. On December 6, the county court entered an order concluding that no tax was due upon the assets of the estate because more than 10 years had elapsed since Reed's death; no action had been maintained for the determination, assignment, or collection of the tax; and the lien for inheritance tax and right to maintain any action for the assessment or collection of the tax had ceased.

## STANDARD OF REVIEW

[1,2] The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record. *In re Estate of Kite*, 260 Neb. 135, 615 N.W.2d 481 (2000). 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. *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[3] 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 conclusions reached by the trial court. *White v. White, ante* p. 43, 709 N.W.2d 325 (2006).

## ASSIGNMENT OF ERROR

The appellant assigns as error the county court's finding that § 77-2037 operated to relieve the appellee of the obligation to pay inheritance tax on the property she received from Reed's estate.

## ANALYSIS

The procedure for collecting inheritance tax is provided for in Neb. Rev. Stat. §§ 77-2001 to 77-2040 (Reissue 2003). Section 77-2003 provides:

> The tax imposed upon transfers under sections 77-2001 and 77-2002 shall be paid to the treasurer of the proper county and all heirs, legatees and devisees, personal representatives, other recipients of property subject to tax, and trustees *shall be liable for any and all such taxes until the same shall have been paid* as hereinafter directed. *This tax shall be a lien on the real property subject thereto until paid or otherwise terminated pursuant to section 77-2037*, except that no interest in any property passing from the decedent to the decedent's surviving spouse shall be subject to the lien.

(Emphasis supplied.)

Section 77-2037 provides:

> Regardless of any defect in the proceedings in which such inheritance tax was determined, or the jurisdiction of the court to make such determination, *the lien of the inheritance tax shall cease upon the first to occur of*: (1) *Ten years from the date of death of a decedent and no action shall be maintained for the determination*, assessment or collection of such tax, unless a determination of the amount of such tax by the court having jurisdiction thereof shall have been made within such ten-year period, in which case such lien and *the right to maintain any action for the assessment or collection of any tax shall cease five years after such determination* or upon payment of such tax, whichever first occurs; (2) the payment of the amount of inheritance tax finally determined by the county court to be due with respect to property described in such proceedings; or (3) the release or discharge of any lien pursuant to section 77-2039.

(Emphasis supplied.)

Section 77-2010 provides that inheritance tax is due and payable 12 months after the date of death, with interest as specified in Neb. Rev. Stat. § 45-104.01 (Reissue 2004) at such rate as may be from time to time adjusted by the Legislature. The current interest rate for delinquent taxes is 14 percent. *Id.*

[4-6] 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 Lamplaugh, supra*. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision. *Curran v. Buser, ante* p. 332, 711 N.W.2d 562 (2006). 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. *Budler v. General Motors Corp.*, 268 Neb. 998, 689 N.W.2d 847 (2004).

[7] With these standards in mind, we conclude § 77-2003 provides that personal representatives and recipients of property are liable for the payment of inheritance tax on transfers upon death and that there is a lien on the real property subject to the tax until it is paid or terminated by § 77-2039.

The appellee neither cites nor discusses § 77-2003, but relies solely upon her suggested interpretation of § 77-2037, which she supports by citation to the legislative history and to the holdings of courts in other states, which courts we conclude either do not have or did not consider statutes similar to § 77-2003.

[8] Our understanding is that the appellee bases her argument on two phrases in § 77-2037. For clarity, we have emphasized below the portions of § 77-2037 that appear to be causing confusion:

> [T]he lien of the inheritance tax shall cease upon the first to occur of: (1) Ten years from the date of death of a decedent and *no action shall be maintained for the determination, assessment or collection of such tax,* unless a determination of the amount of such tax by the court having jurisdiction thereof shall have been made within such ten-year period, in which case such lien and *the right to maintain any action for the assessment or collection of any tax shall cease five years after such determination* or upon payment of such tax, whichever first occurs . . . .

(Emphasis supplied.) Section 77-2037 goes on to provide for a second and third occurrence which would also cause the lien to

cease. We admit that the wording of the statute specifying the first of the three occurrences may be misleading and redundant to a degree. However, we determine § 77-2037 provides, inter alia, that an inheritance tax lien ceases 10 years from the date of death if no proceeding is started within that 10-year period.

On first reading, and out of context, the phrases "no action shall be maintained for the determination" and "the right to maintain any action for the assessment" might be interpreted as limitations on any action after 10 years from death. See § 77-2037. However, the first phrase states the situation in which an inheritance action had not been commenced, and the second phrase prohibits enforcement of the lien more than 5 years after the determination of the tax due. This phrase also prohibits the assessment and collection of taxes, but by its terms, it prohibits assessment and collection only if there has been a determination, which has not occurred in this case. It is important to recognize that both phrases are part of a clause which clearly defines them as one of three occurrences which cause the lien to cease. Section 77-2037 does not relate to the inheritance tax liability of personal representatives or recipients of property.

We recognize there are statutes in other states which by their terms provide that inheritance tax cannot be collected if the inheritance tax is not determined or collected within a specified time. Among other examples, the appellee cites *In Re Batt's Estate*, 220 Ind. 193, 196, 41 N.E.2d 365, 366 (1942), as favoring her interpretation, but in that case, the statute provided that after a certain time lapse, " 'it shall be conclusively presumed that no inheritance tax is due.' " One of the many predecessors of § 77-2037 also provided that all inheritance tax should be sued for within 5 years of the decedent's death or it "shall be presumed to be paid and cease to be a lien and no action shall be maintained thereafter for the enforcement of said tax." See Neb. Rev. Stat. § 77-2220 Comp. Stat. (1929). That language was replaced many years ago.

We note that Neb. Rev. Stat. § 25-218 (Reissue 1995) applies various limitation periods to every claim or demand on behalf of the state "except for revenue, or upon official bonds, or for loans or money belonging to the school funds, or loans of school or other trust funds, or to lands or interest in lands thereto

belonging." We can find no other statute of limitation that might apply to inheritance tax.

## CONCLUSION

We conclude that the inheritance tax due by reason of the death of Reed is not barred by any limitation period, and we therefore reverse the judgment and remand the cause for a determination of the amount of inheritance tax due.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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CARL AND LINDA HAMIT, APPELLEES,
v. TANYA HAMIT, APPELLANT.

715 N.W.2d 512

Filed June 2, 2006. No. S-05-245.

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. **Visitation: Appeal and Error.** Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
4. **Constitutional Law: Statutes: Proof.** A facial challenge to a legislative act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid.
5. **Constitutional Law: Statutes.** A facial challenge is contrasted to a challenge to a statute "as applied" to the individual.
6. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
7. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
8. **Constitutional Law: Statutes.** It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done.
9. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.

10. **Visitation: Statutes: Proof.** Under the Nebraska grandparent visitation statutes, a court is without authority to order grandparent visitation unless a petitioning grandparent can prove by clear and convincing evidence that (1) there is, or has been, a significant beneficial relationship between the grandparent and the child; (2) it is in the best interests of the child that such relationship continue; and (3) such visitation will not adversely interfere with the parent-child relationship.
11. **Constitutional Law: Visitation: Statutes: Parental Rights.** Given the fundamental nature of the parental rights that are claimed to have been intruded upon by the grandparent visitation statutes, a strict scrutiny level of analysis is appropriate.
12. **Visitation: Statutes.** Nebraska's grandparent visitation statutes are narrowly drawn and explicitly protect parental rights while taking the child's best interests into consideration.
13. **Visitation: Statutes: Words and Phrases.** The Nebraska grandparent visitation statutes limit the parties who can petition the court for visitation, in that Neb. Rev. Stat. § 43-1802 (Reissue 2004) permits only grandparents to seek visitation, and a "grandparent" is defined under Neb. Rev. Stat. § 43-1801 (Reissue 2004) to include only "the biological or adoptive parent of a minor child's biological or adoptive parent."
14. **Visitation: Statutes.** Under Nebraska's grandparent visitation statutes, a Nebraska grandparent can seek visitation only under certain circumstances. Under Neb. Rev. Stat. § 43-1802(1) (Reissue 2004), a grandparent may seek visitation if the grandchild's parent or parents are deceased, divorced or in the process of seeking a divorce, or have never been married but paternity has been legally established.
15. **Visitation: Parental Rights: Proof.** The Nebraska grandparent visitation statutes provide that the grandparent seeking visitation must prove by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.
16. **Visitation: Parental Rights.** Although the Nebraska grandparent visitation statutes recognize the interests of the child in the continuation of the grandparent relationship, under Nebraska's grandparent visitation statutes as a whole, the best interests of the child consideration does not deprive the parent of sufficient protection because visitation will not be awarded where such visitation would adversely interfere with the parent-child relationship.
17. **Visitation: Statutes: Proof.** Nebraska's grandparent visitation statutes clearly and significantly place the burden of proof upon the grandparent seeking a visitation order.
18. **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.
19. **Trial: Evidence: Appeal and Error.** An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

James C. Bocott, of McCarthy, Moore & Hall, for appellant.

Michael E. Piccolo, of Dawson & Piccolo, P.C., L.L.O., for appellees.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

MILLER-LERMAN, J.

## I. NATURE OF CASE

Tanya Hamit, appellant and the mother of Wyatt and Garrett Hamit, appeals from the order of the district court for Lincoln County, which concluded that Nebraska's grandparent visitation statutes, Neb. Rev. Stat. §§ 43-1801 to 43-1803 (Reissue 2004), were not unconstitutional and awarded grandparent visitation to the children's paternal grandparents, Carl and Linda Hamit, appellees. In this appeal, we are called on to determine, in light of the U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), whether Nebraska's grandparent visitation statutes are unconstitutional. We conclude that Nebraska's grandparent visitation statutes are not unconstitutional as applied to appellant, and we further conclude that the district court did not abuse its discretion in awarding grandparent visitation to appellees. We affirm.

## II. STATEMENT OF FACTS

Appellant married Jeremy Hamit (Jeremy) in October 1999. Appellant and Jeremy had two children, Wyatt, born on September 7, 2000, and Garrett, born on December 30, 2002.

Appellees are the parents of Jeremy. Appellees own and operate Wallace Flying Service, in Wallace, Nebraska. Jeremy and appellant worked for the flying service during their marriage. Jeremy was a pilot, and appellant was an office assistant. Their children, Wyatt and later Garrett, would accompany Jeremy and appellant to work and would be cared for by appellees when Jeremy and appellant were occupied. The grandchildren were also frequent visitors to appellees' home.

Following Garrett's birth, appellant filed for divorce from Jeremy. During the pendency of the divorce proceedings, Jeremy had custody of Wyatt and Garrett every other week. When Jeremy had custody, he would regularly bring the children to visit appellees, and appellees were actively involved in the care and nurturing of their grandchildren.

On April 4, 2004, prior to the divorce trial, Jeremy died in a plane crash. Following the death of Jeremy, appellees contacted appellant in an effort to continue visiting with their grandchildren. After an initial visit between appellees and the grandchildren, however, appellant did not respond to appellees' further attempts to schedule visitation.

On May 4, 2004, appellees filed their petition in the district court for Lincoln County seeking grandparent visitation pursuant to Nebraska's grandparent visitation statutes, §§ 43-1801 to 43-1803. Appellant opposed appellees' petition. During the pendency of the visitation proceedings, the district court awarded appellees temporary visitation with Wyatt and Garrett every other Saturday.

In appellant's amended answer, she challenged the constitutionality of Nebraska's grandparent visitation statutes. In the district court and on appeal, appellant claims that given the fundamental nature of her parental rights, the Nebraska grandparent visitation statutes violate her substantive due process rights guaranteed by the U.S. and Nebraska Constitutions.

On December 7, 2004, appellees' petition for visitation came on for trial. A total of 11 witnesses testified, and several exhibits were admitted into evidence. On January 7, 2005, the district court entered its order. The order is eight pages in length. The order recites numerous findings of fact and, in some cases, determines the credibility of witnesses. In its order, the district court concluded that Nebraska's grandparent visitation statutes were constitutional. The district court further determined that the evidence presented at trial "was overwhelming and established beyond any doubt, and certainly by clear and convincing evidence that each of the factors set forth in the Nebraska grandparent visitation statutes have been proven by [appellees]." The district court ordered the parties to comply with a specific visitation schedule, which granted appellees visitation with their grandchildren on the first Saturday of each month, from 9 a.m. to 7 p.m., and for 7 consecutive days in the summer. Appellant filed this appeal from the district court's order.

Additional facts will be set forth below where pertinent to our analysis.

## III. ASSIGNMENTS OF ERROR

On appeal, appellant assigns several errors. Appellant claims, renumbered and restated, that the district court erred (1) in concluding that Nebraska's grandparent visitation statutes were constitutional on their face and as applied to appellant and did not violate the due process provisions of the U.S. and Nebraska Constitutions; (2) in determining that appellees had attempted to reconcile their differences with appellant prior to seeking court-ordered visitation; and (3) in finding that there was clear and convincing evidence that there was a significant and beneficial relationship between appellees and the children, that it would be in the children's best interests for such a relationship to continue, and that the continuation of the relationship would not adversely impact appellant's relationship with the children, and in ordering grandparent visitation.

With respect to the second assignment of error regarding whether the parties attempted to reconcile their differences regarding visitation prior to appellees' seeking court-ordered visitation, we note that appellant's brief includes no argument regarding this assigned error. Errors that are assigned but not argued will not be addressed by an appellate court. *Borley Storage & Transfer Co. v. Whitted, ante* p. 84, 710 N.W.2d 71 (2006). Accordingly, we do not consider this assignment of error.

## IV. STANDARDS 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 court below. *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006).

[2,3] Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. *Nelson v. Nelson*, 267 Neb. 362, 674 N.W.2d 473 (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.*

## V. ANALYSIS

### 1. Comparison of Nebraska's Grandparent Visitation Statutes, §§ 43-1801 to 43-1803, to Standards Under *Troxel*

Appellant asserts that Nebraska's grandparent visitation statutes, §§ 43-1801 to 43-1803, are unconstitutional on their face and as applied, because, given her parental rights, they violate her substantive due process rights under both the U.S. and the Nebraska Constitutions. Relying upon the U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), appellant claims that the grandparent visitation statutes are unconstitutional in that they fail to give adequate deference to a fit parent's decisions regarding the care, custody, and control of the parent's minor children and permit a court to order grandparent visitation over the objection of such parent. As discussed in the final section of our analysis, we conclude that the Nebraska grandparent visitation statutes as applied to appellant did not violate her substantive due process rights. Further, since there exists a set of circumstances under which the statutes are valid, §§ 43-1801 to 43-1803 are not unconstitutional on their face. We therefore conclude that the district court did not err when it rejected appellant's constitutional challenge.

#### (a) The U.S. Supreme Court's Decision in *Troxel*

Appellant's argument challenging the constitutionality of the Nebraska grandparent visitation statutes is based primarily upon the U.S. Supreme Court's decision in *Troxel*, in which the Court reviewed the constitutionality of the State of Washington's nonparent visitation statute that permitted " '[a]ny person' to petition a superior court for visitation rights 'at any time,' and authorize[d] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.' " 530 U.S. at 60 (quoting Wash. Rev. Code Ann. § 26.10.160(3) (West 1997)). The U.S. Supreme Court concluded that the Washington statute at issue was unconstitutional.

According to the *Troxel* opinion, the grandparents in *Troxel*, following the death of their son, had sought two weekends of overnight visitation per month, as well as 2 weeks of visitation each summer, with their two grandchildren with whom they had had a longstanding relationship. The children's mother did not oppose all visitation, but, rather, sought to limit visitation to 1 day per month. After a trial, the trial court ruled in favor of the grandparents, stating that " 'it is normally in the best interest of the children to spend quality time with the grandparent.' " 530 U.S. at 69. The mother appealed, and the Washington Court of Appeals reversed, concluding that the grandparents lacked standing to seek visitation under the Washington statute unless a custody action was pending.

The grandparents sought further review, which was granted by the Washington Supreme Court. The Washington Supreme Court affirmed for different reasons. According to the U.S. Supreme Court, the Washington Supreme Court concluded that the state's nonparent visitation statute unconstitutionally infringed on the fundamental rights of parents to rear their children and held that the statute was unconstitutional on its face. 530 U.S. at 63; 530 U.S. at 76 (Souter, J., concurring).

The U.S. Supreme Court granted certiorari and, in a plurality opinion, concluded that the Washington nonparent visitation statute violated the mother's substantive due process rights and was unconstitutional as applied in that case. Justice O'Connor wrote the opinion for the Court in *Troxel*, in which Chief Justice Rehnquist and Justices Ginsburg and Breyer joined.

In its analysis, the plurality opinion noted that the Court had "long recognized that the [14th] Amendment's Due Process Clause . . . 'guarantees more than fair process.' . . . The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' " *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)). The Court identified the liberty interest at issue in *Troxel* as the interest of parents in the care, custody, and control of their children, and stated that this interest was "perhaps the oldest of the fundamental liberty interests recognized by

this Court." *Troxel v. Granville*, 530 U.S. at 65 (citing *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (stating that liberty interest protected by Due Process Clause includes parents' rights to "establish a home and bring up children" and "to control the education of their own")). See, also, *Washington v. Glucksberg*, 521 U.S. at 720 (citing *Meyer v. Nebraska, supra*, and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and stating that "[i]n a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children"); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Parham v. J. R.*, 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) (stating that "[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) (stating that "[w]e have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (stating that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (stating that "[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)). The Court summarized these cases, stating: "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and

control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). We have recognized the fundamental rights of parents in Nebraska cases. See, *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

After reviewing its history of recognizing a parent's right to make decisions concerning the care, custody, and control of his or her children, the Court found the Washington statute, as applied, unconstitutionally infringed upon this right. *Troxel v. Granville, supra*. The plurality found it significant that the Washington statute, which the Court described as "breathtakingly broad," entirely excluded the parents from the visitation decisionmaking process, noting that

> [o]nce the visitation petition has been filed in court and the matter placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. [The Washington visitation statute] contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge.

530 U.S. at 67.

After discussing the fact that the grandparents in *Troxel* had not alleged either that the mother was an unfit parent or that she had decided to cut off visitation entirely, the Court concluded that the "Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made" and declared the Washington statute unconstitutional as applied. 530 U.S. at 73. We observe that by virtue of the act of invalidating the Washington statute, the Court in *Troxel* exercised constitutional oversight in an area in which the state had intervened in the parent-child relationship, and we further observe that we have previously approved of the propriety of such oversight. See *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001).

In its decision concluding that the Washington statute infringed on the "fundamental right of parents," the Court in *Troxel* did not articulate the level of scrutiny it applied. Moreover, the

Court highlighted the circumspect nature of its opinion and noted that it was not defining a specific test by which to evaluate the constitutionality of nonparental visitation statutes. The Court stated:

> Because we rest our decision on the sweeping breadth of [the Washington statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child [if visitation is withheld]. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with [the dissenting opinion of] JUSTICE KENNEDY that the constitutionality of a standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.

*Troxel v. Granville*, 530 U.S. 57, 73, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

Justice Souter concurred in the Court's judgment but would have affirmed on the basis that the visitation statute was facially invalid. *Id.* (Souter, J., concurring in the judgment). Justice Thomas also concurred in the judgment, noting that the Court had failed to identify the "appropriate standard of review." 530 U.S. at 80 (Thomas, J., concurring in the judgment). Justice Thomas would have struck down the Washington statute under a strict scrutiny analysis. *Id.*

Justices Stevens, Scalia, and Kennedy each dissented on different grounds. Justice Stevens criticized the Washington Supreme Court's analysis relative to the "any person" provision and the statute's absence of a provision requiring a finding of harm to the child if visitation was withheld, preferring an as applied analysis rather than resolution of constitutionality based on a facial analysis. *Id.* (Stevens, J., dissenting). Justice Scalia

would have reversed the Washington Supreme Court's decision. He described the "parental rights" at issue as unenumerated and stated that he would prefer that the area of family law implicated in *Troxel* be prescribed by state legislatures and not the federal judiciary. *Id.* (Scalia, J., dissenting). Justice Kennedy stated that the 14th Amendment included a substantive due process right to parent children without undue state interference, but he recognized the potential for tension between this right and the best interests of the child. Justice Kennedy would have remanded the cause to the state courts to engage in an "as applied" analysis. *Troxel v. Granville, supra* (Kennedy, J., dissenting).

The *Troxel* plurality decision for the most part was limited to the specific infirmities of the State of Washington visitation statute as applied to the facts in that case. It has been observed, and we agree, that the *Troxel* Court left to state courts the task of developing the law relative to the resolution of child visitation disputes arising between a parent and nonparent. See *Denise v. Tencer*, 46 Va. App. 372, 617 S.E.2d 413 (2005). We note that since the *Troxel* decision, the U.S. Supreme Court has declined additional opportunities to define the scope of a parent's due process right in the nonparent visitation context, which may mean that state courts are expected to adjudicate the matter on a case-by-case basis. See, *Robinson v. Ford-Robinson*, 362 Ark. 232, 208 S.W.3d 140 (2005), *cert. denied* 546 U.S. 936, 126 S. Ct. 424, 163 L. Ed. 2d 323; *Galjour v. Harris*, 795 So. 2d 350 (La. App. 2001), *cert. denied* 534 U.S. 1020, 122 S. Ct. 545, 151 L. Ed. 2d 422; *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052 (2002), *cert. denied* 537 U.S. 1189, 123 S. Ct. 1259, 154 L. Ed. 2d 1022 (2003); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert. denied* 540 U.S. 1177, 124 S. Ct. 1408, 158 L. Ed. 2d 78 (2004); *Harrold v. Collier*, 107 Ohio St. 3d 44, 836 N.E.2d 1165 (2005), *cert. denied* 547 U.S. 1004, 126 S. Ct. 1474, 164 L. Ed. 2d 248 (2006).

The lack of a precise standard in *Troxel* has been criticized by some authorities. See, e.g., Developments in the Law — The Law of Marriage and Family, *IV. Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 Harv. L. Rev. 2052, 2056 (2003) (stating that "[t]he plurality opinion

in *Troxel*, one of six opinions issued in the case, failed to deliver a clear, unambiguous standard under which to assess nonparental visitation statutes and has been the source of much confusion and debate"); Paula A. Lorfeld, Comment, *Have State Judiciaries Become Legislatures When Grandma Comes to Court?: State Court Decisions in the Post-*Troxel *Era*, 5 Marq. Elder's Advisor 241, 242 (2004) (referring to *Troxel* "opinion's vagueness"). Nonetheless, other authorities have identified certain guiding principles in *Troxel*. Chief among these principles is a recognition that inherent in the Court's refusal to globally hold that "nonparental visitation statutes violate [parental substantive due process rights] and the Due Process Clause as a *per se* matter," *Troxel v. Granville*, 530 U.S. 57, 73, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), is a tacit approval of nonparental visitation statutes that meet substantive due process imperatives. See Developments in the Law — The Law of Marriage and Family, *supra*. See, also, *Blixt v. Blixt, supra*; *Deem v. Lobato*, 136 N.M. 266, 96 P.3d 1186 (N.M. App. 2004).

Despite the absence from *Troxel* of precisely enunciated criteria for awarding nonparental visitation in the face of parental disapproval, the Court offered guidance on several points when considering the constitutionality of statutes governing nonparental visitation. First, in determining whether the nonparental visitation should occur, the plurality opinion declared that "there is a presumption that fit parents act in the best interests of their children." 530 U.S. at 68.

Second, the plurality opinion stated that "if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." 530 U.S. at 70. The *Troxel* Court did not explain the nature of this "special weight." See, *Robinson v. Ford-Robinson*, 362 Ark. 232, 208 S.W.3d 140 (2005), *cert. denied* 546 U.S. 936, 126 S. Ct. 424, 163 L. Ed. 2d 323; *In re R.A., Jr.*, 121 P.3d 295 (Colo. App. 2005). Nonetheless, several authorities have defined it as a degree of "deference" to the parents' decision. Developments in the Law — The Law of Marriage and Family, *supra* at 2057; *Blixt v. Blixt, supra*; *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. 2002).

Third, the *Troxel* Court noted the failure of the Washington trial court to base its order awarding grandparent visitation "on any special factors that might justify the State's interference with [the parent's] fundamental right to make decisions concerning the rearing of her [children.]" 530 U.S. at 68. It has been observed that this comment indicates that there are factors that might override a parent's decision and, therefore, implicit in *Troxel* is the underlying recognition of the "rebuttable" nature of the presumption that fit parents act in their children's best interests. See *Troxel v. Granville, supra* (Stevens, J., dissenting). Although not expressly stated in the plurality opinion, the *Troxel* Court's acknowledgment that this presumption can be rebutted with the appropriate evidence has been noted by many authorities. See *In re R.A., Jr.*, 121 P.3d at 298 (stating that "[c]ourts recognize that, in light of the rebuttable nature of the presumption [that fit parents act in their children's best interests], the 'special weight' requirement does not insulate parental wishes from judicial review"). See, also, *Deem v. Lobato*, 136 N.M. 266, 270, 96 P.3d 1186, 1190 (N.M. App. 2004) (stating that "[t]here is nothing in *Troxel* or the resulting case law to suggest that the Supreme Court considered the presumption that a fit parent acts in the best interests of his or her child to be other than a rebuttable presumption"); *Harrold v. Collier*, 107 Ohio St. 3d 44, 51, 836 N.E.2d 1165, 1172 (2005), *cert. denied* 547 U.S. 1004, 126 S. Ct. 1474, 164 L. Ed. 2d 248 (2006) (stating that "while *Troxel* states that there is a presumption that fit parents act in the best interest of their children, nothing in *Troxel* indicates that this presumption is irrefutable"). Accord *Crafton v. Gibson*, 752 N.E.2d 78, 96-97 (Ind. App. 2001) (stating that under *Troxel*, "a grandparent seeking visitation has the burden of rebutting the presumption that a decision made by a fit parent to deny or limit visitation was made in the child's best interest").

In summary, certain principles emerge from the plurality opinion in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), with respect to a parent's due process rights in the context of a nonparent visitation statute that are useful for our current analysis. Those principles are as follows:

(1) There is a presumption that fit parents act in the best interests of their children.

(2) In light of this presumption, a fit parent's decision concerning the denial of grandparent visitation must be accorded at least some special weight.

(3) Notwithstanding the special weight to be accorded a fit parent's decision, the presumption in favor of fit parents is rebuttable under the appropriate circumstances.

With the guidance of these three principles, we examine Nebraska's grandparent visitation statutes.

(b) Consideration of Nebraska's Grandparent Visitation Statutes Under the Principles in *Troxel* and as Compared to the Washington Statute in *Troxel*

As noted above, appellant brings a substantive due process challenge to the Nebraska grandparent visitation statutes under both the U.S. and the Nebraska Constitutions. Substantive due process relates to the content of the statute specifying when a right can be lost or impaired. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001). Appellant argues in effect that when considered under the principles outlined in *Troxel* and when compared to the Washington statute in *Troxel*, the Nebraska grandparent visitation statutes show the same weaknesses as the Washington statute and that, therefore, the Nebraska statutes impermissibly impair her parental rights.

The federal and state Constitutions contain similar due process language, and both provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV; Neb. Const. art. I, § 3. In the context of a right to privacy, we have effectively stated that the due process provision of the Nebraska Constitution is congruent with the federal Constitution and that the Nebraska Constitution does not contain any rights broader than the federal Constitution. See *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005) (stating that due process clause of Nebraska Constitution does not contain right of privacy broader than that recognized under federal Constitution). We extend the foregoing principle of congruence to the present context involving a parent's substantive due process rights, and accordingly, we do not distinguish between the two constitutions in our analysis.

[4,5] Appellant raises both a facial and an "as applied" due process challenge, and as explained in the last section of our

analysis, we conclude that the grandparent visitation statutes are constitutional as applied to appellant, and it therefore follows that the statutes at issue are not facially invalid. The U.S. Supreme Court has stated that "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). See, also, *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005) (describing facial challenge as asserting no valid application of statute exists because statute is unconstitutional on its face). A facial challenge is contrasted to a challenge to a statute "as applied" to the individual. See *State v. Sanders, supra*.

[6-9] In considering the constitutionality of Nebraska's grandparent visitation statutes, we are guided by certain well-established principles and presumptions. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Chase v. Neth, supra*. See, also, *Pony Lake Sch. Dist. v. State Committee for Reorg., ante* p. 173, 710 N.W.2d 609 (2006). It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done. *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Chase v. Neth, supra*; *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

At common law in Nebraska and elsewhere, " 'grandparents lacked any legal right to visitation and communication with their grandchildren if such visitation was forbidden by the parents . . . . Indeed, the parents' obligation to allow such visitation was a moral, not a legal obligation.' " *Pier v. Bolles*, 257 Neb. 120, 124, 596 N.W.2d 1, 4 (1999) (quoting *Ex Parte Bronstein*, 434 So. 2d 780 (Ala. 1983)). In part due to changing demographics and the presence of single-parent households in which grandparents and

other persons "outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing," *Troxel v. Granville*, 530 U.S. 57, 64, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), and in part due to a recognition of "the importance of the grandparent-grandchild relationship in the lives of children," *Moriarty v. Bradt*, 177 N.J. 84, 97, 827 A.2d 203, 210 (2003), *cert. denied* 540 U.S. 1177, 124 S. Ct. 1408, 158 L. Ed. 2d 78 (2004) (citing Chrystal C. Ramirez Barranti, *The Grandparent/Grandchild Relationship: Family Resource in an Era of Voluntary Bonds*, 34 Fam. Rel. 343 (1985)), every state has adopted a statutory scheme permitting grandparent visitation under varying circumstances. *Pier v. Bolles, supra* (citing 3 Family Law and Practice § 32.09[7][b][*ii*] (Arnold H. Rutkin ed., 1999)). The circumstances under which grandparents can seek and retain visitation differ widely from state to state. *Id.*

Nebraska was the last state in the nation to grant grandparent visitation. Judiciary Committee Hearing, L.B. 105, 89th Leg., 1st Sess. 91 (Mar. 25, 1985). In 1986, the grandparent visitation statutes, 1986 Neb. Laws, L.B. 105, were enacted by the Nebraska Legislature, setting forth the grandparents' statutory visitation scheme. See, §§ 43-1801 to 43-1803; *Pier v. Bolles, supra*. The circumstances in which a grandparent can seek visitation are covered by § 43-1802 of the grandparent visitation statutes, which provides in relevant part as follows:

> (1) A grandparent may seek visitation with his or her minor grandchild if:
>
> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
>
> (c) The parents of the minor child have never been married but paternity has been legally established.
>
> (2) In determining whether a grandparent shall be granted visitation, the court shall require evidence concerning the beneficial nature of the relationship of the grandparent to the child. The evidence may be presented by affidavit and shall demonstrate that a significant beneficial relationship exists, or has existed in the past, between the grandparent and the child and that it would be in the best interests of the child

> to allow such relationship to continue. Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

[10] Synthesizing the requirements of § 43-1802(2), we have stated that under the Nebraska grandparent visitation statutes, a court is without authority to order grandparent visitation unless a petitioning grandparent can prove by clear and convincing evidence that " '(1) [t]here is, or has been, a significant beneficial relationship between the grandparent and the child; (2) it is in the best interests of the child that such relationship continue; and (3) such visitation will not adversely interfere with the parent-child relationship.' " *Nelson v. Nelson*, 267 Neb. 362, 369, 674 N.W.2d 473, 479 (2004) (quoting *Eberspacher v. Hulme*, 248 Neb. 202, 533 N.W.2d 103 (1995)).

Although the Nebraska grandparent visitation statutes allow court intrusion upon the parent-child relationship, it is important to note that as part of its "legislative findings," the Nebraska Legislature recognized that "[t]he state presumes the critical importance of the parent-child relationship and the child-parent relationship in the welfare and development of the minor child . . . ." Neb. Rev. Stat. § 43-2902 (Reissue 2004). So, too, with regard to the importance of the parent-child relationship, this court has stated 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."

*In re Guardianship of D.J.*, 268 Neb. 239, 246, 682 N.W.2d 238, 244 (2004) (quoting *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992)). The importance of the parent-child relationship is reflected in the language of § 43-1802(2), which requires that a grant of grandparent visitation "not adversely interfere with the parent-child relationship" and that any such grant be proved by

clear and convincing evidence, which burden is higher than that in conventional civil cases. See, *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998); *In re Interest of Kindra S.*, 14 Neb. App. 202, 705 N.W.2d 792 (2005). See, also, *Beal v. Endsley*, 3 Neb. App. 589, 529 N.W.2d 125 (1995).

[11] In connection with appellant's challenge to the constitutionality of the Nebraska grandparent visitation statutes due to their purported intrusion into her parent-child relationship, she urges us to utilize a strict scrutiny review of the grandparent visitation statutes. "Under strict scrutiny review, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Douglas Cty. v. Anaya*, 269 Neb. 552, 556, 694 N.W.2d 601, 605 (2005). As noted above, in concluding that the Washington nonparent visitation statute was unconstitutional as applied, the plurality opinion in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), refrained from announcing the level of scrutiny it was applying. Since *Troxel*, state courts have debated the level of scrutiny to apply to challenges to nonparent visitation statutes. Some states have elected to apply the heightened level of analysis of strict scrutiny. See, *Roth v. Weston*, 259 Conn. 202, 789 A.2d 431 (2002); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052 (2002), *cert. denied* 537 U.S. 1189, 123 S. Ct. 1259, 154 L. Ed. 2d 1022 (2003); *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert. denied* 540 U.S. 1177, 124 S. Ct. 1408, 158 L. Ed. 2d 78 (2004); *Harrold v. Collier*, 107 Ohio St. 3d 44, 836 N.E.2d 1165 (2005), *cert. denied* 547 U.S. 1004, 126 S. Ct. 1474, 164 L. Ed. 2d 248 (2006). Other states have opted to apply a lower level of review such as a rational basis analysis. See, *Crafton v. Gibson*, 752 N.E.2d 78 (Ind. App. 2001); *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. 2002). We conclude that given the fundamental nature of the parental rights that are claimed to have been intruded upon by the grandparent visitation statutes, a strict scrutiny level of analysis is appropriate.

We read appellant's argument as claiming that the provisions of Nebraska's grandparent visitation statutes are sufficiently broad as to be comparable to the Washington statute that was disapproved in *Troxel*. Such an argument naturally invites a

comparison of Nebraska's statutes to the provisions of the Washington statute, an approach we note that numerous other state courts have utilized when considering constitutional challenges to their respective grandparent visitation statutes. See, *Rideout v. Riendeau, supra*; *Blakely v. Blakely, supra*; *Moriarty v. Bradt, supra*; *Harrold v. Collier, supra*; *Glidden v. Conley*, 175 Vt. 111, 820 A.2d 197 (2003); *State ex rel. Brandon L. v. Moats*, 209 W. Va. 752, 551 S.E.2d 674 (2001).

[12-14] Comparing Nebraska's statutes to the Washington statute in *Troxel*, we conclude that contrary to appellant's assertion, Nebraska's statutes are more narrowly drawn than the Washington statute and explicitly protect parental rights while taking the child's best interests into consideration. Unlike the Washington statute that allowed "[a]ny person" to petition the court for visitation rights "at any time," the Nebraska grandparent visitation statutes limit the parties who can petition the court for visitation. Section 43-1802 permits only grandparents to seek visitation, and a "grandparent" is defined under § 43-1801 to include only "the biological or adoptive parent of a minor child's biological or adoptive parent." Further, a Nebraska grandparent can seek visitation only under certain circumstances. Under § 43-1802(1), a grandparent may seek visitation if the grandchild's parent or parents are deceased, divorced or in the process of seeking a divorce, or have never been married but paternity has been legally established.

[15,16] We further note that the Nebraska grandparent visitation statutes, unlike the Washington statute at issue in *Troxel*, provide that the grandparent seeking visitation must prove by clear and convincing evidence that "there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship." § 43-1802(2). We believe that unlike the Washington statute, these provisions satisfy the *Troxel* principles that a fit parent is presumed to act in the best interests of his or her child, and although special weight is to be accorded a fit parent's decision regarding visitation, the presumption in favor of a parent's decision is rebuttable. Thus, although the Nebraska grandparent visitation statutes recognize

the interests of the child in the continuation of the grandparent relationship, under Nebraska's grandparent visitation statutes as a whole, the best interests of the child consideration does not deprive the parent of sufficient protection, because visitation will not be awarded where such visitation would adversely interfere with the parent-child relationship. See *Troxel v. Granville*, 530 U.S. 57, 70, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (citing with approval § 43-1802(2) as providing "protection for [the parent's] fundamental constitutional right to make decisions concerning the rearing of [the parent's own children]"). In view of the foregoing comparison, we reject appellant's assertion that Nebraska's grandparent visitation statutes fail to meet the principles in *Troxel* and suffer from the weaknesses of the Washington statute, which weaknesses led the U.S. Supreme Court to disapprove of the Washington statute. We therefore proceed to an examination of the record in this case and an assessment of the grandparent visitation statutes as they were applied to appellant.

### 2. Application of the Nebraska Grandparent Visitation Statutes: Review of the District Court's Decision Ordering Grandparent Visitation

Appellant claims that the district court erred in ordering grandparent visitation in this case. Specifically, appellant claims that appellees failed to produce clear and convincing evidence that grandparent visitation would be in the children's best interests and that such visitation would not adversely interfere with her parent-child relationship.

[17,18] This court has previously recognized that "Nebraska's grandparent visitation statutes clearly and significantly place the burden of proof upon the grandparent seeking a visitation order." *Nelson v. Nelson*, 267 Neb. 362, 369, 674 N.W.2d 473, 479 (2004). Pursuant to the grandparent visitation statutes, a district court cannot order grandparent visitation unless

> a petitioning grandparent proves by clear and convincing evidence that "(1) [t]here is, or has been, a significant beneficial relationship between the grandparent and the child; (2) it is in the best interests of the child that such relationship continue; and (3) such visitation will not adversely interfere with the parent-child relationship."

267 Neb. at 369, 674 N.W.2d at 479 (quoting *Eberspacher v. Hulme*, 248 Neb. 202, 533 N.W.2d 103 (1995)). Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

Turning to the first statutory requirement, we note that in appellant's brief, she does not argue that there has not been a significant beneficial relationship between appellees and the grandchildren. Moreover, the record contains ample evidence upon which to base a qualitative assessment of the personal relationship that existed between appellees and the grandchildren, both prior to the filing of the grandparent visitation petition and thereafter. As noted by the district court:

> A plethora of individuals . . . testified as to the close relationship which they had observed between [appellees] and the minor children . . . . [Appellees] were the owners of the Wallace Flying Service where Jeremy . . . worked and [appellant] worked. The office of the airport was frequently used, especially during the summer months when Jeremy . . . was flying from daylight to sundown, to care for the minor children. [Appellee] Linda Hamit would take care of the boys, feed them and play with them when Jeremy was flying. The children had bicycles and toys, as well as a sand-pile outside the office. Between the months of April and August, the children would be at the airport until dark. The boys would eat with [appellees] and the other pilots.
>
> After the separation . . . Jeremy . . . had the boys every other week, [and] the boys would be at the residence of [appellees] two or three times per week. There were a lot of toys, and the boys would frequently eat at the residence of [appellees]. [Appellees] also own a horse which the boys would ride. The oldest child, Wyatt, would frequently go to the post office with his grandfather. [Appellees] also own a dog which Wyatt considered to be his.
>
> A number of individuals testified at trial that there was a close, affectionate, and loving relationship between both boys and [appellees].

The record also contains the testimony of Dr. Lisa Jones, a licensed clinical psychologist, who testified as to her observations of appellees and their grandchildren during several visitations in the fall of 2004. She testified that "[t]here was a lot of physical contact, either in terms of being held in and snuggled in arms or, again, being held and helped in [activities], just lots of very physical affectionate contact between the boys and the grandparents." She described appellees' home as "very cognizant of the children's needs. For example, they have a room that is set up with toys and two beds and a crib where, obviously, that's the children's room, where they can nap, if they need to, or they can play or they can enjoy themselves . . . ." She testified that at one of her later observations, when the children were more comfortable with her presence, she asked Wyatt whether he "like[d] visiting [appellees.] And he stated, Yes. I then asked him if he was scared to go visit with them, and he gave me a very strange look and he said no. And that was significant to me because, again, he looked at me like, that's a silly question."

In summary, appellees presented ample evidence of the nature of their relationship with Wyatt and Garrett, and that such relationship was beneficial to the children. Given this record, there is clear and convincing evidence to support the trial court's finding that appellees have a significant beneficial relationship with Wyatt and Garrett. Further, in view of the record, it cannot be said that the district court abused its discretion in finding by clear and convincing evidence that it is in the best interests of Wyatt and Garrett for their relationship with appellees to continue.

We next review the evidence relative to the requirement that grandparent visitation not adversely interfere with the parent-child relationship. In this regard, Jones testified to the effect that she had not "notice[d] anything from [appellees] that would indicate that [they are] harboring resentment that is carrying over into [the grandchildren's] visitation." Numerous witnesses testified that they had never heard appellees speak negatively regarding appellant in the presence of Wyatt and Garrett. Appellee Carl Hamit testified to the effect that during visitation with his grandchildren, he had not discussed appellant or the litigation and that his focus was on the grandchildren and spending time with them. Both appellees testified to the effect that they had no animosity

toward appellant. Moreover, the record contains evidence that appellees have attempted to comply with appellant's directions concerning the care of Wyatt and Garrett. Both appellees testified that at times, appellant would request that the children be returned early from their court-ordered visits with appellees, and appellees would accommodate her requests. Jones testified that during one of her observations, Wyatt had asked his grandfather, appellee Carl Hamit, to take the plane to go look at deer, and appellee had told Wyatt that they were going to take the truck. Jones noted that this was in accordance with appellant's expressed desire not to have the children on a plane and stated that "that was significant in terms of respecting that [request]."

There is clear and convincing evidence that visitation by appellees would not adversely interfere with the parent-child relationship between appellant and her children. Referring to the record, it is clear that the relationship between appellant and appellees is strained and that appellant does not encourage a relationship between appellees and the grandchildren. Nevertheless it cannot be said that the record shows that the visitation adversely interferes in the relationship that exists between appellant and her children.

[19] In support of her argument that the district court abused its discretion in ordering grandparent visitation in this case, appellant relies in part upon the testimony of Jane Canell, a mental health therapist, who was called as an expert witness by appellant. In summary, Canell testified that Wyatt was afraid of appellees, that he felt appellees were trying to take him away from appellant, and that he did not want to visit them. The district court stated that "[b]ased upon [its] observation of the demeanor of the witnesses while testifying, [the court] reject[ed] virtually all of the negative testimony by Jane Canell," as "not believable." In this regard, the district court noted certain discrepancies in Canell's office notes, and further noted that Canell had never observed the grandchildren with appellees or talked to appellees. We have frequently recognized that "this court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility." *General Fiberglass Supply v. Roemer*, 256 Neb. 810,

815, 594 N.W.2d 283, 287 (1999). See, *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005); *In re Estate of Craven*, 265 Neb. 41, 654 N.W.2d 196 (2002). In view of the district court's judgment regarding credibility, we reject appellant's invitation to consider Canell's testimony as outweighing other witnesses in the case.

The district court awarded visitation consisting of one 10-hour visitation every month and 7 consecutive days in the summer. In view of the record and the ages of the children, we do not find this ruling to be an abuse of discretion.

### 3. Resolution

We have reviewed the record in this case, and we note that there is no allegation that appellant was an unfit parent. The district court honored the presumption in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), that a fit parent acts in the best interests of his or her child, and appropriately placed on appellees the burden of proving by clear and convincing evidence the requirements of § 43-1802(2). In addition, the record reflects that although it did not use the *Troxel* words, "special weight," the district court gave special weight to appellant's decision concerning visitation. The district court treated appellant's decision as a rebuttable presumption of best interests, thereby protecting appellant's fundamental rights before ultimately determining that it was in the children's best interests to grant visitation to appellees. The district court's decision is consistent with *Troxel*, is narrowly tailored to meet the state's compelling interest in protecting the well-being of its children, see *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986), and is constitutional under a strict scrutiny analysis. Furthermore, the specific visitation awarded was appropriate.

Given the record in this case, we conclude that Nebraska's grandparent visitation statutes, §§ 43-1801 to 43-1803, are constitutional as applied to appellant in this case. Further, since there exists a set of circumstances under which the statutes are valid, §§ 43-1801 to 43-1803 are not unconstitutional on their face. See *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). Additionally, the specific visitation

awarded to appellees was not an abuse of discretion. We find no merit to appellant's assignments of error, and we affirm the decision of the district court concluding that the provisions of §§ 43-1801 to 43-1803 are constitutional and awarding specified visitation to appellees.

## VI. CONCLUSION

For the reasons stated above, we affirm the district court's order concluding that Nebraska's grandparent visitation statutes are not violative of appellant's substantive due process rights and are constitutional. Given the record in this case, we conclude the district court did not abuse its discretion, and we affirm the district court's order awarding grandparent visitation in favor of appellees.

AFFIRMED.

WRIGHT, J., not participating.

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BRIDGET L. KENLEY, APPELLEE, V. BEVERLY J. NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

MARC F. SHIELS, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

716 N.W.2d 44

Filed June 9, 2006. Nos. S-04-1186, S-05-230.

SUPPLEMENTAL OPINION

Appeals from the District Court for Clay County: VICKY L. JOHNSON, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Jon Bruning, Attorney General, Laura L. Neesen, and Milissa Johnson-Wiles for appellant.

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

No appearance for appellee Shiels.

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

PER CURIAM.

This matter is before the court on the motion for rehearing of appellee, Bridget L. Kenley, regarding our opinion reported at *Kenley v. Neth, ante* p. 402, 712 N.W.2d 251 (2006). We overrule the motion, but modify the opinion as follows:

The second to last paragraph of that opinion, *id.* at 415, 712 N.W.2d at 263, is withdrawn and the following substituted:

> With respect to Kenley, in her appeal to the district court, she assigned that there was no competent evidence to support the revocation of her driver's license. Due to its other holdings, the district court did not reach this issue. We remand the cause to the district court for further proceedings consistent with this opinion with directions to determine whether there was competent evidence to support the revocation of Kenley's driver's license.

In accordance with the above, we also withdraw the directive language with respect to case No. S-04-1186, *id.* at 416, 712 N.W.2d at 264, and substitute the following:

> CAUSE IN NO. S-04-1186 REMANDED FOR FURTHER PROCEEDINGS.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

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FRANKIE LEVI COLE, APPELLANT, V.
SCOTT ISHERWOOD ET AL., APPELLEES.

716 N.W.2d 36

Filed June 9, 2006. No. S-04-1270.

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. **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. **Tort Claims Act: Jurisdiction.** Failure to comply with Neb. Rev. Stat. § 81-8,213 (Reissue 1996), the final disposition requirement of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), may provide an affirmative defense, but does not deprive a district court of general subject matter jurisdiction.
4. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
5. **Effectiveness of Counsel: Appeal and Error.** A litigant proceeding on a pro se basis is obligated to follow the same appellate rules and procedures applicable to counsel.
6. **Administrative Law: Civil Rights: Prisoners.** The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2000), requires prisoners to exhaust administrative remedies before filing actions under 42 U.S.C. § 1983 (2000); no action shall be brought with respect to prison conditions under § 1983, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.
7. **Administrative Law: Prisoners.** Failure to exhaust administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2000), before filing a claim constitutes an affirmative defense.
8. **Tort Claims Act: Civil Rights: Prisoners: Injunction: Damages.** When a prisoner requests both monetary damages and injunctive relief, the prisoner must exhaust his or her administrative remedies under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), prior to bringing an action under 42 U.S.C. § 1983 (2000).
9. **Administrative Law: Prisoners.** A suit filed by a prisoner before administrative remedies have been exhausted must be dismissed, even if the prisoner exhausts intraprison remedies before judgment.
10. **Administrative Law: Civil Rights.** In the federal system, failure to exhaust administrative remedies before filing an action under 42 U.S.C. § 1983 (2000) is usually a curable, procedural flaw that can be fixed by exhausting those remedies and then reinstating the suit.
11. **Civil Rights: Courts.** State courts are required to follow federal precedent when hearing actions brought under 42 U.S.C. § 1983 (2000).
12. **Rules of the Supreme Court: Pretrial Procedure.** Although Neb. Ct. R. of Discovery 35 (rev. 2001) allows the court to order a reluctant party, or someone within the party's control, to submit to a physical or mental examination, nothing in this rule mandates that the State pay for the examination or transportation to that examination.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Frankie Levi Cole, pro se.

Jon Bruning, Attorney General, Linda Willard, and Odies Williams, Senior Certified Law Student, for appellees.

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

CONNOLLY, J.

Appellant, Frankie Levi Cole, sued the State of Nebraska and several employees at the Nebraska State Penitentiary (NSP) under 42 U.S.C. § 1983 (2000) and the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996). The allegations stem from conflicts Cole had with his cellmate and from claimed inadequacies in Cole's medical treatment. The court granted the defendants' motion for summary judgment, finding that (1) the State is immune from suit under § 1983; (2) qualified immunity protects the other defendants from liability under § 1983; (3) Cole violated the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) (2000), by failing to exhaust his administrative remedies; (4) the defendants proved their affirmative defense to Cole's state tort claims because he filed them prematurely; and (5) no genuine issue of material fact exists on the merits.

Cole appeals the summary judgment and the district court's failure to order the State to pay for an outside medical examination and transportation to the examination. We affirm the summary judgment on Cole's state tort claims, Cole's § 1983 claims against the State, and the transportation order, but remand his other § 1983 claims with directions to dismiss them without prejudice.

## BACKGROUND

The facts in this case are fully set forth in the Nebraska Court of Appeals' opinion, *Cole v. Isherwood*, 11 Neb. App. 44, 642 N.W.2d 524 (2002), and summarized in this court's opinion on petition for further review, *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002) (*Cole I*). Thus, we address only recent developments. Since we remanded the cause, Cole filed a fourth amended petition.

In October 2003, Cole asked the court to order the Nebraska Department of Correctional Services (DCS) to transport him at DCS' cost to an outside doctor for a medical examination. He sought to use this examination to refute testimony from the DCS doctor that treated him. The court sustained the transportation order so long as Cole could demonstrate that he could cover the

costs of secure transportation and the medical appointment. Cole was unable to comply with the court's order and received no medical examination.

In June 2004, the court considered the defendants' motion for summary judgment. Both parties introduced evidence, and the court sustained the defendants' motion finding (1) that the defendants proved their affirmative defense to Cole's state tort claims because he filed this suit before the State Claims Board denied his claim, (2) that the State is immune from suit under § 1983, (3) that Cole failed to exhaust his administrative remedies for various claims, (4) that qualified immunity protects the other defendants from liability under § 1983 for the remaining claims, and (5) that no genuine issue of material fact exists on the merits. Cole appeals both the summary judgment and the transportation orders.

## ASSIGNMENTS OF ERROR

Cole assigns that the district court erred by (1) granting summary judgment, (2) finding it lacked jurisdiction to hear his claims under the State Tort Claims Act, and (3) denying his request for a travel order for medical examination at state expense.

## 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. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

[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. *State ex rel. Jacob v. Bohn, ante* p. 424, 711 N.W.2d 884 (2006).

## ANALYSIS

Under the fourth amended petition, Cole sued both the State and several of its employees. He sued the employees in their

individual capacities seeking monetary damages and in their official capacities to the extent the court grants injunctive relief.

As best we can divine from the obfuscatory pleading, Cole alleges that the defendants: (1) violated the 8th and 14th Amendments and the State Tort Claims Act by failing to protect him from his violent, smoking cellmate; (2) violated the 14th Amendment by ignoring classification and cell-assignment policies, which resulted in property loss and personal injury; (3) violated the 14th Amendment and the State Tort Claims Act by assigning Cole to mop floors despite his recent hand surgery and punishing him for not completing the assignment; (4) violated "Due Process and/or Nebraska State law" by arbitrarily and capriciously ignoring the DCS classification manual; (5) violated the State Tort Claims Act by denying Cole medical treatment for exposure to secondhand cigarette smoke and the Equal Protection Clause because the Nebraska Clean Indoor Air Act protects Nebraska citizens from secondhand smoke; (6) were professionally negligent and violated the 8th Amendment when treating Cole's eye and hand and by refusing to grant Cole a bottom bunk pass; (7) violated his "Due Process and State law rights" by punishing Cole with disciplinary segregation after his cellmate attacked him; (8) violated the 8th Amendment by exposing him to secondhand cigarette smoke and denying him treatment for the exposure; (9) violated the 8th Amendment by requiring Cole to explain how his hand was injured before treating it; (10) violated "state law rights" to a reclassification hearing with 24-hour notice and written disposition for the February 22, 1999, job-change action; (11) conspired to injure Cole psychologically and physically by placing him in a cell with a violent inmate who smoked and covering up the fact that the cellmate destroyed Cole's property; and (12) violated state law by refusing to render a decision in Cole's appeal of the February 5, 1999, hearing process. Cole's claims arise under both the State Tort Claims Act and § 1983.

## State Tort Claims

[3] Cole argues that the trial court found it lacked jurisdiction to hear his claims under the State Tort Claims Act. This finding, he argues, runs afoul of this court's holding in *Cole I*. There, we held that failure to comply with § 81-8,213 may provide an

affirmative defense, but does not deprive a district court of general subject matter jurisdiction. Section 81-8,213 provides:

> No suit shall be permitted under the State Tort Claims Act unless the State Claims Board has made final disposition of the claim, except that if the board does not make final disposition of a claim within six months after the claim is made in writing to the board, the claimant may, by notice in writing, withdraw the claim from consideration of the board and begin suit under such act.

Cole filed this suit in the district court before the State Claims Board finally disposed of his claims. See *Cole I*.

Cole, however, misreads the district court's order; the district court clearly viewed Cole's failure to comply with § 81-8,213 as an affirmative defense. And nowhere in Cole's briefs does he dispute the court's finding that the defendants proved their affirmative defense or that he filed this suit before the State Claims Board disposed of his claims.

[4,5] 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. *White v. White, ante* p. 43, 709 N.W.2d 325 (2006). While we recognize that Cole represents himself, we also recognize that a "litigant proceeding on a pro se basis is obligated to follow the same appellate rules and procedures applicable to counsel." *Mix v. City of Lincoln*, 244 Neb. 561, 563, 508 N.W.2d 549, 551 (1993) (citing *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989)). Thus, we affirm the district court's summary judgment for Cole's state tort claims.

## § 1983 Claims

Similarly, Cole failed to address the court's entry of summary judgment for the State of Nebraska. As stated, 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. *White v. White, supra*. Thus, we also affirm the court's entry of summary judgment on Cole's § 1983 claims against the State.

Regarding the other defendants, the court found that Cole's claims lacked merit, and the evidence supported the defendants'

affirmative defenses: (1) that Cole failed to exhaust his administrative remedies, violating the PLRA, and (2) that the defendants were entitled to qualified immunity. Because we agree that Cole failed to exhaust his administrative remedies, we need not address the other grounds.

[6,7] The PLRA requires prisoners to exhaust administrative remedies before filing § 1983 actions. It states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Failure to exhaust administrative remedies before filing a claim constitutes an affirmative defense. See *Cole I*. See, also, *Foulk v. Charrier*, 262 F.3d 687 (8th Cir. 2001); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999).

[8] Here, the district court determined that Cole had failed to exhaust his administrative remedies for claims 2, 3, 4, 7, and 9. We, however, note a more fundamental flaw. See *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999) (overruled by *Cole I* because failure to exhaust remedies is affirmative defense, not jurisdictional prerequisite). As we stated in *Pratt* and reaffirmed in *Cole I*, when a prisoner requests both monetary damages and injunctive relief, the "prisoner [must] exhaust his or her administrative remedies under the State Tort Claims Act prior to bringing a § 1983 action." *Cole I*, 264 Neb. at 992, 653 N.W.2d at 828. See, also, *Pratt v. Clarke, supra*. Moreover, even if Cole properly pursued his grievances, he brought his state tort claims in the same action as his § 1983 claims. Thus, under *Pratt* and *Cole I*, he failed to exhaust his administrative remedies before bringing suit under § 1983.

[9] Many circuit courts have held that a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed, even if the prisoner exhausts intraprison remedies before judgment. See, *Jackson v. District of Columbia*, 254 F.3d 262 (D.C. Cir. 2001); *Neal v. Goord*, 267 F.3d 116 (2d Cir. 2001), *overruled on other grounds, Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532 (7th Cir. 1999). See, generally, *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000); *Alexander v.*

*Hawk*, 159 F.3d 1321 (11th Cir. 1998); *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997), *abrogated on other grounds, Booth v. Churner*, 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001).

[10,11] We conclude that Cole filed his § 1983 claims prematurely because he did not exhaust his state tort claims before *filing* his § 1983 action. Although we agree with the district court that Cole failed to exhaust his administrative remedies before filing his § 1983 suit, we do not agree that summary judgment was proper. In the federal system, failure to exhaust administrative remedies is usually a curable, procedural flaw that can be fixed by exhausting those remedies and then reinstating the suit. See *Neal v. Goord, supra*. See, generally, *Walker v. Maschner*, 270 F.3d 573 (8th Cir. 2001). Because state courts are required to follow federal precedent when hearing actions brought under § 1983, we remand to the district court with directions to dismiss his § 1983 claims without prejudice. See *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000). See, also, *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

### Transportation and Medical Examination Order

[12] Finally, Cole argues that his in forma pauperis status entitles him to a travel order and medical examination at State expense to secure expert testimony or evidence substantiating his claims for relief. As support, he cites Neb. Ct. R. of Discovery 35 (rev. 2001), Fed. R. Civ. P. 35, and cases interpreting those provisions. Nebraska's discovery rule 35 provides in part:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by one or more physicians, or other persons licensed or certified under the laws to engage in a health profession, or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Although this rule allows the court to order a reluctant party, or someone within the party's control, to submit to a physical or mental examination, nothing in this rule mandates that the State pay for the examination or transportation to that examination.

Here, the district court ordered DCS to arrange for Cole's medical examination and transportation once Cole advanced the cost of the examination, transportation, and security. Cole failed to advance those costs, thus no examination or transportation occurred. Although Cole argues that the trial court abused its discretion by withholding the "available State resources necessary to resist" the defendants' medical testimony, he cites no statutory authority mandating the State pay for the specific services he requests. See brief for appellant at 26. Because we conclude that the district court did not abuse its discretion by requiring Cole to pay for his independent medical examination and transportation, we affirm the district court's order of summary judgment.

## CONCLUSION

Because Cole failed to properly raise the issues on appeal, we affirm the district court's order of summary judgment on Cole's state tort claims and his § 1983 claims against the State. We also find that the court did not abuse its discretion by requiring Cole to pay the costs of the medical examination and transportation, and thus, we affirm that decision. But we remand the cause to the district court with directions to dismiss Cole's remaining § 1983 claims without prejudice.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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STATE OF NEBRASKA EX REL. DIANNE R. MUSIL, APPELLEE, V. LARRY WOODMAN ET AL., MEMBERS OF THE ADAMS COUNTY BOARD OF SUPERVISORS, APPELLEES, AND WINIFRED W. BARROWS, INTERVENOR-APPELLANT.

716 N.W.2d 32

Filed June 9, 2006. No. S-04-1420.

1. **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.

2. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
3. **Mandamus.** The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
4. **Mandamus: Proof.** In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
5. **Statutes: Municipal Corporations.** If the mode or manner by which a certain action is to be taken is prescribed in a statute or charter, that method must generally be followed.

Appeal from the District Court for Adams County: TERRI HARDER, Judge. Reversed.

Michael P. Burns, of Shoemaker, Witt & Burns, for appellant.

Charles A. Hamilton, Deputy Adams County Attorney, for appellees Larry Woodman et al.

William A. Francis, of Cunningham, Blackburn, Francis, Brock & Cunningham, for appellee Dianne R. Musil.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

MILLER-LERMAN, J.

## NATURE OF CASE

Winifred W. Barrows appeals the order of the district court for Adams County, which granted a petition for writ of mandamus filed by Diane R. Musil and directed the Adams County Board of Supervisors (Board) to amend the Adams County comprehensive plan and Adams County official zoning map to rezone certain property from agricultural to residential. The members of the Board agree with Barrow's argument urging reversal. We conclude that Musil had no clear right to the relief she sought and that, therefore, the district court erred in granting the writ of mandamus. We reverse.

## STATEMENT OF FACTS

This case involves the rezoning of approximately 20 acres of land south of and adjacent to Hansen, Nebraska, an unincorporated village in rural Adams County. Sometime prior to November 2002, Musil bought the property. At the time Musil bought the property, it was zoned for agricultural use pursuant to the Adams County comprehensive plan. Musil intends to develop the property as a residential subdivision called "Huskerland Estates," consisting of approximately 12 tracts.

After some preliminary procedural matters not relevant to our resolution of this case, Musil filed the controlling rezoning petition seeking to rezone the property from agricultural to residential. A protest was filed by owners of other land located within 300 feet of the property proposed to be rezoned.

On June 19, 2003, the "Adams County, Nebraska Area Planning and Zoning Commission" took up Musil's rezoning petition and voted unanimously to recommend to the Board that the petition be denied. On June 24, two motions were made to the Board in connection with Musil's rezoning petition. The first motion was to amend the county's comprehensive plan, and the second motion was to amend the county's zoning map. Each motion was passed by the Board by a vote of 4 to 3.

The Board again took up Musil's rezoning petition at its August 19, 2003, meeting. At that meeting, two resolutions relative to Musil's rezoning petition were read into the record: one to amend the comprehensive plan to change the property from agricultural to residential and one to amend the zoning map to change the property from agricultural to residential. The Board rejected both resolutions by a vote of 6 to 1.

On December 15, 2003, Musil filed a petition for writ of mandamus against the individual members of the Board in the district court for Adams County. The Board filed its response to the mandamus petition on January 20, 2004. On March 22, Barrows filed a petition to intervene in the mandamus action. The intervention petition was sustained. The mandamus petition hearing was held on July 21. The parties submitted a stipulation of facts that was received as an exhibit. The district court relied upon the stipulation in rendering its decision in this case.

In an order filed September 14, 2004, the district court granted Musil's request for a writ of mandamus. In its order, the district court noted that the Board, relying on the language of the Adams County zoning regulations, opposed issuance of the writ and claimed that the votes taken on June 24, 2003, were of no legal consequence because the votes were taken on "motions" and not on "resolutions." The Board's position was that the resolutions were controlling and that the resolutions had been rejected. The court noted that, in contrast, Musil claimed "the votes taken by the . . . Board at the June meeting effectively changed the classification of her land from a classification of agricultural to residential." The district court agreed with Musil's analysis and concluded in its order that "nothing . . . required that the June 24, 2003, action of the . . . Board needed to be . . . voted on again in order to become a valid and binding act." The court ordered the Board to amend its comprehensive plan and zoning map "to reflect the action taken by the [B]oard at its June 24, 2003 meeting with respect to the rezoning request by . . . Musil." Thereafter, both Barrows and the Board filed notices of appeal. Because Barrows filed her notice of appeal first, pursuant to Neb. Ct. R. of Prac. 1C (rev. 2003), Barrows is denominated the appellant.

## ASSIGNMENT OF ERROR

Barrows assigns several errors, including the dispositive claim that the district court erred in issuing the writ of mandamus because Musil failed to demonstrate that she had a clear right to the relief sought in the petition for writ of mandamus.

## STANDARD OF REVIEW

[1] 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. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

## ANALYSIS

Barrows and the Board assert on appeal that Musil had no clear right to the relief she sought in her petition for mandamus and that, therefore, the district court erred when it granted the writ and directed the Board to rezone the property at issue. In

response, Musil claims that the activity of the Board at the meeting of June 24, 2003, was sufficient to require the rezoning and that the district court did not err when it granted the writ and directed the Board to rezone. We agree with Barrows and the Board that Musil is not entitled to relief, and we conclude that the district court erred in issuing the writ of mandamus.

[2-4] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Jacob v. Bohn, ante* p. 424, 711 N.W.2d 884 (2006); *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002). The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.* In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *Id.*

Barrows and the Board direct our attention to the minutes of the Board meeting of June 24, 2003, which show that Musil's rezoning petition was considered at a public hearing concerning amending the comprehensive plan and zoning map. Relative to Musil's rezoning petition, a motion to amend passed by a 4-to-3 vote. Barrows and the Board also direct our attention to the minutes of the Board meeting of August 19, which show that resolutions to amend the comprehensive plan and zoning map were voted on and that each was rejected by a 6-to-1 vote.

Barrows and the Board claim that the motions of June 24, 2003, were of no legal consequence and that amendment of the comprehensive plan and zoning map for rezoning purposes can only be accomplished by a "resolution." In support of their argument, Barrows and the Board rely on portions of article 10 of the Adams County zoning regulations. Article 10 is entitled "Amendment," and the record shows that Musil's rezoning petition was considered a matter of amendment. Article 10, § 1003.02, provides

that amendments affecting zoning boundaries must be accomplished by "resolution/ordinance" adopted by the Board, and Barrows and the Board assert that this provision demonstrates that a "resolution," not merely a "motion," is required for rezoning. At the trial level, the foregoing argument distinguishing between a motion and a resolution was made to the district court and rejected as "semantics."

In considering the arguments of Barrows and the Board, we refer to the Nebraska statutes. Neb. Rev. Stat. § 23-114(1) (Cum. Supp. 2004) provides that with respect to zoning, "[t]he county board shall have power . . . (d) to adopt a zoning resolution, which shall have the force and effect of law . . . ." We believe this statutory provision when read in connection with § 1003.02 controls the outcome of this case, and we conclude that pursuant to § 23-114(1)(d) and § 1003.02, actions with respect to the zoning issue in this case are to be effectuated by "resolution."

This court and other authorities have previously differentiated among various actions that can be taken by inferior tribunals, corporations, boards, or persons. For example, we recently were called upon to distinguish to the extent necessary between an "ordinance" and "resolution" in connection with the participation of a city and others in the creation of an entity involving community revitalization, transportation, and drainage-flood control improvements. *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003). Compare *Read v. City of Scottsbluff*, 139 Neb. 418, 297 N.W. 669 (1941) (stating that city council may act on most administrative matters by motion, resolution, or ordinance). See, also, *California-Oregon Power Co. v. City of Medford*, 226 F. 957 (D. Or. 1915) (stating that amendment to city charter could not be brought on by "motion" as distinguished from "ordinance" or "resolution"); *State ex rel. Commt. for the Referendum of Ordinance No. 3543-00 v. White*, 90 Ohio St. 3d 212, 736 N.E.2d 873 (2000) (stating that city council could not repeal rezoning ordinance by approving "motion" to rescind as distinguished from enacting new "ordinance").

[5] It has been stated elsewhere, and we agree, that if the mode or manner by which a certain action is to be taken is prescribed in a statute or charter, that method must generally be followed. *Cumnock v. City of Little Rock*, 154 Ark. 471, 243 S.W.

57 (1922). Under § 23-114(1)(d) and art. 10, § 1003.02, the rezoning action Musil sought in the instant case was required to be taken up as a "resolution." Based on the foregoing, we agree with Barrows and the Board that the motions of June 24, 2003, were of a different character than the resolutions of August 19 and that the former were merely an expression of possible future action favorable to Musil, whereas the latter were in fact a rejection of Musil's petition for rezoning.

Contrary to Musil's assertion and the conclusion of the district court, the mere motions of June 24, 2003, were not sufficient to require that Musil's rezoning request be implemented, and, on the contrary, the resolutions rejected on August 19 denied Musil's request for rezoning. Musil did not show clearly and conclusively that she was entitled to the relief of rezoning that she sought, and the Board was not legally obligated to rezone. See, *State ex rel. Jacob v. Bohn, ante* p. 424, 711 N.W.2d 884 (2006); *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002). The district court erred in issuing the writ of mandamus directing the rezoning, and we reverse the order issuing the writ.

## CONCLUSION

Musil was not entitled to the writ of mandamus ordering the rezoning of the property, and we reverse the order of the district court granting the writ of mandamus.

REVERSED.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
DANNY R. ROBINSON, JR., APPELLANT.

715 N.W.2d 531

Filed June 9, 2006. No. S-05-326.

1. **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.
2. **Criminal Law: 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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
4. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
5. **Motions for Mistrial: Motions to Strike: Proof: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
6. **Appeal and Error.** When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.
7. **Criminal Law: Pretrial Procedure.** Upon a defendant's proper request through discovery procedure, the State must disclose information which is material to the preparation of a defense to the charge against the defendant.
8. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
9. **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 covered under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
10. **Evidence: Words and Phrases.** In place of the term "res gestae" evidence, some courts have substituted phrases such as "same transaction evidence" or "complete story principle."
11. **Criminal Law: Trial: Evidence: Proof.** Where evidence of other crimes is so blended or connected with the ones on trial so that proof of one incidentally involves the others, 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.
12. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
13. **Hearsay.** A statement is not hearsay if it is offered against a party and is the party's own statement.
14. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
15. **Words and Phrases.** The word "case" ordinarily means a civil or criminal proceeding, action, suit, or controversy at law or in equity.
16. **Criminal Law: Witnesses.** The existence of an agreement to testify by a witness under threats or promises of leniency made by the prosecutor is relevant to the credibility of such witness, and failure to bring that to the attention of the jury denies the defendant due process of law.

17. ____: ____. An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, need not be revealed to the jury.
18. **Trial: Convictions: Evidence.** Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.
19. **Constitutional Law: Witnesses: Self-Incrimination.** The state and federal Constitutions provide that no person shall be compelled to give evidence against himself or herself of an incriminating nature.
20. ____: ____: ____. The Fifth Amendment privilege against compulsory self-incrimination extends not only to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.
21. ____: ____: ____. The guarantee against compulsory self-incrimination must be accorded liberal construction in favor of the right it was intended to secure.
22. **Rules of Evidence: Juries.** In jury cases, the Nebraska rules of evidence provide that proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
23. **Trial: Prosecuting Attorneys: Judges.** The claim of a privilege is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.
24. **Trial: Courts: Witnesses: Self-Incrimination.** Absent extraordinary circumstances, trial courts should exercise their discretion to forbid parties from calling witnesses who, when called, will only invoke a privilege.
25. **Courts: Immunity.** Trial courts in Nebraska do not have inherent authority to confer immunity.
26. **Criminal Law: Courts: Witnesses: Self-Incrimination: Immunity.** In a criminal proceeding, a court's authority to grant immunity to a witness who refuses to testify on the basis of the privilege against self-incrimination comes from Neb. Rev. Stat. § 29-2011.02 (Reissue 1995).
27. **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.
28. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
29. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
30. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
31. **Witnesses: Appeal and Error.** Witness credibility is not to be reassessed on appellate review.
32. **Rules of Evidence: Hearsay.** In determining whether a statement is admissible under Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995), the

residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, materiality of the statement, probative importance of the statement, interests of justice, and whether notice of the statement's prospective use as evidence was given to an opponent.

33. **Rules of Evidence: Hearsay: Appeal and Error.** An appellate court will affirm a trial court's ruling on whether evidence is admissible under the residual hearsay exception unless the trial court has abused its discretion.
34. ____: ____: ____. While analyzing the trustworthiness factor in the context of a declaration against penal interest, particularly relevant to the determination of trustworthiness is whether the declarant was in police custody when the statement was made, whether the declarant had a motive to mitigate his or her own criminal liability, and whether the declarant made the statement in response to leading questions. These factors are similar to the factors the Nebraska Supreme Court has found relevant when considering whether a hearsay statement is sufficiently trustworthy to satisfy the residual exception to the hearsay rule.
35. **Rules of Evidence: Hearsay: Notice.** It is not enough that the adverse party is aware of the unavailable declarant's statement; the proponent of the evidence must provide notice to the adverse party of his or her intentions to use the statement in order to take advantage of the hearsay exception in Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995).
36. **Trial: Prosecuting Attorneys: Evidence.** A prosecutor's argument must be based on evidence introduced rather than on matters not in evidence.
37. **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.
38. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
39. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
40. **Sentences: Appeal and Error.** The Nebraska Supreme Court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed in part, and in part vacated and remanded with directions for resentencing.

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.

## I. NATURE OF CASE

Danny R. Robinson, Jr., was convicted of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. He appeals the convictions and the sentences imposed.

## II. SCOPE OF REVIEW

[1] 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. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[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. Aldaco, ante* p. 160, 710 N.W.2d 101 (2006).

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

[4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). 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.*

## III. FACTS

On January 13, 2001, Dupree Reed and his brother Terez Reed attended a party in Omaha, Nebraska. A confrontation occurred between two street gangs, and shots were fired. Terez died as a

result. On the way to Terez' funeral on January 22, Robinson told Courtney Nelson and James Edwards that he thought Gary Lockett had murdered Terez.

After Terez Reed's funeral, friends and relatives gathered at the home of his aunt. A few hours later, Dupree Reed left the gathering and got into a green Chevrolet Tahoe driven by Robinson. At trial, Dupree described three other people who were in the Tahoe by their gang names: Killer C (Nelson), Boomerang (Edwards), and B Dub (Antonio Witherspoon). Dupree stated that while he was riding in the Tahoe, Robinson said he knew who killed Terez. Robinson was referring to Gary Lockett, whose gang name was "Pipe." As the Tahoe passed a house located in North Omaha, Robinson said, "That's the house that they be at."

Robinson parked the Tahoe, and he and Dupree Reed got out. They approached the above-mentioned house by crossing various yards. According to Dupree, he stayed back by the alley while Robinson jumped a fence and "went on the side [of the house] by the window." Robinson was standing on something, but Dupree could not see what it was. Dupree testified that Robinson was "[r]ight up close" to the house and was looking in the window.

Dupree testified that as he and Robinson walked toward the house, he knew they were going to "shoot it up" because that is what they had said in the Tahoe earlier when they drove past the house. Dupree said that Robinson shot first and that he then started firing. Dupree had a .22-caliber handgun, and he fired six or seven shots at the house. He quit firing because his gun jammed, but Robinson was still shooting. According to Dupree, when they returned to the Tahoe, "[Robinson] said, he'd kill us if we say anything."

Edwards testified that while he waited in the Tahoe, he heard numerous shots fired. He heard different noises that did not sound like they all came from one gun. Edwards said that after he heard the gunfire and saw flashes from the guns, Dupree Reed and Robinson came running back to the Tahoe. When Robinson got into the Tahoe, Edwards saw a 9-mm Beretta gun in Robinson's hands. Edwards noticed that Robinson's weapon had fired all its rounds because it was "cocked all the way back." He said Reed had a .22-caliber "German-style looking gun."

Edwards claimed to be familiar with guns and to have fired them before. Edwards told Robinson that he was not happy with Robinson, and Robinson said, "Don't tell nobody." Edwards testified: "He, like, threatened to kill people or whatever."

Nelson testified that he met Robinson in 1993 and that at that time, Robinson claimed to be affiliated with the "Hilltop Crips" gang. Nelson said he left the funeral reception for Terez Reed in the green Tahoe driven by Robinson. He saw Robinson with a 9-mm handgun, and he saw Dupree Reed with a .22-caliber automatic handgun.

Daniel Lockett was the victim of the above-described shooting. As he was bending down to put on his shoes in the living room of his mother's house in North Omaha, he was shot. Lockett's sister, Teresa Mountain, who was also in the living room, heard at least 15 or 20 shots fired. The gunfire which came through the side window in the front of the house sounded different than the shots she heard in the back. She heard the shots in the front before she heard shots from the back. After the shooting, Mountain shook Daniel, but he did not respond. According to Mountain, Gary Lockett was not in the house at the time of the shooting.

Daniel Lockett died as a result of the incident described above. He sustained four gunshot wounds: one to the right shoulder, two to the right side of his chest, and one to the right forearm. One of the bullets passed through the upper lobe of Lockett's right lung and then through his heart.

Omaha police observed nine bullet holes in the window in the front of the house where the Lockett shooting occurred. Shell casings from a 9-mm handgun and bullet fragments found at the scene were determined to have been fired by the same 9-mm weapon. The bullets retrieved from Lockett's body were most consistent with having been fired from a 9-mm handgun. The police suspected that Daniel Lockett's murder could have been in retaliation for the murder of Terez Reed.

Robinson was subsequently charged with first degree murder in the death of Daniel Lockett, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. Following a jury trial, Robinson was convicted and sentenced to life imprisonment without parole on the murder charge and two consecutive sentences of 5 to 10 years' imprisonment on the use

and possession charges. Other facts will be presented as they relate to the individual assignments of error.

## IV. ASSIGNMENTS OF ERROR

Robinson claims, summarized and renumbered, that the trial court erred when it (1) denied Robinson's motion for mistrial; (2) allowed the State to introduce evidence of Robinson's going to Houston, Texas, and destroying the Tahoe; (3) denied Robinson's motion for further discovery and allowed Courtney Nelson, a jailhouse informer, to testify over Robinson's objection; (4) precluded evidence of a deal between James Edwards, a prosecution witness, and the government, as well as evidence that Edwards was with Gary Lockett when Gary Lockett was shot in an incident not related to the case at bar; (5) precluded Robinson from presenting the testimony of Gary Lockett and Terrell Reed; (6) excluded evidence concerning the alibi of Terrell Reed and Keelan Washington; (7) precluded Robinson from presenting the testimony of Victor Hill, an unavailable witness; (8) violated Robinson's constitutional rights of due process, confrontation, and compulsory process by preventing him from presenting a complete defense; and (9) overruled Robinson's objection during the State's closing argument resulting in facts not in evidence being presented to the jury. Robinson also claims the accumulation of errors requires that the convictions be reversed and the cause remanded for a new trial.

## V. ANALYSIS

### 1. Denied Motion for Mistrial

Robinson claims reversible error in the denial of his motion for mistrial. 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. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004). Robinson's theory of the case was that Dupree and Terrell Reed murdered Daniel Lockett and that Keelan Washington had driven Dupree and Terrell Reed to and from the house where Lockett was shot. The State's theory was that Robinson and Dupree Reed shot into the house where they believed Gary Lockett was located, in retaliation for Terez Reed's death. Gary Lockett was a member of the "29th

Street Bloods" gang and was a suspect in the shooting death of Terez Reed.

At the commencement of the present trial, the State told the jury that it would hear about gangs and the gangster lifestyle, including acts of retaliation. The State claimed the evidence would show that Robinson was a member of the "Hilltop Gangster Crips" in 2001 and that he planned to kill Gary Lockett in retaliation for the death of Terez Reed. The State claimed that the shooting occurred because Robinson believed that Gary Lockett, a rival gang member, had killed Terez Reed.

In its opening statement, the defense told the jury there was no question but that Daniel Lockett's death was the result of previous actions by other individuals. The defense claimed that Robinson was not involved in this murder and that the State's case was based entirely upon the testimony of jailhouse informers, or "snitches," whose testimony was false.

(a) First Trial

In June 2004, Robinson was brought to trial, but that trial ended in a mistrial. In the first trial, Bruce Ferrell of the Omaha Police Department testified as to the gang membership of Dupree, Terrell, and Terez Reed; Gary Lockett; and others. On cross-examination, Ferrell stated that as of the time of the first trial, Robinson did not have a gang file with the Omaha Police Department. However, based upon his investigation, Ferrell believed that Robinson fit 3 of the 12 criteria evidencing gang membership. Ferrell based this opinion upon the documents he saw before the first trial, including field observation cards, and the fact that Robinson associated with known gang members and was involved in the gang-related shooting of Daniel Lockett and another gang-related shooting in 2002. Ferrell had personally investigated the shooting involving Robinson in 2002.

(b) Present Trial

Before Ferrell testified in the present trial, defense counsel moved to preclude the State from presenting evidence of Robinson's background involving gang crimes. The defense claimed that Robinson's involvement in a gang-related shooting in 2002 was not relevant to whether he was in a gang in 2001. Counsel requested the trial court to order the State to tell

its witnesses that in response to questions of how they determined Robinson was in a gang in 2001, the witnesses were not to make any statements about the shooting in 2002. The court sustained this request.

In the present trial, Ferrell testified that he was trained and specialized in gang identification, recognition, and investigation, and other law enforcement activities related to gangs. He stated that gangs existed in the Omaha area in 2001 and that he was familiar with such gangs. In the northeast precinct, the vast majority of gang members were Bloods and Crips. These were street gangs based out of Los Angeles, California, that migrated to Omaha in the late 1980's, and they were antagonistic toward each other. The gangs had begun including in their gang names the names of the streets or the areas in which they lived. In 2001, the main Crip gangs in Omaha were "the Pleasantview/Hilltop group, Murdertown, 40th Avenue, 37th Street, 33rd Street, [and] Small Street." At that time, the Blood gangs included the 29th Street Bloods.

Ferrell testified that the Omaha police used a "12-point criteria," modeled after systems in Denver, Colorado, and Kansas City, Missouri, to identify and track individuals suspected of being gang members. Part of this criteria included whether the persons associated with other known gang members, whether they admitted to being gang members, and whether they were involved in gang-related crimes. The Omaha police had documented Terrell Reed as a suspected member of the Pleasantview/Hilltop Crips. Gary Lockett was documented as being a member of the 29th Street Bloods. Courtney Nelson was documented as being a Murdertown Crip, as was James Edwards.

On cross-examination, Ferrell was asked about his testimony at the first trial regarding whether police had a gang file on Robinson. Ferrell had testified that at that time, no such file existed but that there were "field cards" concerning Robinson's gang activity which were generated in 1998. Ferrell also had stated that Gary Lockett was a suspect in the death of Terez Reed and that Lockett's street name was "Pipe."

On redirect, the State asked Ferrell whether the fact that the police had no gang file on Robinson meant that he had not met the criteria as a suspected gang member in 2001. Ferrell said that

Robinson had met three of the criteria: He associated with known gang members, he indicated to law enforcement that he was a gang member, and he was involved in a gang-related crime.

Defense counsel objected to Ferrell's response concerning a gang-related crime, moved to strike, and moved for a mistrial. The trial court sustained the objection but overruled the motion for mistrial. The jury was admonished to disregard the portion of Ferrell's testimony regarding Robinson's involvement in a crime. On further redirect, Ferrell stated that in 2001, the police had not documented Robinson as a gang member, but he fit the gang criteria and had admitted being a "Hilltop Gangster."

Following this redirect, defense counsel offered evidence in support of the motion for mistrial. Outside the presence of the jury, Ferrell testified that at the first trial, he stated that Robinson fit the gang-related-crime criteria because of two offenses: the one with which he was currently charged and a gang-related shooting in 2002. At the time of the first trial, those were the only two gang-related crimes involving Robinson that the police had recorded in their gang files.

Ferrell then stated that his present testimony related to a gang-related crime for which Robinson was sent to prison in 1997. He said he did not know about the 1997 crime when he testified in June 2004. Prior to the first trial, Ferrell had not checked the records of the Department of Correctional Services concerning Robinson's prison record. About 2 weeks before the present trial, Ferrell retrieved Robinson's penitentiary file, which showed that in 1997, Robinson had committed a robbery with two other suspected gang members. Ferrell had not told the prosecutor about the 1997 robbery. He believed the 1997 robbery was a gang-related crime because an Omaha city ordinance required that if a gang member was a victim, suspect, or witness to a crime in which gang members were involved, it must be classified as a gang-related incident.

Following this evidentiary hearing, Robinson's counsel moved to include the State's failure to disclose the information regarding the 1997 robbery as a part of the motion for mistrial.

[5] Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such

material. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *Id.*

Robinson argues that jurors may have been improperly persuaded that he had a history of being involved not only in gang-related crimes, but also violent gang-related crimes such as driveby shootings. Robinson claims that Ferrell's testimony showed Robinson's bad character as a person who had committed gang-related crimes in the past and that evidence of other crimes is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. See Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995).

The trial court instructed the jury to disregard Ferrell's statement concerning Robinson's "involvement in a crime." Thus, that evidence was excluded. The issue is whether Ferrell's statement was so damaging that the court's admonishment could not cure the prejudicial effect.

A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial, especially when, as in this case, an objection or motion to strike the improper material was sustained and the jury was admonished to disregard such material. See *State v. Lotter, supra*. Robinson must prove the alleged error actually prejudiced him. See *id.*

In *Lotter*, despite an order prohibiting discussion of the defendant's criminal background, the prosecution asked the defendant's girl friend why she had gone to Missouri. She answered she had gone to get money with which to bail the defendant (who had been incarcerated on an unrelated charge) " 'out of jail.' " 255 Neb. at 494, 586 N.W.2d at 621. Defense counsel objected, moved for mistrial, and asked the court to admonish the jury to disregard the question and response. As in the present case, the court admonished the jury to disregard the statement, but overruled the motion for mistrial. We concluded no actual prejudice had resulted.

This court has not defined the term "actual prejudice" in the context of the denial of a motion for mistrial. The word "actual" means "[e]xisting in fact; real." Black's Law Dictionary 38 (8th

ed. 2004). We have characterized "prejudice," in the context of alleged ineffective assistance of counsel, as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

[6] In the context of erroneous jury instructions in a criminal case, the U.S. Supreme Court has stated that a defendant must show that he was actually prejudiced; that is, he "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (Emphasis omitted.) *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case. See, *U.S. v. Wheeler*, 322 F.3d 823 (5th Cir. 2003); *Hester v. BIC Corp.*, 225 F.3d 178 (2d Cir. 2000); *State v. Wildenberg*, 573 N.W.2d 692 (Minn. 1998); *State v. Lyons*, 951 S.W.2d 584 (Mo. 1997).

The record does not show any misconduct by the prosecution with regard to Ferrell's statement about Robinson's involvement in a gang-related crime. Nothing indicates that the prosecutor's questioning of Ferrell was improper or that the prosecutor was responsible for Ferrell's response. Before the first trial, Ferrell had neither obtained nor seen the information from the Department of Correctional Services upon which he concluded that Robinson's 1997 robbery conviction was gang related. Ferrell did not inform the prosecution of this information prior to the second trial.

Robinson's motion in limine was intended to preclude testimony of his alleged involvement in a gang-related shooting in 2002, which Robinson claimed had no bearing on whether he was in a gang in 2001. Robinson requested an order prohibiting the State's witnesses from making any statements about the fact that he was involved in a shooting in 2002.

The jury was not told the nature of the gang-related crime that Ferrell mentioned. Ferrell did not describe the 1997 robbery

or the 2002 shooting to the jury. Furthermore, Ferrell's statement was not the only mention of gang-related crime at the trial. Evidence showed that the crimes for which Robinson was charged were gang related. Throughout the trial, the jury heard evidence about gangs and gang-related activities and crimes, much of which was admitted without objection.

In light of the entire record, we conclude that Ferrell's statement did not prejudice Robinson to such extent as to deny him a fair trial. Other evidence pointed to Robinson's guilt in committing the crimes for which he was charged. We cannot say that Ferrell's statement, which the trial court ordered the jury to disregard, prevented Robinson from receiving a fair trial. The damaging effect of Ferrell's statement was removed by the court's proper admonition to the jury. Under these circumstances, the court did not abuse its discretion in refusing to declare a mistrial.

Robinson also argues that the trial court should have granted his motion for mistrial because the State allegedly did not comply with the rules of discovery. He claims he was not provided with the information Ferrell had retrieved from the Department of Correctional Services concerning Robinson's 1997 robbery conviction.

[7] Upon a defendant's proper request through discovery procedure, the State must disclose information which is material to the preparation of a defense to the charge against the defendant. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). In order for the defendant to receive a fair trial, requested and material information must be disclosed to the defendant. *Id.*

[8] Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *Id.* The trial court's discovery order is not included in the record before us. Assuming, without deciding, that the failure to disclose the 1997 information violated a discovery order, we conclude Robinson has not shown that a mistrial was necessary to avoid a substantial miscarriage of justice resulting from the alleged discovery violation.

The trial court had broad discretion to enter an order as it deemed just under the circumstances. See, Neb. Rev. Stat. § 29-1919 (Reissue 1995); *State v. Surber*, 221 Neb. 714, 380 N.W.2d 293 (1986); *State v. Vicars*, 207 Neb. 325, 299 N.W.2d

421 (1980). The court excluded evidence of Robinson's "involvement in a crime" by instructing the jury to disregard that testimony. An evidentiary hearing was then held on Robinson's motion for mistrial. Specific testimony concerning the 1997 crime was elicited only during the hearing on the motion for mistrial, outside the jury's presence. Clearly, Robinson would have known about the 1997 robbery for which he was convicted and about his gang affiliation.

While we do not condone Ferrell's failure to furnish the information, Robinson has not shown that the outcome of the trial was altered by belated disclosure of the facts surrounding his 1997 conviction. The trial court did not abuse its discretion in denying Robinson's motion for mistrial based on the State's alleged discovery violation.

### 2. Alleged Rule 404 Evidence

At trial, the State presented evidence that the day after Daniel Lockett was killed, Robinson told Courtney Nelson he was going to "Kansas or Texas" to "get rid of the truck." Nelson testified that Robinson stated he did not want to hear anybody talking about what he had done the night before and that he would kill anyone who talked. Except for the day after the murder, Nelson had not since seen Robinson in possession of the Tahoe.

The State's evidence established that on January 29, 2001, a green Chevrolet Tahoe registered in Omaha to Robinson's grandmother was found destroyed by fire in a vacant field in Houston. Further evidence was presented that on January 30, a police officer saw Robinson in Kansas City, exiting a bus which had originated in Houston. Robinson had a bus ticket purchased in Houston, and he told the officer that he was traveling to Omaha.

Robinson moved to preclude the testimony of the Kansas City police officer and the evidence regarding the Tahoe. He argues that such evidence was rule 404 evidence of other crimes, wrongs, or acts, and he claims the trial court committed prejudicial error by allowing the State to present this evidence without a hearing as required by rule 404.

The State claims this evidence was intrinsic to the charged conduct and was offered to explain the circumstances of the crimes. It argues that rule 404 was inapplicable and that the evidence was properly admitted without a rule 404 hearing. The trial

court concluded that the destruction of the Tahoe was not a separate event, but part of the original offense, and showed that Robinson had a consciousness of guilt.

(a) Evidence Intrinsic to Charged Crime

[9] Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not covered under rule 404(2). *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004); *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002). In *Wisinski*, the defendant was charged with burglary. The State presented evidence that

> "approximately ten days after the reported burglary, [the defendant] was apprehended by Omaha police in a [stolen] 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 [was] the name of victim's business."

*State v. Wisinski*, 268 Neb. at 783, 688 N.W.2d at 591.

On appeal, the defendant asserted that information about the stolen van in which he was apprehended was evidence of other crimes subject to rule 404. We concluded that the rule was inapplicable because such information was integral to the State's case. Evaluating the evidence in question, we found that it was

> foundational for establishing that [the defendant] was in possession of the property he was charged with having stolen and that [the vehicle owner'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.

*State v. Wisinski*, 268 Neb. at 785-86, 688 N.W.2d at 592.

[10,11] In the present case, the trial court found rule 404 inapplicable to evidence that Robinson had gone to Houston to destroy the Tahoe, because such information was part of the "res gestae" of the charged conduct. In place of the term "res gestae" evidence, "[s]ome courts have substituted phrases such as 'same transaction evidence' or ' "complete story" principle[.]' " *U.S. v. Forcelle*, 86 F.3d 838, 841 n.1 (8th Cir. 1996). Such evidence is often referred to as "intrinsic evidence." Evidence in this category

"is admissible for the purpose of providing the context in which the crime occurred." *Id.* at 841. This court has explained:

> " ' "[W]here evidence of other crimes is 'so blended or connected, with the one[s] on trial [so] 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 . . . . As such, prior conduct that forms the factual setting of the crime is not rendered inadmissible by rule 404. . . . 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. . . . 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. . . ." ' "

(Citations omitted.) *State v. Wisinski*, 268 Neb. 778, 785, 688 N.W.2d 586, 592 (2004), quoting *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).

Robinson argues that the events in question were not part of the same offense because the "alleged act of burning the truck occurred a week after the homicide and obviously does not include any element of the murder charge." See brief for appellant at 17. In *Wisinski*, however, we applied the above-quoted reasoning regarding *prior* conduct to events which occurred 10 days *after* the charged conduct, finding those events an integral part of the crime. Consequently, the time at which the conduct in question occurs, although a relevant consideration, is not the determining factor for finding such conduct intrinsic to the charged crime. What matters is whether the evidence is so closely intertwined with the charged crime that it completes the story or provides a total picture of that crime. See *State v. Wisinski, supra*.

We conclude that evidence of Robinson's returning from Houston and of the Tahoe's being burned in a field in Houston was intrinsic to the crimes for which he was charged. Testimony was given at trial that Robinson regularly drove a green Chevrolet Tahoe and that he had driven the Tahoe to the scene of the crime on January 22, 2001. The State presented the evidence in question "to show that Robinson desired to get rid of evidence which he deemed may be used as evidence against him." See brief for appellee at 16. As such, it was integral to the charged conduct, and the State was entitled to present a coherent picture of the facts surrounding the crimes charged. The evidence supported Robinson's statement to Nelson that he was going to Texas to "get rid of the truck." Accordingly, the trial court did not err in admitting this evidence without first conducting a hearing pursuant to rule 404.

(b) Evidence Showing Consciousness of Guilt

We have concluded that the trial court did not err in admitting this evidence without conducting a hearing pursuant to rule 404. Therefore, we decline to address Robinson's arguments concerning the evidence as showing consciousness of guilt.

(c) Alleged Hearsay Evidence

Robinson argues that if a rule 404 hearing had been held, the State would have found it difficult to prove Robinson went to Houston. He claims that the police officer's testimony about the bus ticket was hearsay. The bus ticket was not presented as evidence.

[12,13] Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). If we assume that the trial court should have excluded the information about the bus ticket as inadmissible hearsay, such error was harmless because the State presented other evidence to show that Robinson had gone to Houston. Courtney Nelson testified that the day after Daniel Lockett was killed, Robinson told Nelson he planned to go to "Kansas or Texas," where he intended to "get rid of the truck." A Houston police officer testified that a green Chevrolet Tahoe registered in

Omaha to Robinson's grandmother was found destroyed by fire in a vacant field in Houston. The Kansas City police officer testified that on January 30, 2001, he saw Robinson exiting a bus arriving from Houston. Robinson identified himself to the officer and told the officer he was traveling to Omaha. Robinson's statements were admissible as nonhearsay under Neb. Evid. R. 801(4)(b), Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1995). A statement is not hearsay if it is offered against a party and is the party's own statement. *State v. Sims*, 244 Neb. 771, 509 N.W.2d 6 (1993).

### 3. Motion for Further Discovery

Before trial, pursuant to Neb. Rev. Stat. § 29-1929 (Cum. Supp. 2004), the State gave notice to Robinson that it intended to call Courtney Nelson, a jailhouse informer, as a witness. Among other requirements, before testimony of a jailhouse informer may be admitted at trial, the State must disclose

> [a]ll cases known to the state in which the jailhouse informer testified or offered statements against a person but was not called as a witness, whether or not the statements were admitted as evidence in the case, and whether the jailhouse informer received any deal, promise, inducement, or benefit in exchange for or subsequent to such testimony or statement.

See § 29-1929(4).

Upon a defendant's proper request through discovery procedure, the State must disclose information which is material to the preparation of a defense to the charge against the defendant. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). The prosecution must further disclose all material exculpatory evidence, whether or not such information was requested. See *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

In addition to giving notice that it planned to call Nelson, the State provided Robinson with a copy of a police report dated January 18, 2004, which contained information Nelson had volunteered in other matters during a "proffer interview" on September 17, 2003. The copy given to Robinson contained numerous redactions of the identities of individuals named by Nelson during the interview. Robinson moved the trial court to

either order the State to provide the entire report without redactions or preclude Nelson from testifying at trial.

Robinson asserts that under § 29-1929(4), "cases" should include any instances in which a jailhouse informer has offered statements against another person. See brief for appellant at 21. He emphasizes that a defendant is "more likely interested in investigating incidents where information given by the informant proved to be unreliable or an outright lie." *Id.*

The State argued that it had complied with § 29-1929, because it had redacted only the names of those individuals who were the subjects of then ongoing police investigations and had not previously been indicted. The State contended that to reveal such names would not only disrupt investigations by the police department, but would create safety risks for parties involved.

The trial court reviewed the redacted and unredacted versions of the police report, determined that the State had complied with § 29-1929, and overruled Robinson's motion for additional discovery. It concluded that the State was not required to disclose the redacted names of individuals who had not been charged with criminal offenses because § 29-1929(4) required the State to disclose only all known "cases" in which the informer testified or offered statements against a person.

[14] This court has not previously interpreted § 29-1929. Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005). Statutory language is to be given its plain and ordinary meaning. *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005).

[15] The word "case" ordinarily means "[a] civil or criminal proceeding, action, suit, or controversy at law or in equity." Black's Law Dictionary 228 (8th ed. 2004). The plain language of § 29-1929(4) requires the prosecution to disclose all instances in which a jailhouse informer has made statements against a person involved in a "case," i.e., when a legal charge has been filed against that person.

We conclude the trial court correctly determined that the State was obligated to disclose only those instances in which the information offered related to a legal charge that had been filed against

a person. Under the plain meaning of "cases" in § 29-1929(4), the court did not err in denying Robinson's request for further discovery or in allowing Nelson to testify.

### 4. Evidence of Alleged Deal Between Prosecution Witness and Government and Evidence Concerning Subsequent Shooting of Gary Lockett

The State moved to prevent Robinson from calling James Edwards to testify about proffer statements he gave to the police regarding his involvement in three bank robberies. It also moved to preclude evidence that Edwards had been with Gary Lockett (Daniel Lockett's nephew) during a gang-related incident in which Gary Lockett was shot. Robinson wanted to establish that Edwards had a close relationship with Gary Lockett. Both situations occurred over 3 years after the homicide of Daniel Lockett. The trial court sustained the State's motions in limine as to the above-mentioned evidence.

#### (a) Alleged Deal Involving Edwards

Robinson wanted to establish that the State had given Edwards immunity regarding the bank robberies. The trial court determined that evidence of the bank robberies was irrelevant.

[16,17] The existence of an agreement to testify by a witness under threats or promises of leniency made by the prosecutor is relevant to the credibility of such witness, and failure to bring that to the attention of the jury denies the defendant due process of law. *State v. Rice*, 214 Neb. 518, 335 N.W.2d 269 (1983). An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, need not be revealed to the jury. *Id.*

In *Rice*, the defendant claimed the State had failed to disclose alleged promises of leniency or threats made to induce a witness to testify against the defendant. The record, however, was devoid of any proof of the existence of such an agreement. The witness indicated he wished to testify because he felt things would go easier for him if he did. However, the witness repeatedly denied striking a deal with the prosecution. This court determined that the witness "simply had an expectation of leniency, and, as such, absent evidence of any expressed or implied

promise, it need not be revealed to the jury." *Id.* at 523, 335 N.W.2d at 273.

In an unrelated federal case, Edwards had entered a "proffer agreement" to obtain leniency with regard to bank robbery and drug charges in exchange for his testimony in that case. During the present trial, Robinson's counsel was permitted to separately depose Edwards. Edwards repeatedly denied being promised any deal by the State in exchange for his testimony at Robinson's trial. Regarding the existence of any such deal, Edwards said, "I just know I wasn't promised nothing."

Absent evidence of an express or implied agreement, any impression or expectation of leniency on the part of Edwards did not need to be presented to the jury. See *State v. Rice, supra*. Therefore, the trial court did not abuse its discretion when it sustained the State's motion in limine.

(b) Details Surrounding Shooting of Gary Lockett

Robinson further argues that he should have been permitted to present evidence of a driveby shooting in March 2004 in which Gary Lockett was shot while in the company of Edwards. Robinson claims that this evidence showed a close relationship between Edwards and Gary Lockett, which the jury should have considered in order to weigh Edwards' credibility.

[18] Robinson argues that "the close relationship between Edwards and [Gary] Lockett was only revealed at [Edwards'] deposition taken in mid-trial." Brief for appellant at 23. However, the record reveals that Edwards testified on direct examination that he "grew up" with Gary Lockett and that Gary Lockett was a "friend" at the time of Daniel Lockett's homicide. On cross-examination, Edwards stated that he had known Gary Lockett "[s]ince grade school." Thus, even assuming (without deciding) that the trial court erred in precluding evidence that Edwards had been with Gary Lockett when he was shot, such error was harmless. The evidence would merely be cumulative. See *State v. McLemore*, 261 Neb. 452, 467, 623 N.W.2d 315, 328 (2001) ("[w]here the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt").

### 5. Assertion of Fifth Amendment Privilege by Gary Lockett and Terrell Reed

At trial, Robinson wanted the jury to know that he had tried to call Gary Lockett and Terrell Reed as witnesses. The State had endorsed them as witnesses and then had indicated they would not be called by the State. Their attorneys advised all parties that if called, Lockett and Reed would invoke their Fifth Amendment privilege against self-incrimination. The State moved in limine to prevent either witness from appearing before the jury because each planned to assert the Fifth Amendment privilege to all questions asked by the defense. Robinson argued that he wanted to place Lockett and Reed on the stand not to argue any inferences based on their silence, but merely to show the jury that Robinson had called them, because their names had been "floating around the whole trial."

Robinson requested a hearing outside the jury's presence for the trial court to determine if testimony the defense intended to elicit from Gary Lockett and Terrell Reed was covered by the Fifth Amendment privilege against self-incrimination. In chambers, defense counsel informed Lockett of the questions he would be asked if he took the stand. Lockett replied that he would refuse to answer such questions on Fifth Amendment grounds. By affidavit, Reed stated that he would also invoke his Fifth Amendment right and refuse to answer Robinson's questions. The court ruled that the Fifth Amendment covered the information Robinson desired to elicit from Lockett and Reed and refused to compel them to answer because their answers had the potential to be incriminating. The court also denied Robinson's request to order the State to grant use immunity to Lockett and Reed.

Robinson claims the trial court erred in failing to make a proper inquiry to determine whether the witnesses' assertion of their Fifth Amendment privilege was valid, in refusing to allow the presentation of those assertions to the jury, and in refusing to require a grant of use immunity for the witnesses.

#### (a) Trial Court's Role in Determining Sufficiency of Fifth Amendment Privilege Against Self-Incrimination

[19,20] The state and federal Constitutions provide that no person shall be compelled to give evidence against himself or herself of an incriminating nature. See *State v. Bittner*, 188

Neb. 298, 196 N.W.2d 186 (1972). The Fifth Amendment privilege against compulsory self-incrimination extends not only to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. *Id.* The inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination. *Id.*

Robinson claims the trial court abdicated its role in deciding the validity of the Fifth Amendment invocation by authorizing a "blanket assertion" of the Fifth Amendment by Gary Lockett and by Terrell Reed. See brief for appellant at 27.

In *Bittner*, this court affirmed the trial court's decision to restrict the defendant's right to cross-examine an accomplice on the basis of the Fifth Amendment privilege against self-incrimination. We explained the trial court's role in determining the sufficiency of the privilege as follows:

> "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.' "

*State v. Bittner*, 188 Neb. at 300, 196 N.W.2d at 188, quoting *Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

[21] In *Bittner*, we reviewed the record and questioned whether any "possible prejudice appear[ed] [against the witness] except in regard to the question of whether the witness was a prostitute," which "[a]lthough generally forbidden by city ordinance," did not "constitute a crime under state or federal law." 188 Neb. at 299-300, 196 N.W.2d at 188. Although the record did not "throw any light on the situation of the witness in this respect," we recognized that "the guarantee against compulsory self-incrimination 'must be accorded liberal construction in favor

of the right it was intended to secure.' " *Id.* at 300, 196 N.W.2d at 188, quoting *Hoffman v. United States, supra*. Thus, we concluded that the trial court had not abused its discretion because "[i]t [was] entirely possible that such an admission could [have] constitute[d] a link in a chain of evidence required to convict [the witness] of some other offense." *State v. Bittner*, 188 Neb. at 300, 196 N.W.2d at 188.

In the present case, the trial court was required, in the exercise of sound discretion, to determine whether the witnesses' claims of privilege were justifiable. See *id.* The record indicates that the court did so. Outside the presence of the jury, the court conducted a lengthy hearing to determine the privilege issue. The court heard the matters about which defense counsel intended to question Gary Lockett and Terrell Reed. The witnesses—through personal appearance, affidavit, and counsel—asserted that they would invoke their Fifth Amendment right to be silent if questioned about such matters before the jury. After considering the arguments from all involved parties, the witnesses' intentions, and the relevant case law, the court determined that the information Robinson desired to elicit from the witnesses was covered by the Fifth Amendment.

We cannot say the trial court abused its discretion in determining that the witnesses' claims of privilege were justifiable.

(b) Invocation of Fifth Amendment in Presence of Jury

Robinson further claims the trial court erred because it should have required Gary Lockett and Terrell Reed to assert their Fifth Amendment privilege in open court. At trial, Robinson objected to the court's refusal to require the witnesses to assert their privilege before the jury because he would be denied the opportunity to show that he had subpoenaed witnesses whose names had been "floating around the whole trial." He stated that he did not desire to place the witnesses on the stand so he could "argue to the jury . . . inferences based on the silence of the individual invoking the Fifth Amendment."

On appeal, however, Robinson contradicts his statement at trial by arguing that he was "deprived of having the jury assess the logical inferences to be drawn from Terrell Reed's assertion of the privilege." Brief for appellant at 28. A defendant may not on

appeal assert a different ground for his objection to the admission or exclusion of evidence than was offered to the trier of fact. See *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

[22,23] Notwithstanding Robinson's present argument, we conclude that the trial court did not abuse its discretion in refusing to make the witnesses assert their Fifth Amendment privilege in front of the jury. In jury cases, the Nebraska rules of evidence provide that "proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury." Neb. Evid. R. 513, Neb. Rev. Stat. § 27-513 (Reissue 1995). The claim of a privilege is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom. *Id.*

This court has not previously addressed the question of whether a trial court may exercise discretion to allow the defendant to call witnesses to the stand whom the court knows will invoke their Fifth Amendment privilege against self-incrimination. Robinson encourages us to follow the approach suggested in *Gray v. State*, 368 Md. 529, 796 A.2d 697 (2002). The State encourages us to follow the approach of *U.S. v. Reyes*, 362 F.3d 536 (8th Cir. 2004). Although the facts of these cases differ, their conclusions are consistent. They both conclude essentially the following: Although a trial court has some discretion in whether to allow a defendant to call witnesses who will merely invoke their privilege against self-incrimination, such discretion should be exercised only in limited circumstances.

In *Gray*, the defense theory was that another person had committed the crime. The man in question had been with the victim before she was killed, and he had told someone that he had killed the victim. Outside the jury's presence, the court determined that the man the defendant had subpoenaed could properly invoke his Fifth Amendment privilege. The defendant asked the court to make the witness assert his privilege in front of the jury, but the court refused, believing it had no discretion to do so.

On appeal, the Maryland Court of Appeals concluded that a trial court has some discretion to consider permitting a defendant in a criminal case to call a witness to the stand to invoke his Fifth Amendment privilege in the presence of the jury if the trial court first determines that sufficient believable evidence has

been presented to make the matter relevant, i.e., evidence of the possible guilt of such witness. *Gray v. State, supra*. Sufficient evidence must be presented so that any trier of fact might possibly and reasonably believe that the proposed witness might have committed the crime instead of the defendant. *Id*. Because the appellate court reversed on other grounds, it did not determine whether the trial court had actually abused its discretion in refusing to compel the witness to assert his Fifth Amendment privilege in front of the jury.

In *Reyes*, a participant in a drug ring had made statements to undercover agents linking the defendants to the drug conspiracy. The defendants called the participant as a witness, but the witness informed the trial court he would invoke the Fifth Amendment as to all questions. The court held a hearing, inquired of the defendants what questions they planned to ask, determined that the witness' assertion of privilege was valid, and prohibited the defendants from calling the witness to the stand.

The Eighth Circuit concluded that the trial court had not abused its discretion when it refused to require the witness to assert his privilege in the jury's presence. The Eighth Circuit reasoned as follows:

> Very rarely will [the evidence] rules allow a party to argue inferences from a witness's privilege invocation. *See United States v. Doddington*, 822 F.2d 818, 822 (8th Cir. 1987) ("[A] defendant does not have the right to call a witness to the stand simply to force invocation of the right against self-incrimination in the presence of the jury.") (citing *United States v. Lyons*, 703 F.2d 815, 818 (5th Cir.1983)). A third party's privilege invocation is not often relevant. And even if the party seeking to argue the inference concocts a reason that the silence may be relevant, the danger of unfair prejudice usually outweighs the probative value because there is no way the opponent can test the meaning attributed to the invocation. [*U.S. v.*] *Deutsch*, 987 F.2d [878,] 884 [(2d Cir. 1993)]. On cross-examination, a witness who is asked why she invoked the privilege will undoubtedly respond with another privilege assertion. Also, due to the courtroom drama an invocation creates, the jury is likely to place far too much emphasis upon an

> ambiguous invocation. *Id.* Thus, absent extraordinary circumstances, trial courts should exercise their discretion to forbid parties from calling witnesses who, when called, will only invoke a privilege.

*U.S. v. Reyes*, 362 F.3d 536, 542 (8th Cir. 2004).

[24] Robinson argues that the trial court erred with regard to Terrell Reed's statement because it thought it had no discretion to require Reed to assert his privilege in open court and, therefore, the court never engaged in an analysis of the relevance of Reed's asserting the Fifth Amendment before the jury. We conclude that absent extraordinary circumstances, trial courts should exercise their discretion to forbid parties from calling witnesses who, when called, will only invoke a privilege. The record does not show such extraordinary circumstances which might have given the trial court discretion to permit Robinson to call the witnesses just for the purpose of having them invoke their Fifth Amendment privilege. See *U.S. v. Reyes, supra.*

In the present case, Robinson has not presented sufficient believable evidence of the possible guilt of Terrell Reed in the shooting of Daniel Lockett. See *Gray v. State*, 368 Md. 529, 796 A.2d 697 (2002). Robinson wanted to present statements made by Victor Hill to a police officer that Terrell Reed had told Hill he was planning to retaliate for the murder of his brother and that Reed was carrying a gun when he made the statement. Robinson claimed that Hill had refused to testify, and therefore, Robinson wanted the police officer to testify as to Hill's statements. However, that evidence was ruled inadmissible as hearsay. Robinson also wanted to question Reed concerning his whereabouts at the time of Daniel Lockett's shooting, but Reed indicated he would refuse to answer such questions on Fifth Amendment grounds.

The trial court did not abuse its discretion in refusing to compel Gary Lockett and Terrell Reed to assert their Fifth Amendment privilege in front of the jury.

(c) Request to Compel State to Grant Immunity

When the trial court refused to require Gary Lockett and Terrell Reed to testify, Robinson asked the court to order the State to grant immunity to Lockett and Reed. The State objected

that granting immunity to these witnesses would jeopardize ongoing investigations. The court denied Robinson's request.

[25,26] Trial courts in Nebraska do not have inherent authority to confer immunity. In a criminal proceeding, a court's authority to grant immunity to a witness who refuses to testify on the basis of the privilege against self-incrimination comes from Neb. Rev. Stat. § 29-2011.02 (Reissue 1995). It provides that

> the court, on motion of the county attorney [or] other prosecuting attorney . . . may order the witness to testify . . . . [N]o testimony or . . . any information directly or indirectly derived from such testimony . . . may be used against the witness in any criminal case except in a prosecution for perjury, giving a false statement, or failing to comply with the order of the court.

*Id*. This statute does not authorize a grant of immunity to a witness except upon the motion of the prosecuting attorney. *State v. Starks*, 229 Neb. 482, 427 N.W.2d 297 (1988) (affirming trial court's refusal to grant immunity to defense witness after witness invoked Fifth Amendment privilege).

Robinson urges us to adopt the approach taken in *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). The Third Circuit determined that a trial court has authority to confer judicial immunity in two situations in which the Due Process Clause would compel the granting of immunity to a defense witness. The first involves a situation in which the government's decision against granting immunity is made with the deliberate intention of distorting the judicial factfinding process. The second situation arises when the defendant is prevented from presenting exculpatory evidence crucial to the defendant's case.

In *Starks*, we did not decide whether the approach set forth in *Smith* should be adopted by this court. We stated, however, that "[a] number of courts have held there is no authority to grant judicial immunity to defense witnesses." *State v. Starks*, 229 Neb. at 490, 427 N.W.2d at 302. For a detailed discussion of such cases, see *State v. Starks, supra*.

We discussed the rationale against granting judicial use immunity in the following manner:

> "As noted by the Second Circuit in [*United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980)] the two major arguments

> against granting such judicial use immunity are that the immunity decision would carry the courts into policy assessments which are the traditional domain of the executive branch, and that the immunity would be subject to abuse.
>
> "We find these arguments persuasive, and agree that the immunity decision requires a balancing of public interests which should be left to the executive branch. . . .
>
> "Nor are we convinced that any safeguards imposed on the grant of judicial use immunity adequately reduces the risk of abuse by co-defendants, co-conspirators, friends, or employees. Whatever may be gained in fairness in a particular trial in which true exculpatory evidence may be obtained only through judicial use immunity, therefore, may well be lost through the subsequent effect of abuse on the integrity of the judicial process as a whole. . . ."

*State v. Starks*, 229 Neb. at 490-91, 427 N.W.2d at 302, quoting *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982).

In *U.S. v. Serrano*, 406 F.3d 1208 (10th Cir. 2005), the court held that federal district courts do not have inherent authority to grant use immunity to a defendant's witnesses. The court noted that the Third Circuit's ruling in *Government of Virgin Islands v. Smith, supra*, had not been followed by any other federal circuit.

In the case at bar, the trial court did not err in refusing to order the State to grant immunity to the witnesses who invoked their right against self-incrimination.

### 6. Exclusion of Evidence Concerning Alibi of Other Suspects

Robinson's defense included the theory that it was possible Terrell Reed and Keelan Washington were with Dupree Reed at the scene of Daniel Lockett's homicide. Robinson asserts the trial court erred in precluding him from presenting statements given to police by Reed and Washington.

Robinson wanted to offer Terrell Reed's and Washington's statements that they were at a restaurant at the time Daniel Lockett was killed. Robinson claimed he had a witness who would impeach Reed and Washington's alleged alibi that they were at the restaurant at the time of the murder. Robinson wanted to create the inference that Reed and Washington could have been involved in the murder. Reed and Washington were close

friends, and Washington had a green Tahoe. At a sidebar, defense counsel offered to prove that Washington told police he and Terrell Reed were at the restaurant at the time of the shooting but that this alibi had not checked out.

The trial court sustained the State's hearsay objection. Robinson claims he was unfairly prejudiced because he was deprived of the opportunity to create the inference that Reed and Washington may have been involved in Daniel Lockett's murder.

[27] 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. *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004). See, also, rule 801(3). Robinson argues the statements were not hearsay because they were not offered to prove that the assertions were true, but that they were false.

(a) Hearsay

The issue is whether the out-of-court statements made by unavailable witnesses were not hearsay because they were offered for the purpose of proving that such statements were false. 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. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). 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.*

In essence, the State argues that if the out-of-court statements were relevant only if they were true or false, then the statements were hearsay. The State relies upon *Brown v. Com.*, 25 Va. App. 171, 177, 487 S.E.2d 248, 251 (1997), in which the court declared:

> "Whether an extrajudicial statement is hearsay depends upon the purpose for which it is offered and received into evidence. If the statement is received to prove the truth [or falsity] of its content, then it is hearsay and, in order to be admissible, must come within one of the many established exceptions to the general prohibition against admitting hearsay."

The State urges us to conclude that the statements at issue were hearsay because they were offered to prove whether the assertions were true or false. It asks us to adopt such a conclusion notwithstanding a line of cases suggesting that a statement is not hearsay when offered to show that the statement is false. Cf. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986), citing *United States v. Adkins*, 741 F.2d 744 (5th Cir. 1984). The State argues that these cases typically involve fraud charges and that in such cases, the defendant's own statement is used against the defendant to show that the statement was false.

Robinson offered the statements of Terrell Reed and Washington because he claimed they were false. If the statements were admitted, he would then attempt to impeach such statements by other testimony. Robinson wanted to establish that Reed and Washington had lied about where they were at the time of Daniel Lockett's murder. Robinson claimed he had a witness who would testify that Reed and Washington were not at the restaurant at the time of Lockett's murder, but that they arrived there later in the evening.

In *Anderson v. United States*, 417 U.S. 211, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974), the government sought to prove that certain parties had engaged in a conspiracy to cast fictitious votes for candidates for federal, state, and local offices. The evidence at trial showed that by using the power of their office, the parties convinced election officials to cast false and fictitious votes on the voting machines and then destroy poll slips so that the number of persons who had actually voted could not be determined except from the machine tally. Two of the parties, Earl Tomblin and John Browning, had given sworn testimony at a hearing on the election contest. At trial, the prosecution sought to prove that Tomblin and Browning perjured themselves at the election contest hearing for the purpose of having the fraudulent votes counted and certified. Other coconspirator defendants objected to the election hearing testimony of Tomblin and Browning on the ground that it was inadmissible against them.

After addressing the question of whether the declaration of one coconspirator could be used against another, the court then considered whether the out-of-court statements of Tomblin and Browning were hearsay.

> Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted. The election contest testimony of Tomblin and Browning, however, was not admitted into evidence in the . . . trial to prove the truth of anything asserted therein. Quite the contrary, the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false. The rationale of the hearsay rule is inapplicable as well. The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence. Here, since the prosecution was not contending that anything Tomblin or Browning said at the election contest was true, the other defendants had no interest in cross-examining them so as to put their credibility in issue.

*Anderson v. United States*, 417 U.S. at 219-20.

Other federal courts have followed this determination. See, *United States v. Hathaway*, 798 F.2d 902 (6th Cir. 1986) (when statements are offered to prove falsity of matter asserted, there is no need to assess credibility of declarant of false statement; thus, no purpose would be served by extending definition of hearsay to cover statements offered for falsity of matter asserted); *United States v. Pedroza*, 750 F.2d 187 (2d Cir. 1984) (testimony was not hearsay because it plainly was not offered to prove truth of matter asserted; rather, statement was offered for its patent falsity); *United States v. Adkins*, 741 F.2d 744 (5th Cir. 1984) (statements introduced to prove falsity of matter asserted are not inadmissible as hearsay); *United States v. McDonnel*, 550 F.2d 1010 (5th Cir. 1977) (statements introduced not to prove truth of matter asserted, but to establish foundation for later showing that they were false).

Based upon the reasoning of *Anderson v. United States*, 417 U.S. 211, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974), we conclude that the trial court erred in excluding as hearsay the statements of Terrell Reed and Washington. The statements were not offered by Robinson to prove that Reed and Washington were at the restaurant at the time of Daniel Lockett's murder.

[28-30] Having concluded that the district court erred in excluding these statements as hearsay, we must now determine whether such error was harmless. In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Neal*, 265 Neb. 693, 658 N.W.2d 694 (2003). In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004).

> Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

*Id*. at 746, 677 N.W.2d at 173. Accord, *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003); *State v. Neal, supra*.

We must therefore determine, based upon the entire record, whether the actual guilty verdict rendered was surely unattributable to the error. See *State v. Freeman, supra*. We conclude that the verdict was surely unattributable to the error in excluding the testimony. The jury knew from the beginning of the trial that Terrell Reed was the brother of Terez Reed, who had been killed in a gang-related incident the week before Daniel Lockett was murdered. The jury also knew that Dupree Reed was a brother of Terez and Terrell Reed.

[31] The State's case was largely based upon the credibility of three witnesses who testified about the shooting. Witness credibility is not to be reassessed on appellate review. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). Dupree Reed testified that he participated directly in the shooting by firing his .22-caliber automatic pistol into the house in which Daniel Lockett was shot. He testified that Robinson had stated he thought Gary Lockett murdered Terez Reed. Dupree Reed testified that he and Robinson had driven in Robinson's green Tahoe to a residence where Robinson thought Gary Lockett would be present and that Robinson shot through the window of the house.

Courtney Nelson testified regarding the incident. Nelson said Robinson told him that he thought Gary Lockett killed Terez Reed and that Gary Lockett was affiliated with a rival gang. When Robinson got in the Tahoe to leave the funeral reception, Nelson saw him pull out a 9-mm pistol. James Edwards also testified to his observations of Robinson on the night Daniel Lockett was shot. After Robinson and Dupree Reed fired their guns into the residence, Edwards saw Robinson return to the Tahoe with his 9-mm pistol, and the appearance of the weapon indicated that all rounds had been fired.

Nelson further testified that after Daniel Lockett's murder, Robinson stated he was taking the Tahoe to Kansas or Texas to "get rid of the truck." A police officer in Kansas City observed Robinson getting off a bus from Houston and Robinson told the officer he was returning to Omaha. Evidence also showed that a green Tahoe belonging to Robinson's grandmother was found destroyed in a vacant field in Houston.

#### (b) Hearsay Exceptions and Statements Against Penal Interest

Because we have concluded that the exclusion of the alibi statements was error but that such error was harmless, it is unnecessary to address Robinson's arguments that the statements should have been admitted because they were admissions against interest or as residual exceptions to hearsay.

### 7. Testimony of Victor Hill

Under the residual hearsay exception of Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995), Robinson sought to introduce statements made by Victor Hill to Det. Donald Ficenec. Hill refused to testify, and Robinson wanted Ficenec to testify to what Hill allegedly told him about Terrell Reed. Three days after Daniel Lockett was murdered, Hill allegedly told Ficenec that after the murder of Terez Reed, Terrell Reed was carrying a 9-mm pistol and had stated to Hill that he was going to retaliate for the murder of Terez. The trial court refused to admit these statements, because it concluded that the statements did not bear particularized guarantees of trustworthiness.

[32,33] In determining whether a statement is admissible under rule 804(2)(e), the residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, materiality of the statement, probative importance of the statement, interests of justice, and whether notice of the statement's prospective use as evidence was given to an opponent. *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993). An appellate court will affirm a trial court's ruling on whether evidence is admissible under the residual hearsay exception unless the trial court has abused its discretion. *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000).

(a) Trustworthiness

In determining admissibility under rule 804(2)(e), a court must examine the circumstances surrounding the declaration in issue and may consider a variety of factors affecting trustworthiness of a statement. See *State v. Toney, supra*. Hill made his assertions about Terrell Reed during a police interview after Hill was arrested on an unrelated matter.

[34] This court has stated that while analyzing the trustworthiness factor in the context of a declaration against penal interest, "[p]articularly relevant to the determination of trustworthiness is whether the declarant was in police custody when the statement was made, whether the declarant had a motive to mitigate his own criminal liability, and whether the declarant made the statement in response to leading questions." *State v. Hughes*, 244 Neb. 810, 818, 510 N.W.2d 33, 39 (1993). We explained that "[t]hese factors are similar to the factors this court has found relevant when considering whether a hearsay statement is sufficiently trustworthy to satisfy the residual exception to the hearsay rule." *Id.*

The trial court did not abuse its discretion in concluding that Hill's statements to Ficenec were not sufficiently trustworthy to fall within the residual exception to the hearsay rule.

(b) Notice of Use of Statement

The record in this case does not indicate that Robinson provided pretrial notice of his intent to rely upon the residual hearsay exception, and Robinson does not assert on appeal that he provided such notice. Rule 804(2)(e) provides in part:

> A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

See, also, *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

[35] During the trial, at a hearing outside the jury's presence, defense counsel asserted he was going to ask the trial court to allow a hearsay statement of Victor Hill. "[I]t is not enough that the adverse party is aware of the unavailable declarant's statement; the proponent of the evidence must provide notice to the adverse party of his or her intentions to use the statement in order to take advantage of the hearsay exception in § 27-804(2)(e)." *State v. Boppre*, 234 Neb. at 952, 453 N.W.2d at 429.

In *State v. Leisy*, 207 Neb. 118, 295 N.W.2d 715 (1980), the trial court declined to admit an out-of-court statement offered by the defendant under the residual hearsay exception of rule 804(2)(e). The defendant had not made known to the prosecution his intent to use the hearsay testimony. On appeal, the defendant argued that the giving of notice was unnecessary because the prosecutor knew of the declarant's statement and had not called the declarant. This court noted that although the prosecutor knew of the statement, "[h]e did not know . . . that the defense proposed to use [the declarant's] out-of-court statement." *Leisy*, 207 Neb. at 129-30, 295 N.W.2d at 723. Affirming the trial court's exclusion of the hearsay statement, we held that "the notice requirement is mandatory." *Id.* at 130, 295 N.W.2d at 723.

In *State v. Reed*, 201 Neb. 800, 272 N.W.2d 759 (1978), the trial court admitted, over a hearsay objection, a statement made by a young child to an investigating officer at the crime scene. Although it appeared the child's statement had circumstantial guarantees of trustworthiness, we concluded the court erred in overruling the objection because there had been no compliance with the statutory conditions. We stated that, among other requirements, it did not "*affirmatively appear* that notice of intention to use the statement was timely given to the defendant by the State." (Emphasis supplied.) *Id.* at 807, 272 N.W.2d at 763.

In the present case, it does not affirmatively appear from the record that Robinson gave proper pretrial notice to the State of his intention to use Hill's out-of-court statement under the residual hearsay exception. In light of the circumstances surrounding Hill's statement and the fact that Robinson did not give pretrial notice of his intention to use the residual exception to hearsay, the trial court did not abuse its discretion in excluding the hearsay statement made by Hill to the police detective.

### 8. Alleged Violation of Right to Due Process

Robinson claims the exclusion of Terrell Reed's and Victor Hill's statements deprived him of presenting a complete defense and violated his due process rights under *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Robinson's claim is without merit.

In *Chambers*, a third party had confessed, via a sworn written statement prepared for the defendant's attorneys, to killing the victim. This confession was later renounced by the third party. On three other occasions, this person had admitted to killing the victim. Because the defendant was prevented from presenting this aspect of his defense at trial due to a strict application of the state's hearsay rules, the U.S. Supreme Court held that the defendant had been deprived of a fair trial.

The Court determined the defendant should have been permitted to present the third party's confessional statements, which "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Chambers v. Mississippi*, 410 U.S. at 300. The confessions were made spontaneously to close acquaintances shortly after the murder. Each one was corroborated by other evidence in the case. Each was self-incriminatory and against interest. Finally, "if there was any question about the truthfulness of the extrajudicial statements, [the third party] was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury." 410 U.S. at 301.

The present case differs from *Chambers*. There was no evidence providing assurances of trustworthiness for Terrell Reed's and Hill's statements. Neither witness was available for cross-examination by the State. Neither witness confessed to killing

Daniel Lockett. Thus, Robinson's argument is without merit, and the trial court's exclusion of the hearsay statements in question did not deprive him of a fair trial.

### 9. Alleged Prosecutorial Misconduct During Closing Arguments

During closing arguments, the prosecutor made the following remarks to the jury:

> You know, who this case is about has continuously gotten lost. I don't know if all you right now can write down that man's name. The man's name is Daniel Lockett and in this milieu of gang violence and retaliatory murders, he had risen above that. He didn't belong to it, and for that he gets killed. And you stack his body up next to Terez Reed and Samuel Hodges [a friend of Courtney Nelson] and Antonio Witherspoon and White Boy [a friend of James Edwards], and the body count rises and it continues to rise.

Defense counsel objected to these remarks as improper argument, but the trial court overruled the objection. Robinson claims the court's failure to sustain his objection constituted reversible error.

[36] A prosecutor's argument must be based on evidence introduced rather than on matters not in evidence. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). Robinson asserts that although evidence had been presented that Hodges and Witherspoon were dead, no evidence established the death of "White Boy," and Robinson further asserts that no evidence supported that those three were homicide victims.

[37,38] We need not determine whether the prosecutor's comments were improper or inflammatory or whether they were sufficiently prejudicial to constitute error, because the record indicates that Robinson failed to preserve this issue for appellate review in that he failed to 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. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *Id.* A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court

erred in not declaring a mistrial due to such prosecutorial misconduct. *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

In *Fahlk*, the State referred to the assertion of marital privilege in its closing arguments. The prosecutor remarked: " 'You didn't hear from the third person, did you? It's [the defendant's wife].' " 246 Neb. at 847, 524 N.W.2d at 50. Defense counsel objected but did not move for a mistrial. On appeal, this court opined that the claim of a privilege was not a permissible subject of comment by counsel under rule 513, and we considered the comment regarding the assertion of marital privilege to be prosecutorial misconduct. Nevertheless, we concluded that the defendant's failure to move for a mistrial waived any error resulting from the prosecutor's misconduct.

In the present case, Robinson objected to the prosecutor's closing argument, but he did not move for a mistrial based upon the remarks of the prosecutor. As a result, he has waived any error resulting from the prosecutor's remarks.

### 10. Cumulative Error

Robinson's final argument is that the alleged errors committed by the trial court are not harmless and, taken together, deprived him of a fair trial. His argument based on the doctrine of cumulative error is without merit.

### 11. Sentence of Life Imprisonment Without Parole

The trial court sentenced Robinson to life imprisonment without parole for his conviction of first degree murder, which was classified as a Class IA felony. At the time Daniel Lockett was murdered, the penalty for a Class IA felony was life imprisonment. See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2000). Thus, the trial court had statutory authority to impose a sentence of life imprisonment for the first degree murder conviction, but it lacked authority to add the phrase "without parole." See *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005) (holding that sentence was erroneous but not void where sentence of life imprisonment without parole was imposed for first degree murder under unconstitutional penalty statute). See, also, *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980); *Draper v. Sigler*, 177 Neb. 726, 131 N.W.2d 131 (1964) (both holding that indeterminate

sentence imposed for crime, where not authorized by statute, was erroneous but not void).

[39,40] Robinson has not assigned as error his sentence on the murder conviction; however, an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). This court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced. *State v. Conover, supra*. We conclude that in this case, the erroneous imposition of a sentence of life imprisonment without parole warrants a remand with directions that the trial court is to resentence Robinson to life imprisonment for the first degree murder conviction.

## VI. CONCLUSION

The trial court did not commit reversible error as to Robinson's convictions for first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon, and we affirm the judgments of conviction. We also affirm the sentences for use of a deadly weapon to commit a felony and use of a firearm by a felon. However, we vacate the sentence of life imprisonment "without parole" and remand the cause to the trial court with directions to resentence Robinson to life imprisonment on the conviction of first degree murder.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS FOR RESENTENCING.

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# JIM O. KEEF ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

716 N.W.2d 58

Filed June 16, 2006. No. S-03-1306.

1. **Constitutional Law: Supreme Court: Appeal and Error.** Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.

2. **Constitutional Law: States: Actions.** Although by its terms, the 11th Amendment applies only to suits against a state by citizens of another state, the U.S. Supreme Court has extended the 11th Amendment's applicability to suits by citizens against their own states.
3. **Constitutional Law: Immunity.** Congress may abrogate a state's immunity when enforcing the 14th Amendment.
4. ____: ____. For Congress to abrogate a state's 11th Amendment immunity, it must (1) unequivocally intend to do so and (2) act under a valid grant of constitutional authority.
5. **Constitutional Law: Statutes: Immunity.** For legislation enacted under § 5 of the 14th Amendment that reaches beyond the scope of actual guarantees under § 1 to be classified as remedial and therefore a valid exercise of Congress' § 5 power, there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.
6. ____: ____: ____. For congressional abrogation of sovereign immunity, the congruence and proportionality test has two parts. The first part requires examining the legislative history, specifically the congressional findings and purposes, to determine what specific injury Congress is attempting to address. The second requires the statutory remedy to be congruent and proportional to the injury identified in the congressional findings.
7. **Constitutional Law: Statutes: States: Immunity.** Congress must fulfill several requirements to validly abrogate a state's 11th Amendment sovereign immunity: (1) It must act based on the authority of § 5 of the 14th Amendment and expressly indicate its intent to abrogate 11th Amendment immunity and (2) Congress must act only to enforce, not redefine, the 14th Amendment. Thus, the remedy it prescribes must be congruent and proportional to specific findings of a pattern of state constitutional violations.
8. **Constitutional Law: Immunity: Motor Vehicles: Fees.** Congress did not validly abrogate 11th Amendment immunity as it applies to suits for damages involving parking placard fees.
9. **Motor Vehicles: Fees: Taxation.** A fee for a parking placard is not an illegal tax or a taking of property without just compensation.
10. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
11. **Rules of the Supreme Court: Appeal and Error.** The rules regarding the manner of presenting a cross-appeal are the same as the rules applicable to an appellant's brief.
12. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions to dismiss.

Jon Bruning, Attorney General, and Lynn A. Melson for appellant.

David W. Rowe, of Kinsey, Ridenour, Becker & Kistler, Stephen R. Senn, of Peterson & Myers, P.A., and Robert G. Fegers, P.L., for appellees.

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

CONNOLLY, J.

This appeal presents the question whether under title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12134 (2000), Congress validly abrogated Nebraska's sovereign immunity under the 11th Amendment. The specific issue is whether the State of Nebraska is immune from being sued for charging a $3 fee for handicapped parking placards. We determine that in the context of charging a fee for handicapped parking placards, Congress did not validly abrogate Nebraska's immunity under the 11th Amendment.

## BACKGROUND

The appellees, purchasers of handicapped parking placards, sued the Nebraska Department of Motor Vehicles (Department) on behalf of themselves and those similarly situated, seeking (1) recovery of a $3 fee the State charged for the placard, (2) an injunction enjoining the State from collecting the fee, and (3) attorney fees and costs. The appellees claim the fee violated the ADA and 28 C.F.R. § 35.130(f) (2000). That regulation prohibits public entities from charging a fee to recover the costs of accessibility programs designed to assist the disabled.

The Department filed an answer and (1) asserted its state sovereign immunity and alleged that Congress could not waive the State's sovereign immunity from suit, (2) denied that the fee violated the ADA, and (3) raised the statute of limitations as an affirmative defense. Both the Department and the appellees moved for summary judgment, and the appellees moved to certify the class.

The district court determined that Congress abrogated the State's sovereign immunity under title II of the ADA. It then determined that the fee violated the ADA and enjoined future

collection. The court overruled the Department's motion for summary judgment, certified the class, and granted partial summary judgment to the appellees. The Department appealed, and we dismissed for lack of jurisdiction. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). On remand, the court determined issues concerning the distribution of claims and awarded fees. The Department appealed.

We continued oral argument pending resolution of an appeal before the U.S. Supreme Court involving issues of sovereign immunity under title II of the ADA. See *U.S. v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006). After the *Georgia* decision, we ordered supplemental briefing on the effect of the *Georgia* decision on this appeal.

## ASSIGNMENTS OF ERROR

The Department assigns, rephrased and consolidated, that the court erred by (1) determining that Congress abrogated sovereign immunity under the ADA, (2) failing to consider whether the statute of limitations barred the claim, (3) determining that members of the class had standing, (4) determining the fee violated the ADA and awarding reimbursement and an injunction, and (5) awarding attorney fees. The Department also assigns the court erred in its rulings affecting reimbursement and distribution of funds.

The appellees filed a purported cross-appeal that has a separately labeled section in their combined brief, but does not include all required sections, including a separately set out assignment of error. In that section, they argue that the district court erred by denying them leave to amend their petition.

## STANDARD OF REVIEW

[1] Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *Pony Lake Sch. Dist. v. State Committee for Reorg., ante* p. 173, 710 N.W.2d 609 (2006).

## ANALYSIS

The Department contends that Congress did not validly abrogate Nebraska's sovereign immunity under the 11th Amendment

from claims under title II of the ADA. The 11th Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[2-4] Although by its terms, the 11th Amendment applies only to suits against a state by citizens of another state, the U.S. Supreme Court has extended the 11th Amendment's applicability to suits by citizens against their own states. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). Congress, however, may abrogate the state's immunity when enforcing the 14th Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). For Congress to abrogate a state's 11th Amendment immunity, it must (1) unequivocally intend to do so and (2) act under a valid grant of constitutional authority. *Board of Trustees of Univ. of Ala. v. Garrett, supra*.

Here, the first requirement is not in dispute. Congress has unequivocally expressed its intent to abrogate immunity under the ADA. The ADA specifically provides in part: "A State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202 (2000).

The second requirement, however, is in dispute. The question is whether Congress acted within its constitutional authority by subjecting Nebraska to suits for damages under the ADA. In determining whether Congress acted within its authority, we look to § 5 of the 14th Amendment. The principles of state sovereignty which the 11th Amendment embodies are necessarily limited by the enforcement provisions of § 5 of the 14th Amendment. *Fitzpatrick v. Bitzer, supra*. Thus, Congress may subject nonconsenting states to suit when it does so under a valid exercise of its § 5 power. See *id*. The Court has stated that Congress' power to enforce the 14th Amendment includes the authority both to remedy and to deter violation of rights guaranteed by the amendment by " 'prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the amendment's text.' " *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. at

365, quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000). See, also, *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

[5] In *City of Boerne*, the Court found that Congress' enforcement power under § 5 was limited to enacting remedial legislation; Congress has no authority to enact substantive legislation that effectively redefines the scope of the 14th Amendment right. For legislation enacted under § 5 that reaches "beyond the scope of § 1's actual guarantees" to be classified as " 'remedial' " and therefore a valid exercise of Congress' § 5 power, see *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. at 360, 365, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," see *City of Boerne v. Flores*, 521 U.S. at 520.

[6] For congressional abrogation of sovereign immunity, the congruence and proportionality test has two parts. The first part requires examining the legislative history, specifically the congressional findings and purposes, to determine what specific injury Congress is attempting to address. The second requires the statutory remedy to be congruent and proportional to the injury identified in the congressional findings. *Id.*

Since the district court's February 29, 2000, order, the U.S. Supreme Court has reshaped the contours of the 11th Amendment immunity under the ADA. In *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001), the Court held that suits for damages brought by state employees against a state under title I of the ADA are barred by the 11th Amendment.

*Garrett* involved suits brought by state employees seeking money damages for violations of the ADA. The Court found that Congress expressed an intent to abrogate 11th Amendment immunity and proceeded to determine whether Congress had the power to give effect to that intent. Addressing congruence and proportionality, the Court noted that states are not required by the 14th Amendment to make special accommodations for the disabled, so long as their actions toward the disabled are rational. *Board of Trustees of Univ. of Ala. v. Garrett, supra*, citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

The Court then examined whether Congress had identified a history and pattern of unconstitutional employment discrimination against the disabled. *Id*. Examining the legislative history of the ADA, the Court found that Congress had not identified such a history or pattern sufficient to satisfy the congruence and proportionality test. According to the Court, the congressional record showed only general findings of discrimination and that the great majority of incidents did not involve state activities. Such findings were insufficient to establish a pattern of constitutional violations to allow abrogation of 11th Amendment immunity. Therefore, the Court held that Congress did not validly abrogate 11th Amendment immunity.

In 2004, the U.S. Supreme Court addressed title II in the context of access to the courts. *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). The plaintiffs in *Lane* were paraplegics who were denied access to the state court system because of their disabilities. Addressing congruence and proportionality, the Court reviewed the congressional history and examined the purposes of the ADA and title II. The Court then held that the rights protected by title II included the right of access to the courts and that Congress had validly abrogated 11th Amendment immunity.

Examining the issue, the Court stated that whether title II validly enforces constitutional rights "is a question that 'must be judged with reference to the historical experience which it reflects.' " 541 U.S. at 523. The Court noted that title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs." 541 U.S. at 524.

The Court next made reference to specific examples of "systematic deprivations of fundamental rights," *id*., such as (1) laws prohibiting disabled persons from voting, (2) prohibiting disabled individuals from marrying, (3) prohibiting disabled persons from serving as jurors, (4) instances of unjustified commitment, (4) abuse and neglect of persons committed to state mental hospitals, and (5) irrational discrimination in zoning decisions. The Court also noted that other courts' decisions also documented "a pattern of unequal treatment in the administration of a wide range of public services . . . including the penal system, public education, and voting." 541 U.S. at 525.

The Court next focused on specific congressional findings concerning the exclusion of disabled people from courthouses because of a lack of elevators, access, or interpretive services. The Court found that title II's duty to accommodate was consistent with the due process principle that a state must provide individuals a meaningful opportunity to be heard in court. Accordingly, the Court determined that title II, as it applied to the class of cases implicating the fundamental right of access to the courts, was a valid exercise of Congress' § 5 authority to enforce the guarantees of the 14th Amendment.

After *Lane*, a majority of courts limited *Lane*'s holding to circumstances involving access to the courts and, in other cases, continued to follow the principles used in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001), to hold that Congress did not validly abrogate 11th Amendment immunity under title II of the ADA. See, e.g., *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005), *vacated* 412 F.3d 500 (3d Cir. 2005); *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), *vacated and superseded* 449 F.3d 1149 (11th Cir. 2006). The Eighth Circuit has also continued to hold that *Lane* is limited in scope. See, e.g., *Bill M. ex rel William M. v. Nebraska Dept. H.H.S.*, 408 F.3d 1096 (8th Cir. 2005) (citing *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999)), *vacated* 547 U.S. 1067, 126 S. Ct. 1826, 164 L. Ed. 2d 514 (2006). Although the above cases did not deal with a parking placard fee, a pre-*Lane* case has applied the congruence and proportionality test to determine that Congress did not validly abrogate 11th Amendment immunity in the context of a state charging a minimal fee for a parking placard. *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999).

In 2006, the U.S. Supreme Court further addressed title II in *U.S. v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006). That case involved a disabled prisoner's title II and 42 U.S.C. § 1983 (2000) claim that he was denied access to prison facilities and services. Although the Court granted certiorari to consider whether title II validly abrogates sovereign immunity, the Court did not squarely address the issue. The Court stated that the pro se complaint was not clear about what conduct was alleged in support of the title II claims. The Court discussed

"actual violations" of the 14th Amendment and made it clear that in those instances, title II validly abrogates 11th Amendment immunity. The court remanded for further determination of which aspects of the State's alleged conduct violated title II, the extent to which the conduct also violated the 14th Amendment, and "insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." 126 S. Ct. at 882.

[7] In summary, Congress must fulfill several requirements to validly abrogate a state's 11th Amendment sovereign immunity: (1) It must act based on the authority of § 5 of the 14th Amendment and expressly indicate its intent to abrogate 11th Amendment immunity and (2) Congress must act only to enforce, not redefine, the 14th Amendment. Thus, the remedy it prescribes must be congruent and proportional to specific findings of a pattern of state constitutional violations. See, *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004); *Board of Trustees of Univ. of Ala. v. Garrett, supra.*

### Congruence and Proportionality of ADA Title II as Applied to Parking Placards

The Department contends that abrogation of sovereign immunity under title II of the ADA is not congruent and proportional to the findings of Congress. It argues that the congressional record does not show a pattern of pervasive unconstitutional conduct by the states in providing parking services. The appellees concede that the fee does not constitute a direct violation of their constitutional rights. They argue, however, that *Lane* relaxed and broadened Congress' ability to abrogate 11th Amendment immunity under its § 5 powers and that parking is in the realm of public services that Congress was concerned about when passing the ADA.

[8] We determine that Congress did not validly abrogate 11th Amendment immunity as it applies to suits for damages involving parking placard fees. The holding in *Lane* was limited by the Court to when a fundamental right, such as access to the courts, is at issue. In those cases, the congruence and proportionality test is met because Congress specifically identified concerns about

access to the courts and other such fundamental rights, and the ADA proportionally seeks to remedy the identified constitutional violations. But such a fundamental right is not at issue in the present appeal. Nor is there evidence that Congress specifically noted concern about modest fees for parking placards when it enacted the ADA.

When Congress enacted title II, it found widespread discrimination against people with disabilities, but not of the type presented by this appeal. A fee for parking placards is generally designed to recover the costs of programs provided for the benefit of disabled people. See, generally, *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999). The congressional history does not indicate a concern that minor fees for parking placards were a form of discrimination or motivated by animus toward the class. See *id*. Instead, the fee is a rational cost-recovery measure that can assist the disabled. As the *Brown* court noted:

> The facts of this case demonstrate how far the structure of dual sovereignty has been distorted. North Carolina has maintained a long-standing program designed to benefit disabled persons through the provision of special parking spaces. In order to make the program effective, the state undertook to provide placards to those who were eligible to use the spaces. To cover the cost of the placards, North Carolina introduced the most modest of all possible fees—one dollar per year. A federal agency now seeks to deny the state even that meager option in administering the state's voluntary enforcement efforts. The United States further insists that the state may be called to answer for this alleged transgression in federal court. We hold, however, that the Eleventh Amendment forbids this course. To interpret Section 5 to abrogate the state's immunity would be a mark of profound constitutional disrespect to the role that states are meant to play within our federal system.

166 F.3d at 708.

We conclude that abrogating 11th Amendment immunity under the ADA to invalidate a fee for a parking placard is not congruent to the specific findings of Congress, which were concerned with denial of fundamental rights in providing public services. Nor is

the remedy proportional to those findings when the fee appears to be a modest cost-recovery measure and there is no evidence of animus toward the class.

The appellees argue, however, that the fee affects their access to the public services addressed in *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), such as their ability to gain access to the courts or voting precincts. We decline to stretch a modest $3 fee into a denial of a fundamental right. A $3 fee for a movable parking placard is a very different case than *Lane*, in which a paraplegic was required to crawl unassisted up two flights of stairs in order to appear in court. In *Lane*, the congressional record supported the conclusion that Congress found a pattern of irrational discrimination. But here, the fee does not prevent physical entry into a public building and nothing in the record suggests that members of the class have been denied access to public accommodations because of the fee. Nor is there evidence that the fee was the result of irrational discrimination. See *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). Instead, the fee is a rational method of modest cost recovery in a program meant to assist the disabled.

The appellees also argue that under *U.S. v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006), *Lane* is not limited solely to cases involving access to the courts and that title II should be read broadly to abrogate sovereign immunity. *Georgia*, however, only held that immunity was abrogated for actual 14th Amendment violations. Here, the appellees concede that no such violations are at issue. *Georgia* did not address when other circumstances might give rise to abrogation of sovereign immunity.

[9] Finally, the appellees argue that the fee is an illegal tax or is a taking of property without just compensation. They contend that such actions are not barred by sovereign immunity. We determine that there is no valid precedent for the appellees' arguments and determine that they are without merit.

We determine that Congress did not validly abrogate Nebraska's 11th Amendment immunity when it charged a modest fee for parking placards. Accordingly, we reverse.

### Injunction and Declaratory Relief

The appellees argue that equitable claims for injunction and declaratory relief are not subject to 11th Amendment immunity. Therefore, they argue that their equitable claims are still actionable. We determine, however, that the equitable claims are moot.

[10] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

Here, the State has repealed the statute charging the fee. See, 2001 Neb. Laws, L.B. 31 (codified at Neb. Rev. Stat. §§ 18-1739 to 18-1741 (Cum. Supp. 2004 & Supp. 2005)). Therefore, there is no current statute to enjoin. The appellees argue that the fee was removed because of the lawsuit and could be reinstated if the State were found to have immunity. But the remote possibility of reenacting legislation is insufficient.

## CONCLUSION

We determine that Congress did not validly abrogate Nebraska's 11th Amendment immunity under title II. We further determine that any equitable claims are moot. Accordingly, we reverse, and remand with directions to dismiss; thus, we need not address the remaining assignments of error.

[11,12] We also do not address the appellees' purported cross-appeal. The brief on cross-appeal fails to assign any error. The rules regarding the manner of presenting a cross-appeal are the same as the rules applicable to an appellant's brief. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001). Errors argued but not assigned will not be considered on appeal. *Demerath v. Knights of Columbus*, 268 Neb. 132, 680 N.W.2d 200 (2004). We therefore decline to address the merits of the purported cross-appeal.

Reversed and remanded with directions to dismiss.

McCormack, J., not participating.

# LESLIE ROTH, APPELLEE, V. GARY WIESE, APPELLANT.

716 N.W.2d 419

Filed June 16, 2006. No. S-04-1117.

1. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
2. **Actions: Mental Distress: Proof.** To recover for intentional infliction of emotional distress, a plaintiff must prove (1) intentional or reckless conduct (2) that was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
3. **Mental Distress.** Whether conduct is extreme and outrageous is judged on an objective standard based on all the facts and circumstances of the particular case. The facts must be such that when heard, an average member of the community would resent the actor and exclaim "Outrageous!" Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from living in society do not rise to the level of extreme and outrageous conduct.
4. ____. In determining whether certain conduct is extreme and outrageous, the relationship between the parties and the susceptibility of the plaintiff to emotional distress are important factors to consider.
5. ____. Conduct which might otherwise be considered merely rude or abusive may be deemed outrageous when the defendant knows that the plaintiff is particularly susceptible to emotional distress.
6. **Mental Distress: Evidence.** Although outrageous conduct and severe emotional distress are separate elements of the tort of intentional infliction of emotional distress, the two are related in that the extreme and outrageous character of the conduct is itself important evidence that severe emotional distress existed on account of the conduct.
7. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
8. **Rules of Evidence: Words and Phrases.** Relevant evidence, as defined by Neb. Rev. Stat. § 27-401 (Reissue 1995), is that which tends to make the existence of any fact of consequence more or less probable than it would be without the evidence.
9. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
10. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.

11. **Damages: Proof.** Mitigation of damages is an affirmative defense, as to which the defendant has the burden of proof.
12. **Damages: Time.** The doctrine of mitigation of damages applies only to postevent occurrences.
13. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
14. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.
15. ____: ____. 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.
16. **Mental Distress: Damages: Proof.** With regard to the amount of damages sustained in an action for intentional infliction of emotional distress, the plaintiff is simply required to offer sufficient proof of damages so that the jury could reach its award without awarding an uncertain, speculative recovery.
17. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
18. **Judgments: Verdicts.** To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
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.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

David E. Copple and Michelle M. Baumert, of Copple & Rockey, P.C., for appellant.

David A. Domina and Timothy G. Himes, Sr., of Domina Law, P.C., for appellee.

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

STEPHAN, J.

Leslie Roth brought this civil action against Gary Wiese, her paternal uncle, asserting several claims relating to sexual abuse allegedly committed by Wiese between 1967 and 1974. Roth sought damages for her own injuries and as the assignee of her husband's claim for loss of consortium. In Wiese's answer, he

denied the claims and asserted various affirmative defenses. Prior to and during a jury trial in the district court for Cuming County, the court dismissed all claims except for Roth's claim that Wiese had intentionally inflicted emotional distress upon her by initiating certain communications in 2002. That claim was submitted to the jury. The jury returned a verdict in favor of Roth in the amount of $150,000, and the district court entered judgment accordingly. After the district court overruled his motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial, Wiese 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). We conclude that there was no reversible error and therefore affirm the judgment of the district court.

## I. FACTS

Roth was born in Norfolk, Nebraska, in 1963 and resided there until leaving for college in another city after her 1981 high school graduation. At the time of trial and for several years prior, Roth lived and worked in La Crosse, Wisconsin, with her husband, Steve Roth, their child, and her two children from a previous marriage. Wiese, who resides in Wisner, Nebraska, is the brother of Roth's father, who resides in Norfolk. Wiese is approximately 10 years older than Roth.

Roth testified that in 1967, when she was 4 years old, Wiese began sexually assaulting her during visits to her grandparents' home in Wisner. She testified that these attacks occurred 150 to 200 times and continued until she was 10 or 11 years old and strong enough to resist. Wiese was approximately 14 years old when the assaults began. Roth testified that Wiese threatened her during the assaults, stating that if she fought, "he'd make it hurt more," and that if she reported the assaults to her grandparents, they would hate her, call her a liar, and never want to see her again. She testified that she did not tell anyone of the assaults at the time because she feared Wiese. Roth stated that during her adult life, she had only limited contact with Wiese.

In 1998, Roth told her psychotherapist Monica Lazere of the attacks. At the time, Roth was seeing Lazere for counseling related to her first marriage, which had ended in divorce. Lazere

had diagnosed Roth with dysthymia, which she described as " 'longstanding depression of less intense proportion than clinical depression, but definitely always a black cloud that is there.' " Roth testified that the "secret was eating [her] up inside," so she told Lazere about it because she wanted to "get some help." Lazere saw Roth once in December 1997 and 15 times in 1998, and the sexual abuse issue came up during the latter sessions. Lazere was prepared to change the focus of treatment to work with the issue, and they began some treatment. However, the treatment was discontinued because Roth indicated that she did not want to deal with the sexual abuse issue and " 'felt okay.' " Roth told her future husband, Steve, about the assaults in approximately February 1999.

While her father was visiting her home in Wisconsin in late 2001, Roth told him of the assaults, because she had learned in therapy that she needed to tell the people that she should have told at the time of the assaults in order to help her heal. When he returned to Nebraska, Roth's father contacted law enforcement authorities in Cuming County and reported Roth's allegations against Wiese.

On April 27, 2002, Wiese telephoned Roth at her home in Wisconsin. According to Roth, when she answered the telephone, Wiese said, " 'This is your Uncle Gary calling and I want to know what the hell you told your dad.' " Roth testified that during this conversation,

> Every threat that he ever made to me was repeated about what would happen to me if I told what he had done to me. He said — he told me that I'd be in trouble, that I'd be called a liar, that I would get it, that he'd make me regret it.

Roth stated that Wiese was very angry and spoke in an intimidating tone. She testified that he said, " 'I told you to keep your mouth shut. What the hell do you think you're doing? What do you open your mouth for now after all these years?' " Roth testified that Wiese also told her that he knew she had told her father because the sheriff had been investigating him for sexual assault. Roth told Wiese never to call her again.

Roth testified that she was very afraid after the telephone call and that it brought back all the threats Wiese had ever made to her, so that "now I live with the threats, and I live in fear that

he's going to get me, that no one will believe me, that I'll be the liar, that he'd hurt me." After the call, she was afraid that Wiese was going to come to her house and harm her or her children.

In approximately May 2002, Roth received a letter from Wiese. In this letter, he stated that he was "sorry for what I did to you those 30+ years ago." He also stated that he was going to be removing himself from the family, and he requested that if she had "any other demands" of him she should "inform [him] in writing." In July, Roth received another letter and a card from Wiese. Enclosed in the card was a check for $1,000. The letter requested that she accept the check "to help in your healing proccess [sic]. Hopefully some day you will be able to forgive me. Please." Roth had never received a card or a gift of money from Wiese in the past. On the advice of counsel, Roth cashed the check.

On July 22, 2002, Roth's lawyer sent a certified letter to Wiese. The letter stated that in order to avert the commencement of a lawsuit against him, Wiese was to sign an agreement waiving the statute of limitations and agree to pay Roth $125,000. On July 23, Wiese left a voice message on the Roths' answering machine. The message stated:

> Yeah, this message is for Leslie. This is her uncle Gary in Wisner. I got your letter from your lawyer today. Yeah, and I didn't know it was so easy as all it would take is $125,000 to satisfy you. Uh, why didn't you sue for about ten million cuz I'm not paying you that $125,000. Uh, go ahead and sue me and uh, here's a little story for you that our [pastor] always told us. Uh, cuz I'm sure that $125,000 ain't gonna make everything all right for ya. Ya know there was this married lady and this guy asked her if he [could] sleep with her for a million dollars and she said why of course. Then he asked her to sleep with [him] for a dollar and she said well what kind of woman do you think I am? I wouldn't sleep with you for a dollar. He said well we know what kind of woman you are. We're just trying to establish a price. So maybe ya oughta think about that, ya know, as for $125,000 everything's gonna be just fine with ya. Well I don't think so. So take me to court and sue me. I'm willing to go. Good bye.

Roth testified that she found the message shocking, hideous, degrading, insulting, and berating. Her husband, Steve, was irate, and he immediately called the number that Wiese had called from and left a message telling Wiese never to call again.

Later that day, Wiese left three additional messages on the Roths' answering machine. The first told Steve to be a "real man" and call Wiese back. The second, recorded just minutes later, stated:

> Yeah, Steve, Gary again. You are right. There is somebody sick and it's not me and she needs help bad. But at least I admit I made a mistake 35 years ago and uh, it got corrected back then. At least I'm not ruining young girls' lives today like Leslie and her dad have done to my wife's family so if you've got any complaints, I wish you'd hurry up and get this thing into court and sue me so we can drag everybody into court and get this thing settled because I would like to get on [with] my life with my wife and daughter. And if you don't want to get on with your life, that's fine with me. But at least let us get on with ours so get this thing into court, get me sued, and let's get this thing settled once and for all. Thank you much [sic] for your time.

The third message was left approximately 2 hours later:

> Yeah, Steve, ya there? Pick up. (long pause) Well since you won't pick up Steve, I guess, you can tell your wife to call her father and tell him he should be real proud of himself for what he's done to my wife's family and their three little girls out in Wisconsin. You think you've got explaining to do, I figured you'd already talked to them about what an asshole I was. So they got three little girls out there that uh, they gotta explain to for something that they shouldn't have to be explaining to because I got a . . . cuz Leslie's got a dad that ruined their three lives so I . . . tell Leslie to call him and tell him to be real proud of himself. Thank you very much. (long pause) Oh yeah Steve, by the way, I was a juvenile when this happened. I got a half an excuse. I don't know what your wife and her father's excuse is.

Roth testified that these contacts from Wiese brought memories of everything he had done to her since she was 4 years old "flooding back." Because of her fears, Roth installed a caller

identification device on all of the telephones in her home and instructed her children not to answer unless they recognized the number calling. She changed the locks on her doors and began dead-bolting the doors every night. She became very guarded about the children going anywhere alone and also purchased a handgun and learned how to use it. In addition, she and Steve relocated to a new home and obtained an unlisted telephone number, all so that Wiese could not find her.

Roth testified that after the contacts from Wiese, she had difficulty falling asleep and staying asleep. She would have nightmares about Wiese assaulting her or her daughters. She acknowledged on cross-examination that she had experienced some difficulty sleeping prior to the April 2002 telephone call and that her nightmares prior to that date involved the same subject matter as the nightmares she had experienced after the call. She stated, however, that the nightmares had become more frequent.

Roth testified that she sold advertising on commission, and there was evidence that her income decreased after the contacts by Wiese. In addition, Steve testified that prior to the contacts from Wiese, Roth had a positive, friendly personality, but afterward, she was depressed and negative. Following the contacts, Roth began using alcohol on a daily basis and would come home from work and go to sleep. Roth did not interact with her children as she had previously and became short-tempered. Steve also testified that their marital relations had decreased in frequency after the contacts.

After the contacts by Wiese, Roth initially attempted to cope on her own with "all the memories that came flooding back," but eventually resumed counseling with Lazere in March 2003 and informed her of the 2002 contacts by Wiese. Roth described the telephone calls and letters she received from Wiese as " 'bizarre' " and told Lazere that she was very fearful for her children. Roth told Lazere how Wiese had terrified her as a little girl by saying she would lose her grandmother and how she felt that way again, " 'as if he was right in her living room having all this power over her.' " According to Lazere, Roth's reactions were not atypical of a sexual abuse victim who had been untreated. In fact, Lazere opined that the contacts by Wiese were " 'bringing all of these issues right to the surface again . . . as if she were in danger right

now.' " Lazere testified that untreated victims of sexual abuse can " 'jump right back into the memories of what they felt like at that time and feel very vulnerable and very frightened.' " Roth reported to Lazere that she had stomach aches, that she felt nauseous, that she was losing weight, that she was nervous, and that she could not sleep. Lazere referred Roth to a psychiatrist for anxiety medication and then helped Roth deal with her anxiety.

Lazere diagnosed Roth with posttraumatic stress disorder, which she described as

> "a reaction to an event that is so out of the ordinary that the body doesn't know how to cope with it. And if she has not developed coping skills with it, then — then she would not have the control to keep it in a time frame that — it also keeps you in a time warp of the time when it occurred and — and it's most easily explained when you look at war veterans, when they just even smell something that smelled like it was in part of their — their war experience, where they had a horrible experience, if they just smell that, it's as if they're back there, and there's nothing — everything in between gets moved away because it's almost — because it almost becomes a part of their — of their — it's just a deep part of the person."

Lazere stated that she was treating Roth by helping her to put things into a current timeframe and that she hoped Roth would continue to improve in her healing in the future. Lazere testified that Roth was in the second of three stages experienced by a sexual abuse victim and was beginning to share her abuse with others and develop a support system but had not reached the stage of full healing and had not ended treatment. On cross-examination, Lazere acknowledged that she was aware of litigation between Roth and Wiese and stated that from March to November 2003, much of the anxiety experienced by Roth was related to events with respect to the litigation. Lazere noted, however, that all of Roth's worries were ultimately related to the sexual abuse. She clarified on redirect that her treatment of Roth during 2003 was not limited to the effects of litigation.

David A. Van Dyke, a psychiatrist associated with Lazere's practice, also testified by deposition regarding his treatment of Roth. Van Dyke interviewed Roth on several occasions, beginning

in March 1998. At that time, he diagnosed her with an adjustment disorder relating to her failed first marriage. He suggested medication to address her difficulty sleeping, and shortly thereafter, he prescribed an antidepressant. Van Dyke had no professional contact with Roth from June 1998 to March 2003.

In 2003, Roth reported to Van Dyke that she was experiencing anxiety to the extent that she felt disassociated. She told him that Wiese had filed suit against her for slander. She also reported that she had filed suit against Wiese. Van Dyke diagnosed Roth at that time with adjustment disorder with severe anxiety and depression. He opined that Roth's disorder was caused by the suit filed against her and the fact that her grandmother was turning against her. Van Dyke's last meeting with Roth was in August 2003.

Rosanna Jones-Thurman, a clinical psychologist licensed in Nebraska and Iowa, testified on behalf of Wiese. Thurman performed a "Detailed Assessment of Post-Traumatic Stress" (DAPS) test and a "Minnesota Multiphasic Personality Inventory" (MMPI) test on Roth. The tests were conducted after a 1-hour clinical interview on December 5, 2003. During the interview, Roth reported that Wiese had been harassing her and leaving messages, but did not give specific dates. Roth reported that she felt she was reliving some things and that she had some specific memories of things that had happened or things Wiese had said to her.

Thurman explained that the MMPI is a personality test that also tells whether an individual is significantly depressed or anxious. DAPS is a test that assesses whether a person has a post-traumatic stress disorder or an acute stress disorder. Thurman explained that Roth's MMPI revealed elevations of depression, paranoia, psychothemia, schizophrenia, and social introversion. Based on these findings, Roth would be tense and irritable, depressed, introverted, and have trouble trusting others. Thurman explained that psychothemia is a condition of physical symptoms caused by anxiety, such as headaches and stomach aches.

With respect to the DAPS test, Roth met the criteria for post-traumatic stress disorder. Although Thurman conceded the validity of the test results, she noted that the DAPS test is very transparent and that Roth's results seemed slightly overexaggerated. Based on this testing, Thurman diagnosed Roth with generalized

anxiety disorder and dysthymic disorder, a chronic, irritable depression.

Terry Davis, a psychiatrist and lawyer practicing forensic psychiatry, also testified on behalf of Wiese. Davis reviewed Lazere's records, Van Dyke's records, and some of Roth's other medical records. He also reviewed the pleadings and court filings, the depositions of Roth and Steve, and Thurman's report. Davis interviewed Roth for 1½ hours on December 5, 2003. Roth reported to him that she was involved in a lawsuit against Wiese as a result of sexual abuse she suffered as a child. She told him that she had had ongoing problems over a 30-year period as a result of the abuse. She also stated that whenever she received correspondence related to the lawsuit, she would get panic attacks. Roth did not tell Davis about the April 2002 telephone call or the subsequent messages left by Wiese. Roth described her childhood to Davis as "typical," although she had previously indicated in therapy that her childhood was very difficult.

During the interview with Davis, Roth was "guarded." When she discussed the sexual abuse, she was "flat and blank." However, when she discussed the stress of the lawsuit, she became very emotional and started crying. Davis also reported that Roth appeared "honestly quite paranoid" that Wiese would somehow "track her down." Based on all the information available to him, Davis diagnosed Roth with an adjustment disorder with mixed anxiety and depressed mood. He explained that this was a temporary reaction to situational stressors. He also diagnosed Roth with a personality disorder based on "traits of paranoid, borderline, and obsessive/compulsive personalities." He opined that her adjustment disorder was caused by the stress of the lawsuit against Wiese and that the personality disorder had its roots "in childhood." He opined that the adjustment disorder would resolve upon completion of the lawsuit and that the personality disorder would decrease in terms of severity as she reached middle age.

On cross-examination, Davis admitted that victims of early childhood sexual abuse can be more susceptible to emotional pain and emotional injury than someone who was not sexually abused as a child. He also acknowledged that he knew at the time he interviewed Roth that Wiese had filed a separate lawsuit against her, and he subsequently learned that Wiese had filed a

suit against Roth's father. Davis emphasized, however, that the stress experienced by Roth was not related to those other lawsuits.

Wiese testified in his own behalf. He stated that he had telephoned Roth's home in Wisconsin on April 27, 2002, in an effort to contact Roth's father, who he believed was visiting Roth at the time. He denied making the statements and threats attributed to him by Roth in this conversation. He admitted, however, that he had sexually assaulted Roth one time during their childhood, when he was 14 years old. He stated that he made the July 23 telephone call after receiving the demand letter from Roth's lawyer because he was "shocked and dismayed" that a family member would try to "blackmail" him. He then returned Steve's call later that day because he was "frustrated that nobody would communicate with me."

Wiese testified that during Roth's adult life, their families exchanged Christmas cards, and that she sent photographs of her family. His wife corroborated his version of the April 27, 2002, telephone call and testified that they had received cards and photographs over the years from Roth. She admitted, however, that they had received no correspondence from Roth after she married Steve.

## II. ASSIGNMENTS OF ERROR

Wiese assigns, restated, that (1) there was insufficient evidence to sustain the verdict, (2) the damages were excessive, (3) the district court erred in overruling his objections to jury instruction No. 9 and in refusing to give requested instructions regarding mitigation of damages and the definition of extreme and outrageous conduct, (4) the district court erred in admitting evidence regarding prior sexual contact and other pending litigation between the parties, and (5) the district court erred in overruling his motion for directed verdict, motion for judgment notwithstanding the verdict, and motion for new trial.

## III. ANALYSIS

### 1. Sufficiency of Evidence

#### (a) Standard of Review

[1] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence

most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005); *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

(b) Analysis

[2] To recover for intentional infliction of emotional distress, a plaintiff must prove (1) intentional or reckless conduct (2) that was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. See *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). Wiese contends that the record supports neither a finding that his conduct was outrageous nor a finding that Roth suffered severe emotional distress.

*(i) Relevant Conduct*

Before addressing the question of whether Wiese's conduct was so outrageous in character and extreme in degree as to be actionable, we must identify the specific conduct in question. The jury was instructed that Roth had the burden of proving that Wiese contacted her by telephone and mail in April 2002 and thereafter and that this conduct was intentional or reckless. This conduct includes the initial telephone call which Wiese made to Roth on or about April 27, as to which there is sharply conflicting testimony. It also includes the letter sent by Wiese to Roth in May; the card, note, and check sent in July; and the recorded telephone message which Wiese left for Roth on July 23.

Wiese argues on appeal that the conduct at issue does not include the recorded telephone messages Wiese left for Steve on July 23, 2002, or a letter and recorded telephone messages which Wiese directed to Roth's father, because these communications were not made directly by Wiese to Roth. Wiese has not assigned error with respect to the admission of the evidence relating to these communications. We conclude that the letter to Roth's father and all recorded telephone messages are properly considered as a part of the conduct in question. The relevant inquiry is

not the identity of the person to whom the conduct was directed, but whether harm to the plaintiff as a result of the conduct was foreseeable. See *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). Each communication at issue here relates to the subject matter of the initial telephone conversation between Wiese and Roth. The telephone messages were left for Steve on the family's home voice mail system, where it was likely that Roth would hear them or otherwise become aware of their content. It was similarly foreseeable that Roth would learn of Wiese's communications to her father. We conclude that the jury was entitled to consider all of the aforementioned conduct with respect to Roth's claim against Wiese.

*(ii) Nature of Conduct*

[3-5] Whether conduct is extreme and outrageous is judged on an objective standard based on all the facts and circumstances of the particular case. *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005); *Brandon, supra*. The facts must be such that when heard, an average member of the community would resent the actor and exclaim " 'Outrageous!' " *Heitzman*, 270 Neb. at 605, 705 N.W.2d at 431. Accord Restatement (Second) of Torts § 46, comment *d*. (1965). Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from living in society do not rise to the level of extreme and outrageous conduct. *Heitzman, supra*; *Brandon, supra*. In determining whether certain conduct is extreme and outrageous, the relationship between the parties and the susceptibility of the plaintiff to emotional distress are important factors to consider. *Brandon, supra*. Conduct which might otherwise be considered merely rude or abusive may be deemed outrageous when the defendant knows that the plaintiff is particularly susceptible to emotional distress. *Id*.

In *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001), we determined as a matter of law that a sheriff's use of crude and dehumanizing language when interviewing the victim of a sexual assault constituted actionable extreme and outrageous conduct. Another example of conduct held to be actionable was the refusal of a funeral home to release a body until the widow paid a $490 embalming fee. *Dale v. Thomas Funeral Home*, 237 Neb. 528, 466 N.W.2d 805 (1991).

In *Nichols, supra*, we also found actionable conduct when a person who had left a seriously injured passenger to die after a motor vehicle accident called the mother of the passenger and reported that her daughter had stolen the vehicle. In *Foreman v. AS Mid-America*, 255 Neb. 323, 586 N.W.2d 290 (1998), we held that name-calling and other harassment of nonunion replacement workers did not constitute actionable extreme and outrageous conduct. In *Hassing v. Wortman*, 214 Neb. 154, 157, 333 N.W.2d 765, 767 (1983), we stated that it was "doubtful" that the defendant's harassment of his former spouse concerning her current spouse amounted to extreme and outrageous conduct, noting that he did not threaten her safety; however, the case was decided on other grounds.

Considered in the light most favorable to Roth, as our standard of review requires, the evidence demonstrates that prior to the conduct in question, Wiese had sexually abused Roth on numerous occasions when she was a child and threatened her in order to secure her silence concerning the abuse. Then, 30 years later, he contacted her by telephone at her home and angrily berated her for reporting the abuse, repeating the same threats he had made previously. Subsequently, he sent her letters begging for forgiveness and then left a message on her answering machine essentially comparing her to a prostitute. In light of the evidence that Roth was the victim of past sexual abuse perpetrated by Wiese and thus particularly susceptible to emotional distress, we conclude that the evidence was sufficient to support a finding that Wiese's conduct in 2002 was "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community." See *Brandon*, 261 Neb. at 656, 624 N.W.2d at 620-21.

*(iii) Severity of Emotional Distress*

[6] Roth had the burden to prove that Wiese's conduct subjected her to mental distress " 'so severe that no reasonable person should be expected to endure it.' " See *Nichols v. Busse*, 243 Neb. 811, 817-18, 503 N.W.2d 173, 179 (1993). The endurability of the distress is a factual question for the jury; absent a complete lack of evidence on the issue we will not disturb the jury's finding. *Id.* Although outrageous conduct and severe emotional distress are separate elements of the tort of intentional infliction

of emotional distress, the two are related in that the extreme and outrageous character of the conduct is itself important evidence that severe emotional distress existed on account of the conduct. See *Brandon, supra*.

In other factual circumstances, we have held that embarrassment, humiliation, anger, and nervousness did not amount to severe emotional distress caused by outrageous conduct. See, *Dale v. Thomas Funeral Home*, 237 Neb. 528, 466 N.W.2d 805 (1991); *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983). However, in *Nichols*, we held that the plaintiff's adjustment disorder/stress syndrome which resulted in hypersomnia, insomnia, recurring nightmares, anxiety attacks, depression, and headaches requiring prescription medication and counseling was sufficient to support a finding of severe emotional distress.

Here, the record discloses that after receiving the initial telephone call from Wiese, Roth had trouble sleeping, had nightmares, became fearful of her children going out, bought a gun, and relocated to a new home. There was evidence that she began using alcohol on a daily basis, that she began sleeping after work and failing to interact with her family, and that her income suffered due to an inability to concentrate. Expert testimony established that she suffered from posttraumatic stress disorder and chronic depression.

Some evidence in the record attributes Roth's emotional problems to the actual sexual abuse and/or to stress experienced by Roth as a result of the lawsuit against Wiese, rather than to Wiese's 2002 contacts. Lazere testified that Roth's symptoms were caused at least in part by the original sexual abuse and her failure to get treatment for that abuse. Lazere also testified, however, that Roth's symptoms were a result of Wiese's harassment in 2002 and that her emotional response to Wiese's renewed contacts was not atypical of a sexual abuse victim, because the contacts essentially caused her to go back in time and relive the assaults. Although Roth had some trouble sleeping and some depression before Wiese contacted her in 2002, the record reflects that these symptoms intensified after those contacts. It further reflects that her fear for the safety of her children, her inability to concentrate at work, her desire to own a handgun, and her decision to relocate to a new home all developed after the contacts. We conclude that

the evidence is sufficient to support a finding that Roth sustained severe emotional distress primarily caused by Wiese's extreme and outrageous conduct as discussed above. See *Nichols, supra* (upholding jury verdict for plaintiff where evidence established severe emotional distress was primarily caused by extreme and outrageous intentional or reckless conduct of defendant).

### 2. Evidentiary Rulings

#### (a) Standard of Review

[7] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005); *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004).

#### (b) Analysis

[8] Wiese argues that the district court erred in overruling his relevance objections and permitting Roth to testify concerning the nature and frequency of the sexual abuse. Relevant evidence, as defined by Neb. Rev. Stat. § 27-401 (Reissue 1995), is that which tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. *Borley Storage & Transfer Co. v. Whitted, ante* p. 84, 710 N.W.2d 71 (2006); *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999). The 2002 communications which form the basis of Roth's claim against Wiese refer specifically to the prior sexual abuse. The nature and frequency of that abuse is relevant to the issue of whether the communications constituted outrageous conduct and resulted in severe emotional distress. This is particularly so in light of Lazere's testimony that the 2002 communications caused Roth to relive the memories of the previous trauma and feel " 'extremely vulnerable [and] extremely frightened.' " The district court did not abuse its discretion in permitting Roth to testify regarding her specific recollection of the abuse.

Wiese also contends that the district court erred by permitting Roth's counsel on cross-examination of Davis to elicit his awareness of lawsuits brought by Wiese against Roth and her father,

over Wiese's relevance objection. This line of cross-examination was prompted by Davis' testimony on direct examination that Roth's adjustment disorder was caused "by the fact that she is involved in a lawsuit against her uncle." Previously, Van Dyke had testified without objection that Roth told him that Wiese " 'had filed suit against her for slander.' " Also, Lazere testified on cross-examination that she was aware of " 'more than one lawsuit.' " We conclude that the district court did not err in permitting brief cross-examination of Davis on this point.

### 3. Jury Instructions

#### (a) Standard of Review

[9,10] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005). To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

#### (b) Analysis

##### *(i) Refusal to Give Requested Instructions*

Wiese argues that the trial court erred in refusing to give his requested instructions regarding mitigation of damages and the definition of extreme and outrageous conduct. Although the record of the instruction conference reflects that copies of the requested instructions were tendered to the court and opposing counsel, the record does not include the requested instructions.

[11,12] Wiese argues that the district court should have given an instruction based on NJI2d Civ. 4.70 with respect to mitigation of damages. Mitigation of damages is an affirmative defense, as to which Wiese had the burden of proof. See, *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000); *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983). Wiese alleged this

defense in an amended answer. The trial judge concluded that the tendered mitigation of damages instruction was an accurate statement of the law but was not warranted by the evidence. We agree. Based upon testimony of Lazere that Roth's " 'reactions are not atypical of a sexual abuse victim who's untreated,' " Wiese argues that the jury should have been instructed to consider the effect of Roth's "failure to obtain counseling or resolve her issues earlier in life" on the amount of her damages. Brief for appellant at 40. The doctrine of mitigation of damages applies only to post-event occurrences. *Welsh v. Anderson*, 228 Neb. 79, 421 N.W.2d 426 (1988). Roth's claim is based upon tortious conduct occurring in 2002. Wiese did not present any evidence that Roth failed to take reasonable steps to minimize her damages after the conduct in question.

[13] From the colloquy during the instruction conference, it appears that Wiese's other tendered instruction included a "definition of extreme and outrageous conduct citing the Restatement of Torts (Second), Section 46." The trial judge refused to give the tendered instruction, noting that while it was an accurate statement of the law, it was subsumed in another instruction setting forth the elements of the tort as defined in our case law. It is not error for a trial court to refuse to give a requested instruction if the substance of the proposed instruction is contained in those instructions actually given. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003); *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000). Here, the jury was instructed that Roth had the burden of proving intentional or reckless conduct on the part of Wiese that "was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community." This instruction was consistent with our case law, as cited above, and with Restatement (Second) of Torts § 46, comment *d*. (1965). The trial court did not err in refusing to give the tendered instruction.

*(ii) Instruction on Damages*

The district court instructed the jury that if it decided in favor of Roth, it could consider the following factors in determining her damages:

> 1. The nature and extent of the injury, including whether the injury is temporary or permanent;
>
> 2. The reasonable value of the medical, psychiatric, and mental health counseling care and supplies reasonably needed by and actually provided to the plaintiff and reasonably certain to be needed and provided in the future;
>
> 3. The physical pain and mental suffering the plaintiff has experienced and is reasonably certain to experience in the future . . . .

Wiese objected on grounds that the evidence did not warrant instructing the jury as to permanent injury, future treatment, and future pain and suffering. Wiese contends that the trial judge erred in overruling this objection and giving the instruction.

We conclude that this instruction was warranted by the evidence. Lazere testified that Roth was in the second stage of a three-stage recovery process and that she expected to continue treating her in the future. There was evidence of the fair and reasonable cost of professional services which Lazere and Van Dyke had provided to Roth in her treatment to date. There was also testimony that Roth suffers from chronic, longstanding disorders which intensified after the 2002 contacts by Wiese.

### 4. Amount of Damages

#### (a) Standard of Review

[14] The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *Wendeln v. Beatrice Manor, ante* p. 373, 712 N.W.2d 226 (2006); *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

#### (b) Analysis

[15,16] 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. *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004). With regard to the amount of damages sustained, the plaintiff is simply required to offer sufficient proof of damages so that the jury

could reach its award without awarding an uncertain, speculative recovery. See *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). The amount of damages for pain, suffering, and emotional distress inherently eludes exact valuation. *Id.* As a general rule, the law gives the jury the right to determine the amount of recovery in cases such as this, and if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed. *Id.*

Roth presented evidence regarding the cost of her mental health treatment with Lazere and Van Dyke. Specifically, she incurred nine charges of $100 for her time with Lazere and two charges of $195 each for her time with Van Dyke. She also presented evidence of significant emotional pain and suffering, including fear, depression, anxiety, and the disruption of relationships with members of her immediate family. In *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002), the plaintiff was the victim of a sexual assault and experienced many of the same forms of emotional injury suffered by Roth. We held that a verdict of $125,000 was not excessive. Here, there is evidence that Wiese's conduct in 2002 caused Roth to relive the emotional trauma of multiple sexual assaults during her childhood, resulting in similar symptoms. The valuation of such matters is uniquely within the province of the jury. Based upon our review of the record, we cannot say that the verdict is so disproportionate to the injury as to be the product of prejudice or passion, and we therefore conclude that the verdict was not excessive as a matter of law.

### 5. Rulings on Trial and Posttrial Motions

#### (a) Standard of Review

[17-19] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005). 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. *Id.* 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. *Kant v. Altayar*, 270 Neb. 501, 704 N.W.2d 537 (2005); *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

(b) Analysis

Because we conclude that the evidence was sufficient to sustain the verdict, it necessarily follows that the district court did not err in overruling the motion for a directed verdict made at the close of Roth's case in chief and renewed at the close of trial. For the same reason, there was no error in overruling the motion for judgment notwithstanding the verdict. Because we conclude that the verdict was not excessive and the district court did not err in ruling on evidence or instructing the jury, we conclude that it did not abuse its discretion in overruling the motion for new trial.

## IV. CONCLUSION

For the foregoing reasons, we find no error in the proceedings before the district court and therefore affirm its judgment in favor of Roth.

AFFIRMED.

WRIGHT, J., not participating.

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ALFRED S. TURCO, JR., APPELLEE AND CROSS-APPELLANT, V. KENNETH SCHUNING, APPELLEE, AND NORTH AMERICAN TRUCK AND TRAILER, INC., A SOUTH DAKOTA CORPORATION, APPELLANT AND CROSS-APPELLEE.

716 N.W.2d 415

Filed June 16, 2006. No. S-05-068.

1. **Statutes.** The meaning of a statute is a question of law.
2. **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. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. ____: ____. In the absence of ambiguity, courts must give effect to the statutes as they are written. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

5. **Workers' Compensation: Statutes.** Neb. Rev. Stat. § 48-118 (Reissue 2004) does not adopt a "made whole" doctrine.
6. ____: ____. Neb. Rev. Stat. § 48-118 (Reissue 2004) does not prescribe an exact formula for the trial court to apply when making a fair and equitable distribution.
7. **Statutes.** It is not within the province of the Nebraska Supreme Court to read a meaning into a statute that is not there.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Reversed and remanded with directions.

Dallas D. Jones and Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Thomas J. Young for appellee Alfred S. Turco, Jr.

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

CONNOLLY, J.

This appeal presents the question, How should the proceeds of a third-party settlement be distributed between an injured employee and the employer's insurer under the Nebraska Workers' Compensation Act? North American Truck and Trailer, Inc. (North American) appeals the district court's order awarding Alfred S. Turco, Jr., an employee of North American who was injured in a motor vehicle accident, the entire amount of a tort claim settlement. North American asked for a subrogation interest in the settlement. The court, however, determined that Turco had not been "made whole" and denied subrogation under principles of equitable subrogation. We determine that the settlement of a third-party claim under Neb. Rev. Stat. § 48-118 (Reissue 2004) (now codified at Neb. Rev. Stat. § 48-118.04 (Supp. 2005)) does not require that the employee be "made whole" before the employer can subrogate. Instead, under the plain language of § 48-118, the court shall order a fair and reasonable distribution, and the application of a specific doctrine is not required. Accordingly, we reverse, and remand with directions.

## BACKGROUND

North American employed Turco as an outside sales representative. In 2001, while working for North American, Turco's vehicle was struck by another vehicle driven by Kenneth Schuning.

Turco was driving a vehicle owned by Joan Turco. Joan's liability policy included a provision for $100,000 underinsured motorist coverage. Turco settled a claim against Schuning's insurance company for the policy limits of $250,000. North American's insurance carrier also paid Turco $145,682.50 for workers' compensation benefits.

Turco filed an application in the district court for Douglas County under § 48-118 requesting that the court make a fair and equitable distribution of the $250,000 settlement. North American claimed it had a subrogation interest in the settlement. At the distribution hearing, Turco presented evidence that his damages were about $607,670, and the district court made the following factual findings regarding his damages: (1) lost income: $125,000; (2) loss of earning capacity: $300,000; (3) pain and suffering: $80,000; and (4) medical expenses: $80,000.

The court determined that § 48-118 "injected an element of equity into a Nebraska's [sic] statutory right of subrogation where one was not present before." The court then determined that § 48-118 required it to apply principles of equitable subrogation, which required that Turco be "made whole" before North American could subrogate. Because Turco suffered damages totaling more than twice the settlement amount of $250,000 and the settlement would not make him whole, the court awarded Turco the entire settlement. North American appeals, and Turco cross-appeals.

## ASSIGNMENTS OF ERROR

North American assigns, rephrased and consolidated, that the district court erred in (1) finding that the "made whole" doctrine applies to § 48-118, (2) determining that Turco was not "made whole" and failing to consider benefits already paid when reaching that determination, (3) failing to consider other sources of recovery available, (4) awarding the full settlement to Turco, and (5) failing to provide a credit for future benefits.

## STANDARD OF REVIEW

[1] The meaning of a statute is a question of law. *Lamar Co. v. Omaha Zoning Bd. of Appeals, ante* p. 473, 713 N.W.2d 406 (2006).

[2] 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. *McCray v. Nebraska State Patrol, ante* p. 1, 710 N.W.2d 300 (2006).

## ANALYSIS

North American contends that the court erroneously applied equitable subrogation by denying its subrogation claim until Turco had been "made whole." North American argues that § 48-118, which was amended in 1994, altered common-law equitable subrogation in workers' compensation subrogation disputes. Turco, however, argues that the amendment to § 48-118 specifically adopts equitable subrogation and the "made whole" doctrine.

[3,4] 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. *Metropolitan Util. Dist. v. Aquila, Inc., ante* p. 454, 712 N.W.2d 280 (2006). In the absence of ambiguity, courts must give effect to the statutes as they are written. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *McCray v. Nebraska State Patrol, supra.*

Section 48-118 grants an employer's insurance company that has paid workers' compensation benefits to an employee injured by a third party a subrogation interest against payments made by the third party. The section provides that a settlement is void unless agreed to in writing by the employee and employer or the court determines that the settlement is fair and reasonable. At issue is the following language from § 48-118:

> If the employee or his or her personal representative and the insurer of the employer if there is one, and if there is no insurer, then the employer, do not agree in writing upon distribution of the proceeds of any judgment or settlement, the court upon application shall order a fair and equitable distribution of the proceeds of any judgment or settlement.

Before the amendment, § 48-118 did not include language requiring the court to order a fair and equitable distribution. In

the absence of specific contractual or statutory provisions, we have said that equitable principles apply even when a subrogation right is based on contract. See *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993), *disapproved on other grounds, Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). Applying basic equitable principles, we held in *Frohlich* that "in 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." (Emphasis supplied.) 243 Neb. at 122, 498 N.W.2d at 81. In other words, the insured had to be "made whole" before the insurer could subrogate.

We have also recognized, however, that statutory subrogation presents a different scenario. "Statutory and equitable subrogation coexist, but we have never employed a hybrid of statutory and equitable subrogation without direction from the Legislature to do so." *Jackson v. Branick Indus.*, 254 Neb. 950, 960, 581 N.W.2d 53, 59 (1998). In *Branick Indus.*, we held that the amendment to § 48-118 was substantive rather than procedural. We noted that the amendment injected equity into statutory subrogation when one was not present before. We did not, however, hold that the statute adopted pure equitable subrogation.

[5] Now, § 48-118 includes language providing for a fair and equitable distribution. It does not, however, adopt the "made whole" doctrine. Nor does it adopt any other specific rule for determining how to fairly and equitably distribute the settlement. Instead the language is plain: The court "shall order a fair and equitable distribution." Because we apply statutory subrogation, we decline to further read into § 48-118 a requirement that the employee be "made whole."

Turco, however, argues that under our decision in *Dailey, supra*, equitable subrogation and the "made whole" doctrine must be applied to every case. We disagree. In *Dailey*, we addressed a contractual provision that sought to alter equitable subrogation. We did not discuss the effect of a specific statutory provision. A case is not authority for any point not necessary to be passed on to decide the case. *Detter v. Miracle Hills Animal Hosp.*, 269 Neb. 164, 691 N.W.2d 107 (2005).

North American next argues that under § 48-118, we should adopt a "rule of proportionality" to determine what constitutes a fair and equitable distribution. Brief for appellant at 29. According to North American, under such rule, "each party should receive from the total recovery made, a proportionate share of the tort proceeds, based on the net losses suffered by the parties." *Id.*

[6,7] We decline to adopt such rule. Section 48-118 does not prescribe an exact formula for the trial court to apply when making a fair and equitable distribution, and we will not read such formula into the statute. It is not within the province of this court to read a meaning into a statute that is not there. See *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004). Instead, under the plain language of § 48-118, the trial court shall make a fair and equitable distribution. The distribution is left to the court's discretion. We determine that the court erred when it concluded that it was required to apply the "made whole" doctrine.

Next, North American argues that the district court erred by failing to consider all sources of recovery available, particularly $100,000 of underinsured motorist insurance available. It also argues that it should get a credit for future amounts of compensation paid. The record, however, does not show that underinsured motorist benefits have been received or will be received. Nor does the record show the amount of future compensation. Should further distribution claims arise from future settlements, or should North American believe in the future that it no longer owes compensation, those issues may be handled by the court at that time.

## CROSS-APPEAL

On cross-appeal, Turco contends that if the matter is remanded and the court determines that North American is entitled to a portion of the settlement, the court must address attorney fees. We agree and direct that if necessary, apportionment of attorney fees be considered on remand. See, Neb. Rev. Stat. § 48-118.02 (Supp. 2005) (providing for apportionment of attorney fees); *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000).

## CONCLUSION

We determine that § 48-118 does not mandate that the employee be "made whole." Instead, it requires a fair and equitable distribution to be determined by the trial court under the facts of each case. Because the trial court erroneously determined that it was required to apply the "made whole" doctrine, we reverse, and remand with directions that the court fairly and equitably distribute the settlement. If necessary, the court is also directed to consider apportionment of attorney fees.

REVERSED AND REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V.
EDWARD MOYER, SR., APPELLANT.

715 N.W.2d 565

Filed June 16, 2006. No. S-05-079.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
2. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
4. **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.
5. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
6. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
7. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel may or may not be considered when it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
8. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.

9. ____: ____. In order to demonstrate that his or her counsel's performance was deficient in support of a claim for ineffective assistance of counsel, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
10. ____: ____. The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
11. **Effectiveness of Counsel: Proof: Words and Phrases.** To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
12. **Constitutional Law: Legislature: Statutes: Presumptions.** The presumption is always in favor of the constitutionality of legislation, and an act should be held to be within the proclamation if it can be done by any reasonable construction.
13. **Restitution: Damages.** An order to make restitution under Neb. Rev. Stat. § 29-2280 (Reissue 1995) is punitive as to the wrongdoer, but is limited to the actual loss sustained by the victim and is thus compensatory or remedial in nature.
14. **Constitutional Law: Restitution: Damages.** Restitution, ordered in an amount not exceeding the actual damage sustained by the victim, pursuant to Neb. Rev. Stat. § 29-2280 (Reissue 1995), is not a penalty within the meaning of Neb. Const. art. VII, § 5, and is constitutional.
15. **Presentence Reports: Waiver.** A defendant has a qualified right to review his or her presentence report, and the defendant may, with his or her attorney, examine the presentence report subject to the court's supervision. However, the defendant waives that qualified right by not notifying the trial court that he or she has not personally reviewed the report and that he or she wishes to do so.
16. **Presentence Reports: Appeal and Error.** The failure to object to the presentence report precludes a defendant from challenging it on appeal.

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

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

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

GERRARD, J.

## NATURE OF CASE

After pleading guilty to burglary, Edward Moyer, Sr., was sentenced to a term of imprisonment and ordered to make restitution

to his victims. When Moyer's trial counsel did not appeal the sentence, Moyer filed a postconviction action and, ultimately, was granted a new direct appeal by the district court. Pursuant to that order, Moyer filed this appeal.

## FACTUAL AND PROCEDURAL BACKGROUND

In February 2002, Moyer and three other men broke into a convenience store in Bennett, Nebraska, and stole an automatic teller machine (ATM) belonging to First State Bank. The men loaded the ATM into the back of their pickup truck and, after driving to an abandoned farmstead, opened the ATM using a cutting torch. The ATM contained $10,360, which the men split evenly among themselves.

In September, Moyer was charged with burglary. After initially pleading not guilty to the charge, Moyer withdrew the plea and entered a guilty plea. In March 2003, Moyer was sentenced to 5 to 10 years' imprisonment, ordered to pay costs of the action, and ordered to pay restitution of $10,360 to First State Bank and $1,095 to the convenience store.

In April 2004, Moyer filed a motion for postconviction relief in the district court, alleging that his attorney failed to file a direct appeal as Moyer had directed. The court sustained the motion, granted Moyer 30 days in which to file a direct appeal, and appointed the Lancaster County public defender to represent Moyer on appeal. See *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). Pursuant to that order, Moyer filed this direct appeal.

## ASSIGNMENTS OF ERROR

Moyer assigns, summarized, restated, and renumbered, that (1) he received ineffective assistance of counsel because his attorney failed to challenge the constitutionality of the criminal restitution statutes, and as a result, he was ordered to pay restitution in violation of the statutory requirement that criminal penalties be appropriated for the support of common schools; (2) he received ineffective assistance of counsel because his attorney failed to disclose to him the contents of the presentence report, and consequently, the district court imposed a sentence based on a presentence report containing false information; and

(3) the district court abused its discretion by imposing an excessive sentence.

## STANDARD OF REVIEW

[1,2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

[3] The constitutionality of a statute is a question of law, regarding which this court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005).

[4,5] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Aldaco, ante* p. 160, 710 N.W.2d 101 (2006). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Lykens, ante* p. 240, 710 N.W.2d 844 (2006).

## ANALYSIS

*Nebraska's Criminal Restitution Statutes Are Not Unconstitutional, and Thus, Moyer Was Not Prejudiced by Trial Counsel's Failure to Challenge Their Constitutionality.*

Moyer assigns that the district court erred in ordering him to pay restitution pursuant to Neb. Rev. Stat. §§ 29-2280 to 29-2289 (Reissue 1995) because such statutory sections are unconstitutional. Specifically, Moyer argues that Nebraska's criminal restitution statutes violate Neb. Const. art. VII, § 5(1), which states, in relevant part, that

> all fines, penalties, and license money arising under the general laws of the state . . . shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties, and license money arising

> under the rules, bylaws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue . . . .

The State initially asserts that any error committed by the district court in ordering Moyer to make restitution was invited error because Moyer, individually and through trial counsel, agreed to be subject to restitution and encouraged the court to consider the restitution figure in determining Moyer's sentence. Thus, the State argues that Moyer's assignment of error is waived. In addition, the State argues that Moyer also waived his challenge to the constitutionality of the restitution statutes on appeal because he failed to raise the issue before the district court and, alternatively, that the restitution statutes are constitutional.

During Moyer's arraignment hearing, the court informed Moyer of the punishment associated with burglary, including a potential order to pay restitution, and when asked if he understood the potential penalty for burglary, Moyer answered affirmatively. Neither Moyer nor his trial counsel challenged the constitutionality of the statutes providing for criminal restitution. During Moyer's sentencing hearing, the court noted that Moyer had agreed that an order of restitution could be entered against him, and Moyer's attorney encouraged the court to consider the amount of restitution to be ordered in determining Moyer's sentence. Further, when asked to comment on his sentencing, Moyer stated, in part, "I know I did wrong and I am doing my time. And if I — as soon as I get out, I could pay my restitution." Again, neither Moyer nor his attorney challenged the constitutionality of the restitution provisions.

[6] A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal. See *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003). Moyer failed to challenge the constitutionality of the restitution statutes before the trial court, and he, without question, waived the error. However, Moyer argues that such waiver occurred as a result of the ineffectiveness of his trial counsel in failing to

present a constitutional challenge to the restitution statutes. Accordingly, we consider whether the failure of Moyer's attorney to challenge the constitutionality of the Nebraska criminal restitution penalties constitutes ineffective assistance of counsel.

[7] A claim of ineffective assistance of counsel may or may not be considered when it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

[8-10] 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. Aldaco, ante* p. 160, 710 N.W.2d 101 (2006). To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004). Moyer argues that his attorney was deficient in failing to challenge the constitutionality of the criminal restitution statutes at the sentencing hearing. The record on appeal is not sufficient to determine whether the performance of Moyer's attorney was deficient. However, the record is sufficient to review the issue of whether the alleged deficiency was prejudicial to Moyer's defense. The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003).

[11] To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006). Here, we must determine whether, but for the failure of Moyer's

attorney to challenge the constitutionality of the Nebraska restitution statutes, the result of Moyer's sentencing would have been different. Thus, we consider the merits of a constitutional challenge to §§ 29-2280 to 29-2289.

[12] Moyer asserts that §§ 29-2280 to 29-2289, under which a sentencing court may order a defendant to make restitution for the loss sustained by a victim, violate Neb. Const. art. VII, § 5(1), which provides that all fines, penalties, and license money be reserved for the use and support of the common schools. The presumption is always in favor of the constitutionality of legislation, and an act should be held to be within the proclamation if it can be done by any reasonable construction. *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005).

We have stated that restitution ordered by a court pursuant to § 29-2280 is a criminal penalty imposed as punishment for a crime. *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987). However, we have yet to determine whether such restitution orders are penalties within the meaning of Neb. Const. art. VII, § 5. In *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990), we noted the potential conflict between §§ 29-2280 to 29-2289, which contemplate the payment of restitution to the victim, and Neb. Const. art. VII, § 5, which requires that penalties be paid over to the counties for the support of the common schools. However, it was not necessary to decide the issue in *Yost, supra*.

In *School District of the City of Omaha v. Adams*, 147 Neb. 1060, 26 N.W.2d 24 (1947), we considered whether, based upon Neb. Const. art. VII, § 5, statutory penalties collected for the failure to list intangible property for taxation belonged to the Omaha School District. We stated that art. VII, § 5, does not refer to those damages that a private person may sustain, but applies only to those that are given to the public and go into the public treasury.

> Clearly a statutory provision for liquidated damages in favor of a private person where it is not so oppressive as to offend constitutional requirements as to due process, although in the form of a penalty, does not create a penalty that must be appropriated to the use and support of the common schools within the meaning of section 5, article VII, of the Constitution.

*Adams*, 147 Neb. at 1064, 26 N.W.2d at 27.

In evaluating the 50-percent penalties imposed by statute for the failure to list intangible property for taxation, we stated that such penalties are "punitive in character insofar as the wrongdoer is concerned[,] prescribed . . . in part to induce owners of intangible property to list such property for assessment by imposing a severe penalty for failure to so do." *Id.* at 1063, 26 N.W.2d at 26. However, we further stated that while the statute is punitive in that respect, it is compensatory or remedial as to the taxing bodies involved "for the delay caused by the failure to list for assessment purposes and the consequent derangement of tax records and collection processes." *Id.* at 1066, 26 N.W.2d at 28. Because the statute was not solely punitive, we determined that the penalty imposed by the statute was not contemplated by Neb. Const. art. VII, § 5.

In *School District of McCook v. City of McCook*, 163 Neb. 817, 81 N.W.2d 224 (1957), we addressed whether moneys paid after receiving a violation notice under parking meter ordinances were fines, penalties, and license moneys within the meaning of article VII, § 5, and therefore property of the school district. We noted the regulatory purpose of coins deposited in a parking meter under the ordinance, in preventing overtime parking so as to avoid congestion, permitting free movement of traffic, and correcting abuses of the parking privilege. However, we explained that the penalties imposed for parking violations were not part of that regulatory purpose but were penalties paid by violators to purge themselves of the violation charges. Such penalties were not remedial or compensatory to the city. Thus, we found the facts to be distinguishable from those of *Adams, supra*, stating that in *School District of McCook*, 163 Neb. at 825, 81 N.W.2d at 229, "the moneys were paid as a punishment for violating a police regulation which was in no manner compensatory to the city. It was clearly a penalty within the meaning of the constitutional provision." Cf., *DeCamp v. City of Lincoln*, 202 Neb. 727, 277 N.W.2d 83 (1979) (court costs collected by city violations bureau for parking violations were not fines or penalties within meaning of state Constitution); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960) (damages which double or treble

actual compensatory damages established are in contravention of due process clause and article VII, § 5).

[13,14] Based on our reasoning in *School District of the City of Omaha v. Adams*, 147 Neb. 1060, 26 N.W.2d 24 (1947), and *School District of McCook, supra*, the Nebraska criminal restitution statutes challenged by Moyer do not violate Neb. Const. art. VII, § 5. Section 29-2280 states, in part: "A sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted." Although an order to make restitution is punitive as to the wrongdoer, it is limited to the actual loss sustained by the victim and is thus compensatory or remedial in nature. Accordingly, we hold that restitution, ordered in an amount not exceeding the actual damage sustained by the victim, pursuant to § 29-2280, is not a penalty within the meaning of Neb. Const. art. VII, § 5, and is constitutional.

We conclude that Nebraska's criminal restitution statutes are not unconstitutional and, therefore, the failure of Moyer's trial counsel to challenge such statutes before the sentencing court was not prejudicial to Moyer's defense, as such argument would have been without merit.

*Record Is Insufficient to Review Moyer's Claim of Ineffective Assistance of Counsel Regarding Counsel's Alleged Failure to Disclose to Moyer Contents of Presentence Report.*

Moyer argues that the presentence report prepared prior to his sentencing contained errors that were never disclosed to him by his trial counsel and that the district court's consideration of the inaccuracies was in error. Moyer asserts that his trial counsel was deficient in failing to disclose information in the presentence report, depriving him of the opportunity to correct the errors regarding his criminal history prior to sentencing. Moyer asks us to remand the cause for an evidentiary hearing on this claim of ineffective assistance of counsel.

The State argues that Moyer waived any claim that the presentence report contained erroneous information because when asked during his sentencing hearing, he confirmed to the court that he had an opportunity to talk with his attorney about the contents of

the presentence report and that he was not aware of any necessary changes or additions. With respect to Moyer's claim of ineffective assistance of counsel, the State asserts that Moyer was not prejudiced by the alleged failure of trial counsel to disclose the contents of the presentence report because none of the claimed errors are significant in the context of Moyer's criminal record and, thus, would not have affected the sentence.

[15,16] A defendant has a qualified right to review his or her presentence report, and the defendant may, with his or her attorney, examine the presentence report subject to the court's supervision. However, the defendant waives that qualified right by not notifying the trial court that he or she has not personally reviewed the report and that he or she wishes to do so. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). The failure to object to the presentence report precludes a defendant from challenging it on appeal. *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004).

Prior to Moyer's sentencing, the following colloquy took place:

> THE COURT: [Counsel for Moyer], have you had an opportunity to review the contents of the presentence investigation report?
>
> [Counsel]: I have, Judge.
>
> THE COURT: Are you aware of any changes, corrections or additions that need to be made to it?
>
> [Counsel]: No, sir, not to my knowledge.
>
> THE COURT: Mr. Moyer, have you had an opportunity to talk with [counsel] about the contents of the presentence investigation report?
>
> DEFENDANT E. MOYER, SR.: Yes, sir.
>
> THE COURT: Are you aware of any changes, corrections or additions that need to be made to it?
>
> DEFENDANT E. MOYER, SR.: No, sir.

Moyer's failure to object to the presentence report at sentencing effectively waived his right to challenge it on appeal. However, Moyer claims that such failure was a result of his trial counsel's failure to disclose to him the contents of the presentence report.

*State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004), presented a similar question. In that case, Robert McDermott pled guilty to possession of a controlled substance with intent to deliver pursuant to a plea agreement. At the sentencing hearing,

the court asked trial counsel if he had had an opportunity to review the presentence report and whether he wished to make any corrections. No objections were made to the accuracy of the information in the report. McDermott was sentenced, and counsel filed an appeal alleging that the sentence was excessive.

After the sentence was affirmed, McDermott retained new counsel and filed a postconviction motion alleging ineffective assistance of counsel due, in part, to counsel's failure to adequately discuss McDermott's criminal history with him prior to sentencing. McDermott alleged that if he had been given the opportunity to review the presentence report, he would have brought erroneous information in the report to the attention of his attorney and the court. The district court denied the motion. On appeal, the Nebraska Court of Appeals concluded: "McDermott's motion for postconviction relief contained 'factual allegations which, if proved, constitute an infringement of McDermott's right to effective assistance of counsel under the federal Constitution, and the records and files do not affirmatively show that McDermott is entitled to no relief.' " *Id.* at 763, 677 N.W.2d at 159. Accordingly, the Court of Appeals remanded the matter for an evidentiary hearing.

On remand, the district court conducted an evidentiary hearing, during which trial counsel, McDermott, and the probation officer responsible for compiling the presentence report testified. The district court overruled McDermott's postconviction motion, and McDermott appealed. We affirmed the judgment of the district court, finding that McDermott's trial counsel was not deficient. We relied on testimony by the probation officer that she had met with McDermott to review his criminal record in the course of preparing the presentence report, and trial counsel's testimony that he went over the report with McDermott for 20 minutes prior to the sentencing hearing. We determined that without any indication by McDermott that the report contained errors, trial counsel was reasonable in relying on the report. *Id.*

The instant case presents the same question: whether Moyer's trial counsel was deficient in failing to disclose the contents of the presentence report to Moyer prior to sentencing. However, the record before us is simply not sufficient for us to review the claim. Unlike *McDermott, supra*, we do not have the benefit of

a record containing evidence of any conversations that took place between Moyer and trial counsel regarding the contents of the presentence report. If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). Because the record is insufficient to evaluate Moyer's claim of ineffective assistance of counsel in this regard, we decline to address it on direct appeal.

*District Court Did Not Impose Excessive Sentence.*

Moyer assigns that the district court erred in imposing an excessive sentence. Moyer claims that the court failed to adequately consider information regarding the plea agreements provided to his codefendants and the fact that Moyer accepted responsibility and pled guilty. The State argues that the sentence was within statutory limits and that the court properly considered Moyer's extensive criminal history in determining the sentence.

Burglary, a Class III felony, is punishable by a maximum of 20 years' imprisonment, a fine of $25,000, or both, and a minimum of 1 year's imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002); Neb. Rev. Stat. § 28-507 (Reissue 1995). In addition to the order of restitution, Moyer was sentenced to 5 to 10 years' imprisonment to be served consecutively to other sentences being served by Moyer, well within the statutory limits for the crime of burglary. Furthermore, Moyer's criminal record dates back to 1974 and includes convictions for sexual assault, multiple thefts and burglaries, and possession of a firearm by a felon.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Aldaco, ante* p. 160, 710 N.W.2d 101 (2006). Based on our review of the record, we conclude that the sentence imposed in this matter was not excessive and that the district court did not abuse its discretion in ordering such sentence.

## CONCLUSION

The judgment of the district court is, therefore, affirmed.

AFFIRMED.

# LEONARD L. WEBSTER, APPELLANT, V. SUSAN K. WEBSTER, APPELLEE.

716 N.W.2d 47

Filed June 16, 2006. No. S-05-372.

1. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
2. **Divorce: Property Division: Pensions.** That portion of a pension which is earned during the marriage is part of the marital estate.
3. ____: ____: ____. In dissolution proceedings, the trial court has broad discretion in valuing and dividing pension rights between the parties.
4. **Divorce: Property Division: Alimony.** While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately.
5. **Divorce: Property Division: Pensions.** In a dissolution proceeding, it would be incongruous to reduce one party's equitable share in the other's pension simply because one has elected to retire early, while the other continues to work.
6. **Federal Acts: Social Security: Divorce.** Under 42 U.S.C. § 407(a) (2000), state law that would authorize distribution of Social Security benefits is preempted, and Social Security benefits themselves are not subject to direct division in a dissolution proceeding.
7. **Constitutional Law: Federal Acts: Social Security: Divorce: Property Division.** The anti-assignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution prohibit a direct offset to adjust for disproportionate Social Security benefits in the property division of a dissolution decree.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

John A. Kinney, of Govier, Milone & Kinney, L.L.P., for appellant.

Karen A. Bates-Crouch, and, on brief, Kimberly A. Booth, of Bates-Crouch Law Office, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

This case presents an appeal from the decree of dissolution dividing the parties' marital property, including pension and retirement benefits. The issues presented are (1) whether the disparate timing of the parties' retirement must be considered in the

distribution and (2) whether a party who participated in a public employee retirement fund "in lieu of" Social Security participation is entitled to an offset or other compensation for a spouse's Social Security benefits.

## BACKGROUND

Leonard L. Webster and Susan K. Webster were married on July 30, 1983. On September 25, 2003, Leonard petitioned for dissolution. The marriage was dissolved by a decree filed March 14, 2005. The trial court did not award alimony and set forth an equal distribution of marital assets. With regard to pension and retirement plans, the court awarded 50 percent of the marital portion of Susan's employee retirement trust fund to Leonard, pursuant to a qualified domestic relations order, to be entered at a date separate from the decree and incorporated at that time. It similarly awarded 50 percent of the marital portion of Leonard's employee retirement plan to Susan, pursuant to a qualified domestic relations order, to be entered at a date separate from the decree and incorporated at that time. The court set forth that the parties had "stipulate[d]" that the " 'marital portion' " of each pension should be determined using a coverture fraction, and each party should be entitled to 50 percent of the other parties' pension benefit, multiplied by a fraction, the numerator of which was the number of months of marital service (employment/service during the marriage) and the denominator of which was the total months of service/employment.

Leonard had begun working for the Omaha Public Power District (OPPD) on November 10, 1969. He worked there until his voluntary retirement on April 1, 2004, at the age of 54, which was during the pendency of the dissolution proceedings. There is no evidence that Leonard retired because of any disability or hindrance to his ability to work. The evidence presented at trial showed that Leonard received a monthly pension distribution of $3,728.75 before taxes.

Leonard testified that he did not contribute to Social Security during his employment with OPPD. No evidence was presented as to the amount of Social Security payments to which Leonard personally would have been entitled had he been entitled to receive Social Security. Susan was still working, and there was no evidence attempting to calculate either her expected Social

Security benefit or Leonard's spousal share of such benefit under the Social Security Act.

Susan began working for the Douglas County treasurer on February 9, 1981, where she remains employed, with no current plans to retire. She regularly contributed to Social Security, but evidence was not presented as to the future value of any Social Security benefits to which she might be entitled. The Douglas County employee retirement summary entered into evidence, calculated when Susan was 48, sets forth as follows:

> If you resign now your monthly benefit at age 65 will be . . . $1,055.99
>
> Retire at age [55] with no reduction in benefits . . . $1,272.21
>
> If you retire at age 62 your monthly benefit would be . . . $1,618.14
>
> If you retire at age 65 your monthly benefit would be . . . $1,618.14.

Susan was born on July 10, 1955, and was therefore 49 years old at the time of the dissolution decree.

Leonard filed suggestions with the court, in which he proposed the following as to the division of pension benefits:

> [Leonard's] pension is in "pay status". His gross income from the pension is $3,728.75. According [to Susan's] calculation, she should be awarded $1,121.24 per month from [Leonard's] pension award. The problem with [Susan's] suggestion is twofold:
>
> First, [Leonard] is entitled to one-half of [Susan's] pension, as admitted by [Susan] in her Suggestions to the Court. However, she has no intention to retire. While she is getting $1,121.24 from [Leonard's] pension, he will be getting no payment from her pension. According to documents obtained from Douglas County, if [Susan] retired now she would have a monthly benefit of $1,055.00 and [Leonard] would be entitled to one-half of that ($527). The difference between the two amounts is $594. [Leonard] suggests that he pay to [Susan] the sum of $750.00 per month to . . . for ten (10) years to equalize their income and the pensions. This amount is higher than the $569 because alimony would be taxable to [Susan]. Under this scenario, [both of them] would both keep their own pensions. The

> alternative to this would be [to] have [Susan] refund to [Leonard] each month the sum of $527, until such time as she retired and [Leonard] began to draw his portion of her pension. This would not have to be in the form of alimony, and could be termed an equalization payment.

Leonard also suggested that because he did not contribute to Social Security during his employment and would have insufficient time to do so with any future employer, the court should "allow [him] the opportunity to offset some of the inequity in social security benefits against his payment of pension benefits to [Susan]." Leonard explained:

> This would be done only when [Susan] begins to receive social security benefits, and the order should state that [Leonard's] social security benefits should be deducted from [Susan's] social security benefit when both begin to collect it, and then offset the remainder, subject to the formula established in the case of *Marx v. Marx*, [265 N.J. Super. 418,] 627 A.2d 691 ([] 1993).

Susan's suggestions to the court, in contrast, proposed that each party should be awarded 50 percent of the marital portions of the other's retirement plans. Susan explained that the marital portion of Leonard's plan would be 60.14 percent, calculated by dividing the 249 months of marriage during service by the 414 months of total service. Fifty percent of 60.14 would be 30.07 percent. Thus, Susan calculated that she should be awarded 30.07 percent of Leonard's $3,728.75 monthly distribution, which would be $1,121.24 per month for the remainder of her lifetime. At the hearing, Susan explained that she was opposed to Leonard's suggested distribution of the pension benefits, because she believed that it resulted in an unfair distribution of the assets and would cause her to incur an additional tax liability if the court were to adopt Leonard's suggested distribution in the form of alimony. Susan testified that she was not seeking any alimony.

## ASSIGNMENTS OF ERROR

Leonard assigns that the trial court erred in (1) equally dividing the marital portions of the parties' respective pension plans without considering the fact that Leonard was older and was retired and that his pension was in "pay status"; (2) failing to consider, when dividing the pensions of the parties, the fact that

Susan was working at the time of trial and testified that she had no present intention to retire; and (3) failing to consider the fact that Leonard did not contribute to Social Security during his employment with OPPD and that Susan will receive a disproportionate share of his pension benefits unless a Social Security offset is ordered.

## STANDARD OF REVIEW

[1] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001).

## ANALYSIS

### Pension "Pay Status"

We first address Leonard's assertion, embodied in his first two assignments of error, that the trial court erred in failing to adjust the property division for the fact that Leonard's pension plan is already in "pay status," while Susan does not plan to retire for several more years. Essentially, based on the assumption that both parties will live to their actuarial life expectancy and that Susan will not in fact retire until several years into the future, it is Leonard's assumption that Susan will receive many more years of her percentage share of his retirement benefit than he will of hers. Therefore, Leonard concludes that his share of the marital portion of the pension is inequitably low compared to Susan's and that the trial court should have made an adjustment to correct such inequity. Leonard explains:

> With respect to the parties' pensions, at the time of trial, [Leonard] was receiving a gross monthly pension payment of $3,728.75. After taxes, he received the sum of $3,010.81. According to documents obtained from Douglas County, if [Susan] retired on December 31, 2003, she would have a monthly benefit of $1,055.99 from her pension, payable at age 65. [Leonard] used this very conservative number in calculating the difference between the amounts that [Leonard] and [Susan] would receive each month if they were both retired. [Susan] acknowledged that if she waited until age 65 to retire, she would receive over $130,000 from [Leonard's] pension before [Leonard] received any

> funds from the Douglas County pension as an alternate payee. The trial court's decision would have the following effect on income: [Susan's] $2,735.74 per month in salary combined with the $1,121.24 she would receive from [Leonard's] pension would give her a gross monthly income of $3,856.98. In contrast, [Leonard's] gross monthly income would be reduced to $2,607.51.

Brief for appellant at 6-7.

Leonard relies on *Dutchin v. Dutchin*, 273 Wis. 2d 495, 681 N.W.2d 295 (Wis. App. 2004), for his argument that the dissolution court abused its discretion in failing to embark upon his proposed income discrepancy analysis quoted above. In *Dutchin*, the appellate court concluded that it would not find an abuse of discretion in the trial court's decision to treat the husband's pension as income and enter a maintenance order for the wife until she reached retirement age. The evidence showed that the husband, although age 60, was unable to work due to physical and mental disability. The trial court had determined that if it were to treat the husband's pension as an asset and divide it equally, the wife would have a higher monthly income than the husband, which would result in a maintenance award being paid to him, resulting in a circular and complicated flow of money. See, also, *In re Marriage of Crosby*, 699 N.W.2d 255 (Iowa 2005) (upholding reduction by court of appeals in wife's share of husband's retirement benefits where husband suffered residual effects from stroke and was contemplating early retirement and had no Social Security, while 38-year-old wife continued to work and accrue both retirement and Social Security); *In re Marriage of Wilson*, 449 N.W.2d 890 (Iowa App. 1989) (refusing to find abuse of discretion in trial court's ruling that husband, who was going to take early retirement, would not be required to divide any of his pension and Social Security benefits with wife until wife actually retired).

In contrast, where the husband apparently suffered no physical or mental disability, but simply elected to retire earlier than anticipated, the court in *Baker v. Baker*, 268 Mich. App. 578, 710 N.W.2d 555 (2005), held that early retirement did not affect his unretired former wife's right to begin receiving her share of his pension benefits upon his receipt thereof. Accordingly, the court

affirmed summary judgment against the husband in his action to recoup payments made to the wife through the automatic effectuation of the divorce judgment and eligible domestic relations order. The court explained that the pension benefits in issue were regular pension benefits, a portion of which was marital property. The husband simply elected to receive those benefits earlier than his expected retirement date. Such election in no way rendered the early retirement payments outside the scope of the marital division of the judgment of divorce and the eligible domestic relations order, and the wife properly received her coverture share of the payments. See, also, *In re Marriage of Ramsey*, 339 Ill. App. 3d 752, 792 N.E.2d 337, 275 Ill. Dec. 106 (2003); *In re Marriage of Ably v. Ably*, 155 Wis. 2d 286, 455 N.W.2d 632 (Wis. App. 1990).

[2,3] That portion of a pension which is earned during the marriage is part of the marital estate. See, Neb. Rev. Stat. § 42-366(8) (Reissue 2004); *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997); *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). In dissolution proceedings, the trial court has broad discretion in valuing and dividing pension rights between the parties. *Sonntag v. Sonntag*, 219 Neb. 583, 365 N.W.2d 411 (1985); *Rockwood v. Rockwood*, 219 Neb. 21, 360 N.W.2d 497 (1985). In *Polly v. Polly*, 1 Neb. App. 121, 487 N.W.2d 558 (1992), the Nebraska Court of Appeals explained that the most widely accepted method of valuing and dividing a pension plan upon a dissolution is to determine a fixed percentage of the future benefits to be paid to the spouse if and when they are payable to the owner of the plan. (Citing *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235 (1978).) See, also, *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981); *Paulone v. Paulone*, 437 Pa. Super. 130, 649 A.2d 691 (1994). This is described as the "coverture fraction" and was the method utilized by the dissolution court in this case. See, e.g., *Menake v. Menake*, 348 N.J. Super. 442, 792 A.2d 448 (2002).

[4] While pension benefits actually received can be considered when determining alimony, see, e.g., *Carruth v. Carruth*, 212 Neb. 124, 321 N.W.2d 912 (1982), and *McBride v. McBride*, 211 Neb. 459, 319 N.W.2d 72 (1982), we are somewhat perplexed by Leonard's income analysis of the respective pension benefits when neither party ultimately requested an alimony award in this

case. As stated in part in Neb. Rev. Stat. § 42-365 (Reissue 2004), "While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately."

[5] With property division, the purpose is "to distribute the marital assets equitably between the parties." § 42-365. No matter which party has the larger pension, courts have determined that the value of that pension which was acquired during the marriage should be divided relatively equally. Both parties contributed to the earning of the pensions by their participation in the marriage and expected to be mutually protected by the pension benefits. See *Menake v. Menake, supra*. By this standard, it would be incongruous to reduce one party's equitable share in the other's pension simply because one has elected to retire early, while the other continues to work.

This is especially true because by electing to continue working, the working spouse generally increases the overall benefit in which his or her former spouse is to share. This is the case because generally speaking, the longer the employed party remains employed after the divorce, the more the retirement payments increase. See *Stouffer v. Stouffer*, 10 Haw. App. 267, 867 P.2d 226 (1994). As the court in *Holland v. Holland*, 403 Pa. Super. 116, 588 A.2d 58 (1991), explained, to compensate for the postponement of the working spouse's benefit, the spouse is permitted to enjoy increases in value occasioned by continued employment of the worker. Here, the Douglas County employee retirement summary confirms that the longer Susan waits to retire, the larger her retirement benefit will be.

The case law relied on by Leonard for his proposition that an adjustment should be made for the disparity in the expected years of payout of the parties' respective pension benefits generally deals with the unique circumstance of the "pay status" party's having been forced into early retirement because of a disability. In those cases, courts have crafted an approach to the equitable division of the property to accommodate this circumstance. As *Baker v. Baker*, 268 Mich. App. 578, 710 N.W.2d 555 (2005), illustrates, however, the fact that one party simply elects to enter into pay status early, without any compelling reason to do so, does not mandate that early retirement be considered in

the equitable division of those benefits. See, also, *Ward v. Ward*, 502 So. 2d 477 (Fla. App. 1987) (although "forced" retirement may establish changed circumstances permitting a modification, "voluntary" retirement will not), *disapproved on other grounds, Pimm v. Pimm*, 601 So. 2d 534 (Fla. 1992). Here, Leonard offered no evidence that he was unable to work or was otherwise forced to retire early. In fact, Leonard could presumably find other employment while at the same time drawing his early retirement benefit, thereby significantly altering the income analysis upon which Leonard wishes this court to rely. We conclude the trial court did not abuse its discretion by not adjusting for Leonard's pension pay.

### Social Security

We next address Leonard's argument that the trial court abused its discretion in failing to account for the fact that Susan will receive significantly greater Social Security benefits than he will. Under 42 U.S.C. § 407(a) (2000), the transfer or assignment of Social Security benefits is forbidden and, in general, protects these benefits from "execution, levy, attachment, garnishment, or other legal process." The U.S. Supreme Court in *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973), described § 407(a) as "impos[ing] a broad bar against the use of any legal process to reach all social security benefits." Congress has carved out an exception to allow the collection of past-due child support or alimony, but at the same time, it specifically excluded from that exception payment obligations arising from a community property settlement, equitable distribution of property, or other division of property between spouses or former spouses. See 42 U.S.C. § 659(a) and (i)(3)(B)(ii) (2000).

[6] Courts generally agree that § 407(a) preempts state law that would authorize distribution of Social Security benefits, and that Social Security benefits themselves are not subject to direct division in a dissolution proceeding. Indeed, Leonard appears to concede that a direct allocation of Susan's Social Security benefits as a marital asset would be contrary to the anti-assignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution. His argument is that the trial court erred in failing to order an "offset" of Susan's marital share of Leonard's

pension by an amount reflecting the marital share of the difference between Leonard's spousal share of Susan's Social Security and Susan's share of her Social Security benefit. Leonard claims that this form of indirect allocation is permissible. The issue of whether state courts may adjust for the parties' disproportionate Social Security benefits when dividing marital property in a dissolution decree is one of first impression for this court.

The U.S. Supreme Court has not specifically addressed whether a state court can indirectly offset or otherwise consider the parties' respective Social Security benefits in dividing marital property in a dissolution proceeding. However, several state courts look to the Court's decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979), as instructing them that Social Security is not subject to an indirect adjustment through offset. See, *In re Marriage of James*, 950 P.2d 624 (Colo. App. 1997); *Johnson v. Johnson*, 726 So. 2d 393 (Fla. App. 1999); *In re Marriage of Crook*, 211 Ill. 2d 437, 813 N.E.2d 198, 286 Ill. Dec. 141 (2004); *In re Marriage of Boyer*, 538 N.W.2d 293 (Iowa 1995); *Olson v. Olson*, 445 N.W.2d 1 (N.D. 1989); *Reymann v. Reymann*, 919 S.W.2d 615 (Tenn. App. 1995); *Marriage of Zahm*, 138 Wash. 2d 213, 978 P.2d 498 (1999); *Berthiaume v. Berthiaume*, No. C5-90-2392, 1991 WL 90839 (Minn. App. June 4, 1991). But see, *Kelly v. Kelly*, 198 Ariz. 307, 9 P.3d 1046 (2000); *Panetta v. Panetta*, 370 N.J. Super. 486, 851 A.2d 720 (2004); *Eickelberger v. Eickelberger*, 93 Ohio App. 3d 221, 638 N.E.2d 130 (1994); and *Cornbleth v. Cornbleth*, 397 Pa. Super. 421, 580 A.2d 369 (1990) (cases allowing offset without discussion of *Hisquierdo*).

In *Hisquierdo*, the U.S. Supreme Court held that in dissolution proceedings, a wife did not have a community property interest in her husband's expectation of receiving railroad retirement benefits. The Court, in so holding, expressly pointed to the similarities between the railroad retirement benefits and benefits under the Social Security Act, including the fact that the laws providing for both forms of benefits specifically prohibited the assignment of the benefits through garnishment, attachment, or other legal process. The Court noted that Congress, "[c]oncerned about recipients who were evading support obligations and thereby throwing children and divorced spouses on the public dole,"

passed an exception for reaching Social Security benefits to satisfy a legal obligation for child support or alimony. *Hisquierdo v. Hisquierdo*, 439 U.S. at 576. However, the Court emphasized that the statute, at the same time, specifically stated that " 'alimony . . . does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with *any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses*.' " (Emphasis supplied.) 439 U.S. at 577, quoting Pub. L. No. 95-30, tit. V, § 501(d), 91 Stat. 160 (1977).

The Court concluded that Congress had decided upon a delicate statutory balance in which it fixed an amount it thought appropriate to support an employee's old age and to encourage the employee to retire. In deciding how finite funds were to be allocated, Congress chose not to allow diminution of that fixed amount by the spouse for whom the fund was not designed. The Social Security Act provides a specific limited avenue for divorced persons to obtain a share of the former spouse's benefits. See 42 U.S.C. § 402(b)(1)(A) through (D) and (c)(1)(A) through (D) (2000).

The Court in *Hisquierdo* specifically rejected the wife's argument that even if a direct allocation of her former husband's railroad retirement benefit would be contrary to the statutory benefit scheme, she should still be entitled to an offsetting award of presently available community property to compensate her for her interest in the expected benefits. The court explained: "An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

The weight of authority has concluded that an offset of Social Security benefits is prohibited by the anti-assignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution. Most of these courts, however, especially those in equitable division states as compared to community property states, see *In re Marriage of Brane*, 21 Kan. App. 2d 778, 908 P.2d 625 (1995), have not found a more generalized consideration of Social Security benefits to be an impermissible factor in the overall scheme when making a property division. See, *In re*

*Marriage of Morehouse*, 121 P.3d 264 (Colo. App. 2005); *In re Marriage of Boyer*, 538 N.W.2d 293 (Iowa 1995); *In re Marriage of Brane, supra*; *Bradbury v. Bradbury*, 893 A.2d 607 (Me. 2006); *Mahoney v. Mahoney*, 425 Mass. 441, 681 N.E.2d 852 (1997); *Rudden v. Rudden*, 765 S.W.2d 719 (Mo. App. 1989); *Neville v. Neville*, 99 Ohio St. 3d 275, 791 N.E.2d 434 (2003).

The court in *Marriage of Zahm*, 138 Wash. 2d 213, 978 P.2d 498 (1999), concluded that where the trial court neither computed a formal calculation of the value of the husband's Social Security benefits nor offset a formal numerical valuation into the court's property division via a specific counterbalancing property award to the wife, the reasoning in *Hisquierdo* did not apply. The court explained that the antireassignment clause of the Social Security Act did not preclude the trial court from considering a spouse's Social Security income "within the more elastic parameters of the court's power to formulate a just and equitable division of the parties' marital property." 138 Wash. 2d at 222, 978 P.2d at 502. As described by the court in *Neville*, "[a]lthough a party's Social Security benefits cannot be divided as a marital asset, those benefits may be considered by the trial court under the catchall category as a relevant and equitable factor in making an equitable distribution." *Neville v. Neville*, 99 Ohio St. 3d at 278, 791 N.E.2d at 437. This is especially true when " 'a spouse's social security contributions and ultimate benefits have been increased by the work of the other spouse, and . . . a nonemployed spouse loses spending power after a divorce through the inability to use the other spouse's social security benefits.' [Quoting] 2A Social Security Law and Practice (Flaherty & Sigillo, Eds., 1994), Section 34:67." 99 Ohio St. 3d at 278, 791 N.E.2d at 437.

Other courts, however, have found the distinction between a general equitable consideration and a prohibited mathematically specific offset to be meaningless. These courts have accordingly found impermissible any consideration of Social Security disparity in the property division of divorcing parties. See, e.g., *Cox v. Cox*, 882 P.2d 909 (Alaska 1994); *In re Marriage of Hillerman*, 109 Cal. App. 3d 334, 167 Cal. Rptr. 240 (1980); *In re Marriage of Crook*, 211 Ill. 2d 437, 813 N.E.2d 198, 286 Ill. Dec. 141 (2004); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *English v. English*, 118 N.M. 170, 879 P.2d 802 (N.M. App.

1994); *Olson v. Olson*, 445 N.W.2d 1 (N.D. 1989); *Swan and Swan*, 301 Or. 167, 720 P.2d 747 (1986); *Reymann v. Reymann*, 919 S.W.2d 615 (Tenn. App. 1995). In *In re Marriage of Crook*, the court explained:

> Instructing a trial court to "consider" Social Security benefits . . . either causes an actual difference in the asset distribution or it does not. If it does not, then the "consideration" is essentially without meaning. If it does, then the monetary value of the Social Security benefits the spouse would have received is taken away from that spouse and given to the other spouse to compensate for the anticipated difference. This works as an offset meant to equalize the property distribution.

211 Ill. 2d at 451, 813 N.E.2d at 205, 286 Ill. Dec. at 148.

[7] We conclude that the anti-assignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution prohibit a direct offset to adjust for disproportionate Social Security benefits in the property division of a dissolution decree.

## CONCLUSION

We find no abuse of discretion in the property division ordered by the trial court. Accordingly, we affirm.

AFFIRMED.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. RYAN K. SHULTZ, RESPONDENT.

716 N.W.2d 45

Filed June 16, 2006. No. S-06-289.

Original action. Judgment of disbarment.

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

PER CURIAM.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Ryan K. Shultz. As indicated below,

the court accepts respondent's surrender of his license and enters an order of disbarment.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on November 30, 1999. At all times relevant hereto, respondent was engaged in the private practice of law in Nebraska.

On March 15, 2006, an application for the temporary suspension of respondent from the practice of law was filed by the chairperson of the Committee on Inquiry of the Sixth Disciplinary District. The application stated that two grievances had been filed against respondent and were under investigation by the Counsel for Discipline. The application stated, in effect, that according to the grievances, respondent had repeatedly made false statements to clients regarding the status of pending legal matters he was handling for said clients and had provided to a client a judgment purportedly signed by a judge, when in fact no such judgment had been entered. The application further stated, in effect, that respondent "has engaged in and continues to engage in conduct that, if allowed to continue until final disposition of disciplinary proceedings, will cause serious damage to the public and to the members of the Nebraska State Bar Association."

On March 22, 2006, this court entered an order directing respondent to show cause why his license should not be temporarily suspended. A copy of the show cause order was served on respondent, and respondent filed an affidavit in response to the show cause order. On April 12, this court determined that respondent had failed to show cause why his license should not be temporarily suspended and ordered respondent's license to practice law in the State of Nebraska temporarily suspended until further order of the court.

On May 4, 2006, 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 knowingly does not contest the truth of the allegations in the grievances to the effect that he repeatedly made false statements to clients regarding the status of their pending legal matters. 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 and knowingly does not contest the truth of the allegations in the grievances to the effect that he repeatedly made false statements to clients regarding the status of their legal matters, including providing a client with a judgment purportedly signed by a judge, when in fact no such judgment had been entered, all in violation of applicable provisions controlling the conduct of attorneys. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent voluntarily has stated that he knowingly does not contest the truth of the allegations in the grievances to the effect that he repeatedly made false statements to clients regarding the status of their pending legal matters. 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. 2004), 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. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. SCOTT D. FREESE, RESPONDENT.

716 N.W.2d 56

Filed June 16, 2006. No. S-06-512.

Original action. Judgment of disbarment.

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

PER CURIAM.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Scott D. Freese. As indicated below, the court accepts respondent's surrender of his license and enters an order of disbarment.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 19, 1983. At all times relevant hereto, respondent was engaged in the private practice of law in Nebraska.

On May 4, 2006, an application for the temporary suspension of respondent from the practice of law was filed by the vice-chairperson of the Committee on Inquiry of the Third Disciplinary District. The application stated that a federal indictment had been returned against respondent, generally alleging that respondent had engaged in a conspiracy to possess and distribute methamphetamine in violation of federal law. The application further stated that the indictment alleged that some

of respondent's "co-conspirators" were clients or former clients of respondent. The application also stated that respondent had entered into a plea agreement with the U.S. Attorney in which respondent had admitted that he had engaged in conduct in violation of federal law, which conduct constituted a felony punishable by incarceration in prison for a period of 10 years to life. The application further stated that "if the respondent's illegal conduct (including but not limited to conspiring with clients or former clients) is allowed to continue until final disposition of pending disciplinary proceedings, it will cause serious damage to the public and the Bar."

On May 5, 2006, this court entered an order directing respondent to show cause why his license should not be temporarily suspended. A copy of the show cause order was served on respondent. On May 15, 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 admitted that on March 24, 2005, an indictment had been filed against him alleging that he had conspired with others to possess and distribute substances containing methamphetamine in violation of federal law. Respondent also admitted he had entered into a plea agreement with the U.S. Attorney, in which he admitted violating federal law. A copy of respondent's plea agreement is attached to his voluntary surrender. In the plea agreement, respondent agreed, inter alia, that he would enter a guilty plea to one count of conspiracy to distribute and possession with intent to distribute 500 grams or more of a substance containing methamphetamine. In his voluntary surrender, respondent knowingly admitted that his conduct as set forth in the plea agreement violated the applicable provisions controlling the conduct of attorneys in effect at the time relevant to the underlying facts. Respondent further knowingly does not contest the truth of the allegation made against him and voluntarily surrenders his license to practice law in the State of Nebraska. In addition to surrendering his license, respondent consented to the entry of an order of disbarment and knowingly 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, knowingly does not contest the truth of the allegation that he conspired with others to possess and distribute substances containing methamphetamine in violation of federal law, and has waived all proceedings against him in connection with his voluntary surrender. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent voluntarily has stated that he knowingly does not contest the truth of the allegation that he conspired with others to possess and distribute substances containing methamphetamine in violation of federal law. 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. 2004), 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. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

# IN RE ESTATE OF LEONARD G. ERIKSEN, DECEASED. T. RICHARD ERIKSEN, APPELLANT, V. SHIRLEY MACRANDER, PERSONAL REPRESENTATIVE, ET AL., APPELLEES.

716 N.W.2d 105

Filed June 23, 2006. No. S-04-966.

1. **Decedents' Estates: Taxation: Appeal and Error.** Review of apportionment proceedings under Neb. Rev. Stat. § 77-2108 (Reissue 2003) is de novo on the record.
2. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the County Court for Burt County: C. MATTHEW SAMUELSON, Judge. Reversed and remanded for further proceedings.

Lawrence K. Sheehan and George T. Blazek, of Ellick, Jones, Buelt, Blazek & Longo, for appellant.

Darren R. Carlson, of Walentine, O'Toole, McQuillan & Gordon, for appellees Pat McGuire and Bart McGuire.

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

CONNOLLY, J.

The appellant, T. Richard Eriksen, a residuary devisee, purchased a family farm under an option in the will of his deceased uncle Leonard G. Eriksen (Leonard). After purchase, Eriksen allowed Leonard's estate to make elections under the federal tax code, I.R.C. §§ 2032A and 2057 (2000 & Supp. III 2003), resulting in a tax refund to the estate. The election imposes on Eriksen both responsibilities and potential liabilities. Eriksen sought to be paid the tax savings under Neb. Rev. Stat. § 77-2108 (Reissue 2003), which provides for apportionment of federal estate taxes, and appellees Pat McGuire and Bart McGuire, residuary devisees, objected. The county court determined that the will directed how the taxes should be apportioned and did not address application of § 77-2108. We determine that the will did not control apportionment of taxes and that the court should have applied § 77-2108. Accordingly, we reverse, and remand for further proceedings to apply § 77-2108.

## BACKGROUND

Eriksen farmed Leonard's land for 10 years before Leonard's death. Leonard died in 2002. The land was part of his residuary estate, which he devised to 13 of his nieces and nephews. The will stated: "After the payment of my final debts, expenses of administration and taxes, I give and bequeath all of my property and estate to [various devisees, including the nieces and nephews]." The will, however, granted the nieces and nephews the right to purchase the farm. Eriksen was the only one to exercise the option and purchased the land in June 2003, for the appraised value of $1,174,330.

A federal estate tax return had been due in May 2003, but the estate accountant, Steven E. Pribnow, filed for an extension of time and sent an estimated tax payment of $330,000. In addition, Pribnow discussed with Eriksen the possibility of making a "special use valuation election," available under the federal tax code. See § 2032A. Eriksen informed Pribnow that he believed he was also qualified for a "qualified family-owned business interest" election. See § 2057.

In general terms, § 2032A provides for a special valuation of farm or real property used in a family-owned business, and § 2057 allows a deduction for certain family-owned business interests. Under both provisions, the qualified heir who obtains the property must materially participate in the operation of the business for 10 years following the decedent's death. The qualified heir must also sign an agreement agreeing to pay recapture taxes that will be imposed if the qualified heir sells the property or ceases to participate in its operation within the required period. As the owner of the land, Eriksen was required to sign the agreement before the estate could make the elections.

After discussing the matter with his attorney, Eriksen sent a letter to Pribnow stating his belief that he was entitled to all the tax savings under the elections, but stated that he would sign the agreements and split the savings 75-25 with the other devisees to avoid any disputes and accomplish a quick resolution of the estate. Pribnow then sent a letter dated November 6, 2003, to the devisees explaining the effect of the elections, stating that he thought the offer was fair and reasonable and that "[t]he estate can make the tax elections with or without your approval under the

circumstances, and will probably do so." Eriksen's attorney received a telephone call from appellee Pat McGuire on November 12, stating that he had talked to some of the other devisees and that they agreed with the proposal. But not all of the devisees agreed.

The estate made the elections, and later, several devises rejected Eriksen's proposal. In January 2005, the estate received a refund generated by the elections. Eriksen filed a petition seeking the tax savings under § 77-2108, and some, but not all, of the devisees objected. The county court determined that the will required distribution after payment of taxes and denied the petition. Thus, the court did not apply § 77-2108 or address issues concerning the proper apportionment under § 77-2108. Eriksen appeals.

## ASSIGNMENTS OF ERROR

Eriksen assigns, rephrased, that the county court erred by (1) not apportioning the tax savings in favor of Eriksen and (2) not determining that the residuary devisees were unjustly enriched.

## STANDARD OF REVIEW

[1] Review of apportionment proceedings under § 77-2108 is de novo on the record. See *In re Estate of Detlefs*, 227 Neb. 531, 418 N.W.2d 571 (1988).

## ANALYSIS

Eriksen contends that the will does not control apportionment because it only generally addresses payment of taxes without addressing the apportionment of taxes between devisees. He argues that absent such a specific direction in the will, the taxes are to be apportioned under § 77-2108.

Section § 77-2108 provides in part:

> Whenever it appears upon any accounting or in any appropriate action or proceeding that a personal representative, executor, administrator, trustee, or other person acting in a fiduciary capacity has paid or may be required to pay any transfer tax levied or assessed under sections 77-2101 to 77-2116 or under the provisions of any federal estate or generation-skipping transfer tax law heretofore or hereafter enacted upon or with respect to any property required to be included in the gross estate of a decedent or total amount of generation-skipping transfer under the

> provisions of any such law, the amount of the tax so paid or payable, except as otherwise directed in the decedent's will or except in a case when by written instrument executed inter vivos direction is given for apportionment within the fund of the taxes assessed upon the specific fund dealt with in such inter vivos instrument, shall be equitably apportioned and prorated among the persons interested in the estate or transfer. Such apportionment and proration shall be made in the proportion as near as may be that the value of the property, interest, or benefit of each such person bears to the total value of the property, interests, or benefits received by all such persons interested in the estate or transfer, except that in making such proration, allowances shall be made for any exemptions granted by the law imposing the tax and for any deductions, including any marital deduction, allowed by such law for the purpose of arriving at the value of the net estate or transfer.

Most states have adopted apportionment statutes. See *Nielsen v. Sidner*, 191 Neb. 324, 215 N.W.2d 86 (1974). The statutes express the policy that each portion of the estate that created the tax shall bear its fair share of the tax burden. *Id.*

Estate taxes in Nebraska are apportioned equitably under § 77-2108 unless a testator has directed otherwise in his or her will. *Nielsen, supra*. We have held that estate taxes will be apportioned under § 77-2108 unless there is a clear and unambiguous direction to the contrary. Any ambiguity is to be resolved in favor of apportionment under § 77-2108. *Nielsen, supra*. Further, we have indicated that to remove the will from the terms of § 77-2108, the testator must provide an express direction against statutory apportionment. *Nielsen, supra*.

At oral argument, the appellees conceded that the phrase: "After the payment of my final debts, expenses of administration and taxes, I give and bequeath all of my property and estate to [various devisees, including the nieces and nephews]" was not an apportionment clause. Therefore, the will did not direct against statutory apportionment and the court should have applied § 77-2108.

Eriksen next contends that under § 77-2108, he should be allocated the tax savings caused by his elections. But the county

court did not decide issues regarding apportionment under § 77-2108. Further, at oral arguments, the parties agreed that the residuary of the estate had not been distributed and informed the court that the § 2057 election has now been denied by the Internal Revenue Service. Until the estate taxes have been finally determined, § 77-2108 cannot be applied.

[2] In addition, a determination about apportionment involves a number of issues that could require additional factual findings. The county court did not address apportionment under § 77-2108 and did not make specific factual findings, because it determined that the will controlled instead of the statute. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). Accordingly, we do not address the apportionment under § 77-2108 and remand the matter for that determination by the county court when the final amount of federal estate taxes has been determined.

Likewise, the county court did not address Eriksen's unjust enrichment arguments, and an application of § 77-2108 could potentially affect those claims. Accordingly, we also do not address unjust enrichment and remand the matter for determination by the county court.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

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DUTTON-LAINSON COMPANY, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. THE CONTINENTAL INSURANCE COMPANY, A CORPORATION, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, APPELLEES, AND NORTHERN INSURANCE COMPANY OF NEW YORK, A CORPORATION, AND EMPIRE FIRE AND MARINE INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLEES AND CROSS-APPELLANTS.

716 N.W.2d 87

Filed June 23, 2006. No. S-04-1223.

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. **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: Proof.** While the burden rests with the insurer to establish the initial applicability of the pollution exclusion by showing the discharge or release of a pollutant into the environment, the burden then shifts to the insured to show that the "sudden and accidental" exception to that exclusion is applicable.
4. **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 the moving party is entitled to judgment as a matter of law.
5. ____: ____. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.
6. **Insurance: Contracts: Words and Phrases.** Since the "sudden and accidental" exception to a pollution exclusion clause is expressed in the conjunctive, both requirements must be met for the exception to become operative.
7. ____: ____: ____. The language of an insurance policy should be considered in accordance with what a reasonable person in the position of the insured would have understood it to mean.
8. ____: ____: ____. A reasonable person in the position of the insured would understand the term "sudden," as found in the context of a qualified pollution exclusion, to refer to the objectively temporally abrupt release of pollutants into the environment.
9. **Limitations of Actions.** If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.
10. **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.
11. **Insurance: Contracts.** Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: (1) the duty to defend any suit filed against the insured party and (2) 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.
12. **Limitations of Actions: Insurance: Contracts.** It is the general rule that a cause of action cannot accrue before the insurer fails to perform the obligations agreed to in the contract.
13. **Limitations of Actions: Insurance.** A claim for indemnity accrues at the time the indemnity claimant suffers loss or damage, which is not at the time of the underlying act causing the damage, but when the would-be indemnitee pays the judgment arising from the underlying loss or damage.
14. ____: ____. A cause of action on an insurer's duty to defend does not run until the underlying action is resolved against the insured.
15. **Insurance: Liability: Notice: Proof.** In order to escape liability or the duty to defend on account of an insured's unreasonable and unexcused delay in giving notice of claim, a liability insurer is required to show that it was prejudiced.
16. **Insurance: Notice: Waiver.** The insurer's ability to insist upon its insured's duty to notify may be waived through its representations to the insured.

17. **Insurance: Liability: Waiver.** The insurer waives its right to defend not only through an express or unequivocal denial, but in any instance where the facts and circumstances warrant the inference that liability was, and would be, denied.
18. **Laches: Equity.** Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.
19. **Laches.** The defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

James W.R. Brown, Thomas R. Brown, and Steven J. Olson, of Brown & Brown, P.C., L.L.O., for appellant.

Thomas J. Culhane and John B. Morrow, of Erickson & Sederstrom, P.C., and Peter B. Kupelian, of Kupelian, Ormond & Magy, P.C., for appellees Northern Insurance Company of New York and Empire Fire and Marine Insurance Company.

Robert S. Keith and Kellie R. Harry, of Engles, Ketcham, Olson & Keith, P.C., and Eileen King Bower and Julie L. Burgener, of Ross, Dixon & Bell, L.L.P., for appellee The Continental Insurance Company.

Stephen L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, and Frank Winston and John R. Casciano, of Steptoe & Johnson, L.L.P., for appellee United States Fidelity and Guaranty Company.

Randall L. Goyette, of Baylor, Evnen, Curtiss, Grimit & Witt, and, of Counsel, Laura A. Foggan, John C. Yang, and Mariela Olivares, of Wiley, Rein & Fielding, L.L.P., for amicus curiae Complex Insurance Claims Litigation Association.

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

MCCORMACK, J.

## I. NATURE OF CASE

The plaintiff, Dutton-Lainson Company (Dutton), incurred costs and expenses relating to the cleanup of environmental damage as demanded by the U.S. Environmental Protection Agency (EPA). In this action, Dutton is suing several of its

liability insurers for indemnification of those costs and expenses. Summary judgment was granted in favor of the insurers, and Dutton appeals.

## II. STATEMENT OF FACTS

Dutton is a Nebraska corporation with its principal place of business in Hastings, Nebraska. Since at least 1948, Dutton conducted a manufacturing business. In the course of its manufacturing operations, Dutton used various solvents to clean its machines and parts. From approximately 1948 to 1971, the cleaning solvents contained trichloroethylene (TCE). From approximately 1971 to 1985, the solvents contained "1,1,1, trichloroethane" (TCA).

From February 1962 to October 1964, Dutton placed the solvents and some sludge-filled degreaser fluid in sealed metal drums and deposited the solvents and drums in the North Landfill in Hastings, which was operated by the city of Hastings. From October 1964 to July 1982, Dutton placed sludge from the degreaser and, prior to September 7, 1977, some of the sludge-filled solvent fluid in sealed metal containers and deposited them in the South Landfill in Hastings, which was also operated by the city of Hastings.

At some point after the drums and containers were deposited in the North and South Landfills, either the solvent and sludge in the drums and containers were emptied into the landfills or the operator of the landfills bulldozed the materials and crushed the containers, causing the sludge and solvent "to be removed from" the containers. This was done either directly by Dutton employees or by the landfill operators with full knowledge of Dutton. Commencing prior to 1970 and continuing past 1987, the TCE and TCA deposited by Dutton in the North and South Landfills seeped into the soil and ground water at both subsites.

In addition to the North and South Landfills contaminations, from 1948 to 1987, Dutton's regular manufacturing operations caused solvents containing TCE and TCA to spill onto the concrete floor of its operating premises. The TCE and TCA seeped from the concrete floor into the ground water beneath and continued to spread to the ground water under adjacent property. The pollution emanating from such seepage is designated as "Well No. 3." Dutton presented evidence that until it received a

letter from the EPA in 1992, it was unaware that the solvent was migrating through the concrete floor and invading the soil and ground water.

The evidence is undisputed that Dutton's deposits in the North and South Landfills were in compliance with then-existing laws and ordinances for the disposition of these solvents and that Dutton did not anticipate that the solvents would cause pollution of the soil or ground water.

Throughout its manufacturing operations, Dutton carried several insurance policies with multiple insurers. United States Fidelity and Guaranty Company (USF&G) issued the following policies to Dutton: policy No. MP8393 (effective November 15, 1973, to November 15, 1976), policy No. MP9379 (effective January 1, 1977, to January 1, 1980), and policy No. MP20284 (effective January 1, 1980, to January 1, 1983). Empire Fire and Marine Insurance Company (Empire) issued a commercial umbrella policy, No. 280381, to Dutton for the policy period January 1, 1978, to January 1, 1979. Both the USF&G policies and Empire's policy contained pollution exclusion clauses which provided that the insurance did not apply

> to **bodily injury** or **property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

(Such pollution exclusion clauses are hereinafter referred to as the "qualified pollution exclusion.")

Continental Insurance Company (Continental) issued three primary general liability policies to Dutton as follows: policy No. CBP415666 (apparently effective August 1, 1980, to August 1, 1983), policy No. CBP914504 (apparently effective August 1, 1981, to August 1, 1984), and policy No. CBP900212 (effective October 1, 1984, to October 1, 1987). Northern Insurance Company of New York (Northern) issued a commercial general liability policy, No. SM37686395, for the period October 1, 1983, to October 1, 1986. However, this policy was canceled by Dutton effective October 1, 1984.

The Continental policies contained an addendum stating: "It is hereby agreed and understood that the Comprehensive General Liability Insurance . . . is amended to include Bodily Injury or Property Damage caused by the dumping, discharge, or escape (sudden or non-sudden), of irritants, pollutants, or contaminants." Northern's policy's standard form contained a pollution exclusion clause identical to the one found in the USF&G and Empire policies; however, pursuant to negotiations between Dutton and Northern, the pollution exclusion clause was deleted from the policy.

On September 23, 1985, the EPA notified Dutton that it was a potentially responsible party (PRP) for the cost of cleaning up the contamination at the North and South Landfills and of the contamination that had emanated from those subsites. On November 5, 1992, the EPA notified Dutton that it was a PRP for the cost of cleaning up the contamination at the Well No. 3 subsite and of the contamination that had emanated from that subsite. On December 28, 2001, Dutton was notified by the EPA that it was a PRP for "Operable Unit 19," which was an area-wide ground water contamination subsite allegedly contaminated in part by the leaching of the North and South Landfills and Well No. 3, which leaching had not been addressed by the other subsite response actions.

The PRP notices from the EPA generally gave Dutton a specified period of time to voluntarily undertake cleanup of the relevant subsites, or else the EPA would design and implement its own plan and would collect reimbursement from Dutton in the event it were ultimately determined to be a PRP. Beginning August 14, 1998, consent decrees were entered between Dutton and the EPA regarding cleanup of the various subsites. Pursuant to these decrees, Dutton has conducted extensive cleanup, with such efforts still continuing.

In November 1985, Dutton notified Continental, Northern, USF&G, and Empire of the EPA's designation of Dutton as a PRP for the North and South Landfills. Dutton updated its notice to Continental in 1991 and to USF&G in 1992.

Continental first responded to Dutton's notice in February 1987 with a strict reservation of rights, "because there is a possibility, and even a good likelihood that no coverage existed

under our policies for the pollution occurring near Hastings, Nebraska. Coverage might be eliminated by exclustions [sic] listed in our policy." In February 1992, Continental sent a letter to Dutton stating that "[u]pon review of both the documentation provided with your submission of this claim and the above referenced policies, Continental must respectfully deny coverage for this claim . . . ." The letter then set forth several reasons for such denial. As Continental admitted during oral argument to this court, "the denial was clear."

Northern, through its parent company, Maryland Casualty Company, responded to Dutton's notice in April 1986. Therein, Northern stated that it did not believe that any "suit" within the meaning of the policy had yet been brought. Therefore, "any determination as to coverage would appear to be premature." Yet, Northern went on to state that coverage sought by a future suit might be inconsistent with the definitions of "occurrence" and "property damage," as well as other provisions. In closing, Northern stated that it "would appreciate . . . being kept apprised of the progress of EPA's investigation, and would welcome any future information that you believe relevant." At oral argument, Northern's attorney admitted that the 1986 letter "could be fairly read as being a refusal."

Empire responded to Dutton's notice in 1992. Characterized as an "interim response," Empire stated that based on the information it had, the losses for which Dutton sought coverage did not appear to be derived from an "occurrence," as defined by the policy, and that moreover, the claim against Dutton did not involve "damages," as required by the policy. Empire also cited several policy exclusions which would apply to bar Dutton's claim, including the qualified pollution exclusion. Empire closed that it "invite[d] [Dutton] to furnish [it] any information which might bear upon the question of coverage." It further stated that it would "continue to monitor the matter through [USF&G]."

USF&G first responded to Dutton's 1985 notice with an acceptance of the notice with a strict reservation of all rights and defenses under any and all policies in effect between USF&G and Dutton, noting that there was a "likel[i]hood" that no coverage existed for the pollution due to policy exclusions and the fact that the damages did not manifest themselves until 5 years

after the time Dutton's policy with USF&G was last in effect. The letter did not request any further information from Dutton. The next communication between Dutton and USF&G occurred around November 26, 1991, when Dutton's counsel wrote to Dutton's insurance broker regarding the pollution-related claims asserted against Dutton, and the broker then forwarded this letter to USF&G. In response, USF&G sent a letter dated April 6, 1992, to Dutton stating its reservation of rights and setting forth numerous reasons why there was likely no coverage. However, USF&G asked that Dutton forward specified information to it. No response was received from Dutton, and the next contact between Dutton and USF&G was a letter dated May 11, 1993, when USF&G wrote to Dutton requesting an update of the status of the claims. Again, USF&G received no response and did not hear again from Dutton until the current action was filed.

Dutton filed suit against Continental, Northern, USF&G, and Empire on September 4, 2002, seeking indemnification for sums expended in connection with defending against the EPA's investigation and the resulting environmental cleanup, for attorney fees, and for a declaratory judgment that the insurers, subject to the policy limits, are liable for any future expenditures with respect to the North and South Landfills, Well No. 3, and Operable Unit 19. Continental's answer set forth 29 affirmative defenses, including the statute of limitations, laches, and late notice. Northern similarly responded with 37 affirmative defenses, including the statute of limitations, laches, and failure to provide timely and proper notice as required by the policy. USF&G set forth 13 affirmative defenses, but did not plead the statute of limitations or laches. It did plead late notice and the qualified pollution exclusion contained in the policy. Empire asserted 37 affirmative defenses, including the statute of limitations, laches, late notice, and the qualified pollution exclusion.

Northern, USF&G, and Empire made general motions for summary judgment, and Continental filed a motion for summary judgment based upon the statute of limitations and laches. Dutton responded by filing a "Motion for Partial Summary Judgment," asking that the court determine that (1) under each of the policies, each defendant had breached its duty to indemnify Dutton; (2) Continental, Northern, and USF&G each breached its duty to

defend Dutton against the EPA proceedings and therefore could not later contest coverage under the policies; (3) all defendants were jointly and severally liable to Dutton for the amounts it had expended pursuant to administrative orders on consent of the EPA and to consents it had executed for entry of consent decrees in the U.S. District Court for the District of Nebraska, the amounts of which remained to be determined; (4) all defendants were jointly and severally liable for any other cleanup costs Dutton had paid and all defense costs it had incurred, the amounts of which remained to be determined; (5) defendants were jointly and severally liable for interest on cleanup and defense expenses at a rate of 12 percent per annum; (6) defendants were jointly and severally liable for reasonable attorney fees; and (7) defendants were jointly and severally liable to pay to Dutton all cleanup costs thereafter required to be expended by Dutton for the cleanup of the North and South Landfills, Well No. 3, and Operable Unit 19, and for all future monitoring and maintenance expenses with respect thereto, with interest at a rate of 12 percent per annum from the date of payment by Dutton.

The district court granted summary judgment in favor of all four defendants. As to USF&G and Empire, the court found the pollution to be excluded under the pollution exclusion provision of the policies. The court reasoned that the terms "sudden" and "accidental" were unambiguous and that regardless of the fact that Dutton may not have anticipated the pollution that occurred as a result, the leakage from the Dutton plant over a period of 17 years and spillage for a period of 29 years were neither "sudden" nor "accidental." As to Continental and Northern, and as an additional basis for summary judgment in favor of Empire, the court determined that the statute of limitations barred Dutton's claims. The court further found that laches barred Dutton's claims against Continental and USF&G and that "late notice" defeated Dutton's claims against Northern and USF&G. The district court denied Dutton's motion for partial summary judgment.

## III. ASSIGNMENTS OF ERROR

Dutton assigns, consolidated and restated, that the district court erred in (1) sustaining Empire and USF&G's motions for summary judgment on the ground that coverage was precluded

by the pollution exclusion; (2) sustaining summary judgment in favor of Continental, Northern, and Empire on the basis of the statute of limitations; (3) sustaining summary judgment in favor of Continental and USF&G on the basis of laches; (4) sustaining summary judgment in favor of Northern and USF&G on the basis of "late notice"; and (5) failing to grant Dutton's motion for partial summary judgment.

Northern and Empire cross-appeal, asserting that the district court erred in (1) not including Empire in its determination that because of late notice, no coverage is available to Dutton with regard to the Well No. 3 subsite and Operable Unit 19, and (2) not sustaining Northern's and Empire's motions for summary judgment based on laches.

## 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. *Molina v. American Alternative Ins. Corp.*, 270 Neb. 218, 699 N.W.2d 415 (2005).

[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. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

## V. ANALYSIS

### 1. Qualified Pollution Exclusion

We first address the qualified pollution exclusion clause found in Dutton's policies with USF&G and Empire. USF&G and Empire assert that under the undisputed facts of the case, the qualified pollution exclusion released them from any liability to defend or indemnify Dutton for expenses relating to the EPA investigation and consent judgments against it. Dutton, in contrast, argues that the "sudden and accidental" exception to the pollution exclusion applies so as to make such exclusion inapplicable. The district court determined that because it was undisputed that the discharge occurred over a long period of time,

there was no material issue of fact and as a matter of law, the pollution in question was neither sudden nor accidental, and that the exception to the exclusion did not apply. Inherent to this determination was the district court's interpretation of the phrase "sudden and accidental."

[3] Courts that have considered the qualified pollution exclusion here presented have generally held that while the burden rests with the insurer to establish the initial applicability of the pollution exclusion by showing the discharge or release of a pollutant into the environment, the burden then shifts to the insured to show that the "sudden and accidental" exception to that exclusion is applicable. See, *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98 (6th Cir. 1995); *Aeroquip Corp. v. Aetna Cas. and Sur. Co., Inc.*, 26 F.3d 893 (9th Cir. 1994); *American Mut. Liability Ins. Co. v. Beatrice Companies, Inc.*, 924 F. Supp. 861 (N.D. Ill. 1996); *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278 (D. Utah 1994); *Hudson Ins. Co. v. Double D Management Co., Inc.*, 768 F. Supp. 1549 (M.D. Fla. 1991); *Cooper Dev. Co. v. Employers Ins. of Wausau*, 765 F. Supp. 1429 (N.D. Cal. 1991); *A. Johnson & Co. v. Aetna Cas. and Sur. Co.*, 741 F. Supp. 298 (D. Mass. 1990); *E.I. du Pont de Nemours v. Allstate Ins.*, 693 A.2d 1059 (Del. 1997); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305 (Minn. 1995); *Northville Industries v. Nat. Union Ins.*, 89 N.Y.2d 621, 679 N.E.2d 1044, 657 N.Y.S.2d 564 (1997); *U.S. Industries v. Ins. Co. of N. Am.*, 110 Ohio App. 3d 361, 674 N.E.2d 414 (1996). But see *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F. Supp. 1406 (D. Del. 1992).

[4,5] 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 the moving party is entitled to judgment as a matter of law. *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005). A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Id.*

It is undisputed that the initial applicability of the pollution exclusion found in the USF&G and Empire policies has been

established. Thus, USF&G and Empire made their prima facie case for summary judgment on the basis of such exclusion. Dutton argues, however, that it presented a material issue of fact as to whether the exception to the pollution exclusion applies. In order to determine whether such a material issue of fact exists, we must first determine the meaning of the phrase. The sudden and accidental exception to the standard pollution exclusion clause has been the subject of copious litigation. See, generally, e.g., Annot., 89 A.L.R.5th 1 (2001). However, it presents an issue of first impression for our court.

[6] Since the "sudden and accidental" exception to the pollution exclusion clause is expressed in the conjunctive, both requirements must be met for the exception to become operative. See *Technicon v. American Home*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989). We ultimately conclude that the discharges leading to the pollution in issue in this case were not "sudden." We, therefore, affirm summary judgment as to USF&G and Empire on that basis, and need not address the meaning of the term "accidental," or any other alternative basis for summary judgment presented to the district court.

Courts have disagreed as to whether "sudden" refers to something temporally abrupt from an objective standpoint, something unexpected from the subjective standpoint of the insured, or whether the term is ambiguous. In considering the meaning of the term "sudden," several courts have noted that recognized dictionaries differ as to its meaning. See, e.g., *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990); *Hecla Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991); *Claussen v. Aetna Cas. &c. Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989).

In Webster's Third New International Dictionary of the English Language, Unabridged 2284 (1993), the primary definition of the term "sudden" is "happening without previous notice or with very brief notice: coming or occurring unexpectedly: not foreseen or prepared for." Webster's also lists synonyms for "sudden" that include "prompt" and "immediate."

Similarly, Black's Law Dictionary 1432 (6th ed. 1990) defines "sudden" as "[h]appening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen;

unprepared for." In contrast, however, the Random House Dictionary of the English Language 1900 (2d ed. 1987) defines "sudden" in temporal terms as "happening, coming, made, or done quickly."

Accordingly, numerous courts have determined that the term "sudden," as used in the sudden and accidental pollution exclusion exception, is ambiguous and should be interpreted in favor of the insured, as referring to something subjectively unexpected. See, e.g., *Pepper's Steel & Alloys v. U.S. Fidelity & Guar.*, 668 F. Supp. 1541 (S.D. Fla. 1987); *U.S. v. Conservation Chemical Co.*, 653 F. Supp. 152 (W.D. Mo. 1986); *Ala. Plating v. U.S. Fidelity and Guar.*, 690 So. 2d 331 (Ala. 1996); *Sauer v. Home Indem. Co.*, 841 P.2d 176 (Alaska 1992); *Hecla Min. Co. v. New Hampshire Ins. Co., supra*; *Claussen v. Aetna Cas. &c. Co., supra*; *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Morton Intern., Inc. v. General Acc. Ins. Co.*, 134 N.J. 1, 629 A.2d 831 (1993); *Textron, Inc. v. Aetna Cas. and Sur. Co.*, 754 A.2d 742 (R.I. 2000); *Greenville County v. Insurance Reserve Fund*, 313 S.C. 546, 443 S.E.2d 552 (1994); *Key Tronic Corporation v. Aetna*, 124 Wash. 2d 618, 881 P.2d 201 (1994); *Joy Technologies v. Liberty Mut. Ins.*, 187 W. Va. 742, 421 S.E.2d 493 (1992); *Just v. Land Reclamation, Ltd., supra*; *Compass Ins. Co. v. Cravens, Dargan & Co.*, 748 P.2d 724 (Wyo. 1988). See, also, *MAPCO Alaska Petroleum v. Central Nat. Ins. Co.*, 795 F. Supp. 941 (D. Alaska 1991).

However, other courts have decided that in its common, vernacular understanding, "sudden" is unambiguous and is to be understood as objectively, temporally abrupt. See, e.g., *Bell Lumber and Pole Co. v. U.S. Fire Ins. Co.*, 60 F.3d 437 (8th Cir. 1995); *Buell Industries v. Greater N.Y. Mut. Ins.*, 259 Conn. 527, 791 A.2d 489 (2002); *E.I. du Pont de Nemours v. Allstate Ins.*, 693 A.2d 1059 (Del. 1997); *Dimmitt Chevrolet v. Southeastern Fidelity*, 636 So. 2d 700 (Fla. 1993); *North Pacific Ins. Co. v. Mai*, 130 Idaho 251, 939 P.2d 570 (1997); *Board v. Farmland Mut. Ins.*, 568 N.W.2d 815 (Iowa 1997); *Am. Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 659 A.2d 1295 (1995); *Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc.*, 407 Mass. 675, 555 N.E.2d 568 (1990); *Auto-Owners Ins v City of Clare*, 446 Mich. 1, 521 N.W.2d 480 (1994); *Board of Regents*

*v. Royal Ins. Co.*, 517 N.W.2d 888 (Minn. 1994); *Sokoloski v. American West Ins. Co.*, 294 Mont. 210, 980 P.2d 1043 (1999); *Northville Industries v. Nat. Union Ins.*, 89 N.Y.2d 621, 679 N.E.2d 1044, 657 N.Y.S.2d 564 (1997); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986); *Kerr-McGee Corp. v. Admiral Ins. Co.*, 905 P.2d 760 (Okla. 1995); *Sharon Steel v. Aetna Cas. and Sur.*, 931 P.2d 127 (Utah 1997); *Sinclair Oil Corp. v. Republic Ins. Co.*, 929 P.2d 535 (Wyo. 1996).

The court in *Buell Industries v. Greater N.Y. Mut. Ins., supra*, for instance, explained that " '[t]he existence of more than one dictionary definition is not the sine qua non of ambiguity. If it were, few words would be unambiguous.' " *Id.* at 546, 791 A.2d at 501, quoting *New Castle County v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991). The court concluded that in the context of the "sudden and accidental" exception to the pollution exclusion, the term "sudden" was unambiguous and that under its plain meaning, only a temporally abrupt release of pollutants would be covered by the exclusion exception. The court found it was simply "untenable" to construe the term "sudden" as an event whose only requirement is that it be unexpected to the observer. 259 Conn. at 544, 791 A.2d at 500. It thus quoted the California Court of Appeal, stating, " 'We cannot reasonably call "sudden" a process that occurs slowly and incrementally over a relatively long time, no matter how unexpected or unintended the process.' " *Id.*, quoting *Shell Oil v. Winterthur Swiss Ins.*, 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815 (1993). Similarly, the court stated, " 'It seems incongruous . . . to think of a leakage or seepage that occurs over many years as happening suddenly.' " *Id.* at 544, 791 A.2d at 501, quoting *Board of Regents v. Royal Ins. Co., supra.*

[7,8] We conclude that under the terms of the policy at issue, an event occurring over a period of time is not sudden. The language of an insurance policy should be considered in accordance with what a reasonable person in the position of the insured would have understood it to mean. See *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005). We conclude that a reasonable person in the position of the insured would understand the term "sudden," as found in the context of the

qualified pollution exclusion, to refer to the objectively temporally abrupt release of pollutants into the environment.

The district court was correct in concluding that the fact that the discharges occurred over a period of time precluded Dutton's recovery against USF&G and Empire. We therefore affirm the summary judgment in favor of USF&G and Empire on that basis. However, because the policies with Continental and Northern did not contain the qualified pollution exclusion clause, we must consider other grounds submitted to the district court for summary judgment with regard to Continental and Northern.

### 2. Statute of Limitations

The parties agree that the applicable statute of limitations is contained in Neb. Rev. Stat. § 25-205 (Cum. Supp. 2004), which provides a 5-year statute of limitations on written contracts. The question presented is when that 5-year period began to run. The defendants argue, and the district court so held, that the statute of limitations began to run when the insurer denied any duty to defend.

[9,10] If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law. See *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Shipler v. General Motors Corp., ante* p. 194, 710 N.W.2d 807 (2006).

[11] We first note that coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: (1) the duty to defend any suit filed against the insured party and (2) 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. See *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004). The district court, however, in deciding the statute of limitations, treated these two obligations indistinguishably. Although ultimately our conclusions as to when the statute of limitations begins to run on a duty to defend makes the failure to distinguish the two duties inconsequential, we will properly address each duty separately. We turn first to the duty to indemnify.

(a) Duty to Indemnify

[12,13] It is the general rule that a cause of action cannot accrue before the insurer fails to perform the obligations agreed to in the contract. See *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000). Nebraska has long held that a claim for indemnity accrues at the time the indemnity claimant suffers loss or damage. See *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989). We have elaborated that this means that the cause of action accrues and the statute of limitations begins to run not at the time of the underlying act causing the damage, but when the would-be indemnitee pays the judgment arising from the underlying loss or damage. See, *id.*; *Lyhane v. Durtschi*, 144 Neb. 256, 13 N.W.2d 130 (1944); *Bankers Surety Co. v. Willow Springs Beverage Co.*, 104 Neb. 173, 176 N.W. 82 (1920); *Northern Assurance Co. v. Borgelt*, 67 Neb. 282, 93 N.W. 226 (1903). See, also, *Snyder v. EMCASCO Ins. Co., supra* (prior to time when contract is violated, there is no justiciable controversy, and it would be illogical to let statute of limitations for bringing action begin to run before action can be brought).

Here, the duty to indemnify under the contracts with the defendants is upon the insured becoming legally obligated to pay the damages. At the earliest, such legal obligation arose with the first consent judgment against Dutton on August 14, 1998. Dutton filed suit on September 4, 2002, within 5 years of such judgment. Therefore, we conclude that the statute of limitations does not bar Dutton's cause of action for breach of the insurers' duty to indemnify.

(b) Duty to Defend

We next consider the duty to defend as it relates to the policies with Continental and Northern.

The issue of when the statute of limitations begins to run for breach of contract on a duty to defend is an issue of first impression for this court. The insurers focus on continuing duty cases in Nebraska, which deal almost exclusively with professional negligence. However, such cases, and other general principles upon which the insurers wish to rely, are inapposite to the case at hand. Numerous courts from other jurisdictions have recognized

that the issue of the statute of limitations in the context of an insurer's duty to defend is a distinct area of law.

Courts that have addressed the issue of the statute of limitations for a duty to defend under an insurance contract have almost uniformly held that

> in an action by an insured against an insurer for refusal to defend, the insured's cause of action under general statutes of limitations accrues when judgment is obtained against the insured, as opposed to the date the insurer refused to defend, the date the insurer denies coverage, or the insured's payment of a compromise settlement.

17 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 236:102 at 236-94 to 236-95 (2000). See, also, 46 C.J.S. *Insurance* § 1154 (1993) (insured may elect to wait until final judgment is entered before filing action against insurance company for its failure to defend); Annot., 96 A.L.R.3d 1193 (1979) (notwithstanding argument by insurers that their alleged breach of contract occurred and insured's cause of action therefore accrued, when insurer rejected tender of defense, courts have ordinarily determined accrual of such action to be concurrent with termination of underlying litigation which insurer refused to defend). But see *Whatley v. City of Dallas*, 758 S.W.2d 301 (Tex. App. 1988). Courts have given various reasons for this general rule that the statute of limitations on a duty to defend will not run until after resolution of the underlying judgment.

The court in *Vigilant v. Luppino*, 352 Md. 481, 723 A.2d 14 (1999), rejected the insurer's argument pursuant to general principles stating that limitations periods begin to run when the plaintiff should have known of the breach. The insured argued that the cause of action for breach of contract accrued and the statute of limitations period for breach of a duty to defend began to run when the insurer sent the insured its letter denying coverage. The court held that the insurer was correct in stating that the insured's cause of action had accrued when it denied coverage; nevertheless, the duty to defend, by its very nature, was a continuing one that extended throughout the course of the litigation against the insured. The court reasoned that "[a]n insured should be allowed to expect the insurer to step in and cure its breach so long as the underlying action is continuing." *Id.* at 492, 723 A.2d at 19. The

court noted that although the insured could have brought a declaratory judgment action earlier, explaining that such actions were not generally encouraged and, therefore, certainly the failure to bring one would not operate to prejudice the insured.

The court in *Moffat v. Metropolitan Casualty Insurance Co. of New York*, 238 F. Supp. 165 (M.D. Pa. 1964), reasoned that to hold that the statute of limitations on a duty to defend began to run from the time of a denial letter would have absurd results. The court stated:

> In this day of crowded court calendars and delays of years before trial, an insured could find that the statute had run long before he had incurred his trial and appellate expenses. . . . Also it would lead to the multiplicity of suits, long in disfavor in law. There would be a suit for costs and expenses and then, after judgment against the insured, a suit for indemnity. The latter cannot be started until there is a final judgment against the insured.

*Id*. at 175.

The court in *Lambert v. Commonwealth Land Title Ins.*, 53 Cal. 3d 1072, 811 P.2d 737, 282 Cal. Rptr. 445 (1991), likewise explained that the statute of limitations for an insurer's breach of the duty to defend commenced when final judgment was entered in the underlying litigation. To hold otherwise, and allow the expiration of the statute of limitations on a lawsuit to vindicate the duty to defend even before the duty itself was to expire, would have "untenable" and "grim" results. *Id*. at 1077, 811 P.2d at 739, 282 Cal. Rptr. at 447. The court elaborated that many times, the insured is simply a private homeowner for whom it would be inequitable and harsh to demand that he defend the underlying action at his own expense and at the same time prosecute at his expense a separate action against the insurer for failure to defend.

The court in *Bush v. Safeco Insurance*, 23 Wash. App. 327, 596 P.2d 1357 (1979), simply declared that while an insurer's duty to defend may be separate from a duty to pay the judgment, both duties arise out of a written insurance contract and that a cause of action for breach of either duty accrues for purposes of the statute of limitations when the final judgment is entered. See, also, *Continental Casualty Co. v. Florida Power & Light Co.*,

222 So. 2d 58 (Fla. App. 1969) (cause of action for breach of duty to defend accrued when third-party litigation ended rather than earlier date when insurer denied coverage).

[14] We adopt the clear majority view that a cause of action on an insurer's duty to defend does not run until the underlying action is resolved against the insured. Accordingly, we reverse the district court's determination that Dutton's claims were barred by the statute of limitations.

### 3. Notification

We next address whether summary judgment was proper as to Continental and Northern on the basis of Dutton's alleged breach of its duty to notify. The district court's determination that Dutton was barred by "late notice" specified only Northern and USF&G. However, Continental argues late notice as an additional basis upon which this court should affirm the district court's ruling in its favor. The issue having been properly presented below, we consider it as to Continental as well.

Dutton's policies with Continental and Northern set forth that it was the insured's duty:

> (a) In the event of an **occurrence**, written notice containing particulars sufficient to identify the **insured** and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the **insured** to the Company or any of its authorized agents as soon as practicable.

The policies further provided that "(b) If claim is made or suit is brought against the **insured**, the **insured** shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative."

[15] In order to escape liability or the duty to defend on account of an insured's unreasonable and unexcused delay in giving notice of claim, a liability insurer is required to show that it was prejudiced. *Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998). Prejudice is established by examining whether the insurer received notice in time to meaningfully protect its interests. *Mefferd v. Sieler & Co.*, 267 Neb. 532, 676 N.W.2d 22 (2004).

[16] In addition, the insurer's ability to insist upon its insured's duty to notify may be waived through its representations to the insured. In *Thomas Kilpatrick & Co. v. London Guarantee & Accident Co.*, 121 Neb. 354, 237 N.W. 162 (1931), we held that an insurance company whose policy provides that the insured shall forward to the company every summons and other process in suits as soon as served upon him waives such provision by an unconditional denial of liability. We explained that as the insurer has already denied liability, it is neither necessary nor proper to notify the insurer again. However, in *Thomas Kilpatrick & Co.*, we affirmed a jury determination that an "unconditional" denial liability was made by the insurer despite the fact that no formal letter of denial was issued. Instead, there was conflicting testimony as to oral representations of the parties and the undisputed fact that the insurer had denied liability in another suit related to the same incident, thus creating "a circumstance which, in connection with all the other evidence, would tend to establish a course of conduct consistent with the contention" of the insured that liability had been denied. *Id.* at 358, 237 N.W. at 164.

In the context of clauses requiring the filing of proof of loss, we have further explained:

> The general rule is that a denial by the insurer, or its authorized agent, of liability under its policy, or any act or artifice to mislead the insured, and cause him to omit to perform a duty he would otherwise have performed, will operate as a waiver of a provision requiring proof.

*Barrett v. Northwestern Mutual Life Ins. Co.*, 124 Neb. 864, 871, 248 N.W. 391, 394 (1933). Thus, we have held that there is sufficient denial by the insurer to effect a waiver where the denial is of "such a character, or made under such circumstances, as reasonably to induce the belief that the submission of proofs will be useless." *Id.*

[17] Similarly, with regard to clauses precluding the insured from entering into settlement agreements without authorization of the insurer, we have explained that the insurer waives its right to defend not only through an "express or unequivocal" denial, but in any instance where "the facts and circumstances warrant the inference that liability was, and would be, denied." *Otteman v. Interstate Fire & Cas. Co., Inc.*, 172 Neb. 574, 580, 111

N.W.2d 97, 101 (1961). We explained that "[t]he insured may not be deprived of his rights by a narrow and technical construction of formal requisites, by which that right is to be made available. On the contrary, a liberal and reasonable construction should be given." *Id*. Thus, in *Otteman*, we found a denial of coverage where there was an unreasonable delay to take action after notice of the claim, with correspondence reserving a decision on liability and asking for an interview, which when eventually conducted, failed to indicate any urgency to defend the insured's claim. The insured had accordingly, through such delay and equivocation, waived any right to insist on the policy provision regarding defense or settlement.

Northern does not dispute that its correspondence with Dutton should reasonably be read as a denial of coverage. Instead, it argues that because such denials were made before any notice of Dutton's claims as to the Well No. 3 pollution subsite, the denials applied only to the Hastings subsites, and did not apply to any claim arising out of Well No. 3. Continental admits that its denial of coverage was "unequivocal." Brief for appellee Continental at 12. However, it asserts that because one of the listed reasons for denying coverage was the absence of a "suit," Dutton should have still been held to its duty to forward every demand, notice, summons, or other process received when the EPA filed suit against it leading to the first consent judgment.

For the reasons that follow, we conclude that the district court erred in granting summary judgment to Continental and Northern on the basis of Dutton's alleged breach of the notice provisions of the contracts.

(a) Continental

We first address Continental's claim that Dutton breached its duties under the notice requirements of the contract. Continental does not allege any prejudice from any lack of notice prior to its 1992 denial of liability. The 1992 letter to Dutton clearly stated that it was disclaiming coverage. The letter stated that it was doing so because Continental had concluded that the EPA's claim failed to constitute a claim for "property damage" as defined by the policy. While the letter also referred to the lack of a "suit," as defined by the policy, the reason for there being no "suit" was explained as follows: "It is Continental's position

that an administrative order or action does not constitute a 'suit.' " Under such reasoning, Dutton could safely assume that the eventual filing against it by the EPA would not change Continental's position. Accordingly, we conclude that there is an issue of fact precluding summary judgment as to whether the 1992 letter constituted a denial of liability such that Dutton could reasonably believe that any further notification or forwarding of documents would be fruitless. Assuming the letter did reasonably induce Dutton to believe that further correspondence would be useless, Dutton's notification duties under the contract were waived and could not be used by Continental as a basis for nonperformance.

(b) Northern

The question presented with regard to Northern is whether its denials of liability upon notice of the Hastings subsites operate so as to waive Dutton's notice obligations as to the later-developed Well No. 3 subsite. Again, in this regard, we consider whether in any instance "the facts and circumstances warrant the inference that liability was, and would be, denied." *Otteman v. Interstate Fire & Cas. Co., Inc.*, 172 Neb. 574, 580, 111 N.W.2d 97, 101 (1961).

Northern's letter to Dutton indicated that there was not yet any "suit" as defined by the policy, but that regardless, any future "suit" might be inconsistent with the definitions of "occurrence" and "property damage," as well as perhaps other provisions of the policy.

As already discussed, the addition of equivocal language to correspondence is not decisive, and Northern in fact admits that Dutton reasonably took its letter as a denial of coverage. As a result, Dutton could have reasonably believed that further efforts of notification under the policies would be useless. We conclude an issue of fact precluding summary judgment exists as to whether the correspondence between Northern and Dutton was properly interpreted by Dutton as indicating that any Well No. 3 claim would be similarly denied.

4. LACHES

Finally, we address that portion of the district court's ruling reasoning that laches supported summary judgment in favor of

Continental. Northern cross-appeals the district court's failure to include it in this finding, so we address this issue as to Northern as well.

We conclude that the district court erred in granting summary judgment because of laches. The defendants assert that Dutton's delay in bringing suit resulted in the loss of important witnesses and in consent judgments being entered into without their participation. Dutton responds that any prejudice experienced by Continental or Northern is due to its own failure to investigate. See *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). Dutton argues that the defendants denied coverage at their own risk and that it should not be compelled to file suit before required by law simply to protect the parties from such denials.

[18,19] Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). The defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary. *Id.*

The case of *UTI Corp. v. Fireman's Fund Ins. Co.*, 896 F. Supp. 362 (D.N.J. 1995), is instructive. Therein, the court, after determining that the statute of limitations on a duty to defend did not begin to run until the final EPA consent orders were entered against the insured, rejected the insurer's argument that laches barred the insured's claim. The insurer argued that it was prejudiced by the fact that it had long since closed its claim file and that the insured had failed to keep them informed of communications with the EPA. The court concluded that the insurer, by its letter denying a duty to defend, had "already articulated its position, and the case law does not support the proposition that there are additional burdens placed upon an insured in order to protect its rights against its insurer once coverage has been denied." *Id.* at 369.

We similarly conclude that under the undisputed facts presented, laches does not operate to bar Dutton's claims. Dutton was under no duty to file a declaratory judgment suit earlier against the defendants, but was entitled to wait and bring a single suit

once the damages were more fully known. It would be incongruent to recognize this right while precluding its exercise through the operation of laches. Moreover, we note that had the insurers wished to avoid the prejudice inherent to the time that has elapsed, they were on notice of the matter and could have investigated it.

### 5. Dutton's Motion for Partial Summary Judgment

We turn now to Dutton's assertion that the district court erred in failing to grant its cross-motion for partial summary judgment. As to USF&G and Empire, since summary judgment was properly entered in their favor, the district court did not err in failing to grant Dutton's motion for partial summary judgment as to them.

As to Continental and Northern, Dutton's motion for partial summary judgment asked the court to declare the insurers jointly and severally liable and is only "partial" in the sense that certain damages have yet to be determined. Considering the number and complexity of the issues yet to be fully presented to or passed upon by the district court or briefed to this court, which may affect the defendants' liability under the policies, we decline to reverse the district court's denial of Dutton's motion for partial summary judgment. We do, however, note that in accordance with this opinion, the district court's reasoning that Dutton's motion should be denied because of its failure to "timely advise and keep apprised the insurance companies" is in error.

## VI. CONCLUSION

In conclusion, we affirm the district court's grant of summary judgment in favor of USF&G and Empire and we affirm the district court's denial of Dutton's motion for partial summary judgment. In all other respects, the district court's order is reversed and the cause is remanded for further proceedings.

Affirmed in part, and in part reversed and remanded for further proceedings.

Connolly and Stephan, JJ., not participating.

# Carol K. Munstermann, Personal Representative of the Estate of Jodi Sue Rowe, deceased, appellee, v. Alegent Health - Immanuel Medical Center, a not-for-profit corporation, and Hudson Hsieh, M.D., appellants.

716 N.W.2d 73

Filed June 23, 2006. No. S-04-1312.

1. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
2. ____: ____. 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.
3. **Negligence.** The threshold inquiry in any negligence action, including those involving a duty to warn and protect, is whether the defendant owed the plaintiff a duty.
4. **Negligence: Words and Phrases.** A duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
5. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
6. ____. When determining whether a legal duty exists for actionable negligence, a court considers (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
7. **Negligence: Public Policy.** The determination of a legal duty is fundamentally based in public policy considerations.
8. **Physician and Patient: Mental Competency: Negligence.** In some circumstances, a special relation may exist between a psychiatrist and patient which imposes a duty upon the psychiatrist to warn or protect a reasonably identifiable victim when a patient has communicated a serious threat of physical violence against that potential victim.
9. ____: ____: ____. A psychiatrist is liable for failing to warn of and protect from a patient's threatened violent behavior, or failing to predict and warn of and protect from a patient's violent behavior, when the patient has communicated to the psychiatrist a serious threat of physical violence against himself, herself, or a reasonably identifiable victim or victims. The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under those limited circumstances and shall be discharged by the psychiatrist if reasonable efforts are made to communicate the threat to the victim or victims and to a law enforcement agency.
10. **Negligence: Mental Competency: Intent.** A "serious threat of physical violence" does not refer to the credibility of a patient's stated intentions, the harm likely to be suffered irrespective of his or her intent, or the gravity of the threatened injury.
11. **Physician and Patient: Mental Competency: Negligence.** A psychiatrist's duty to third parties to warn of and protect from a patient's violent behavior is not premised on a professional standard of care.

12. **Physician and Patient: Mental Competency: Negligence: Proof.** A psychiatrist's liability for failing to warn of and protect from a patient's violent behavior rests entirely on the fact finder's determination that each factual predicate of the cause of action is satisfied: the existence of a professional relationship, the psychiatrist's actual belief or prediction that the patient poses a serious risk of inflicting grave bodily injury, a reasonably identifiable victim, and the failure to undertake reasonable efforts to warn the victim and a law enforcement agency.
13. **Physician and Patient: Mental Competency: Negligence.** A psychiatrist's duty to warn of and protect from a patient's violent behavior arises only if the information communicated to the psychiatrist leads the psychiatrist to believe that his or her patient poses a serious risk of grave bodily injury to another.
14. **Negligence.** An action predicated on a duty to warn and protect is essentially a negligence action.
15. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action predicated on a duty to warn and protect, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
16. **Negligence.** The question in a negligence action is whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed and remanded for a new trial.

P. Shawn McCann, Joseph S. Daly, and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellants.

William T. Ginsburg for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

GERRARD, J.

Marty Nuzum murdered his estranged girl friend, Jodi Sue Rowe, on February 12, 2002. The question presented in this appeal is whether Nuzum communicated a serious threat of physical violence against Rowe to the defendants, Nuzum's treating psychiatrist and health care facility, such that the defendants were under a duty to take reasonable precautions to prevent the murder. The jury in this case was unable to reach a verdict, and the district court declared a mistrial. The defendants appeal from the judgment of the district court denying their motion for judgment notwithstanding the verdict. We affirm the district court's denial of the defendants' motion for judgment notwithstanding the verdict, and remand the cause for a new trial.

## BACKGROUND

### Procedural History

This is an action for wrongful death brought by Carol K. Munstermann, personal representative of Rowe's estate, against Alegent Health – Immanuel Medical Center (Alegent) and Hudson Hsieh, M.D., Nuzum's treating psychiatrist at Alegent, for their alleged failure to protect or warn Rowe.

The matter went to trial, after which the defendants made a motion for directed verdict, arguing, inter alia, that there was insufficient evidence that Nuzum communicated a serious threat of physical violence against Rowe to the defendants to give rise to a duty to protect or warn Rowe. The motion was denied, and the matter was submitted to the jury, but the jury was unable to reach a verdict. A mistrial was declared, and the defendants moved for a judgment notwithstanding the verdict, which was denied. See Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2004). This appeal followed. See Neb. Rev. Stat. § 25-1315.03 (Reissue 1995).

### Trial Evidence

Nuzum was admitted to inpatient care at Alegent on February 4, 2002, when he checked himself in, suffering from depression and suicidal ideations. Nuzum was treated by Hsieh. Nuzum had been treated as an inpatient at Alegent in January 2002, following a suicide attempt. Nuzum had attempted suicide in 1990, 2000, and 2002.

When Nuzum was admitted in January 2002, he was not found to exhibit any homicidal tendencies. Nuzum was examined and observed for homicidal risk factors during his week as an inpatient, and none were found. When Nuzum checked himself back in on February 4, he again denied having homicidal ideations or assaultive behavior.

Nuzum was seen by Hsieh on February 5, 2002, with several medical students present, and one of those students, Rebecca Gurney (who is now a medical doctor), transcribed notes for Hsieh. Because those notes are central to the plaintiff's case, they are set forth below in their entirety.

> 2/5/02
>
> <u>M3 transcribing for Dr. Hsieh</u>
>
> Pt was last here ~ 1 mo ago. Pt was to follow up with therapist and take medications. Pt was working, did Ø see

> therapist. Pt was taking meds. Pt is having problems with girlfriend - she doesn't understand depression. He has been calling into work, doesn't want to get out of bed.
>
> Pt has had suicidal thoughts. He wants to sleep all time, stop thinking.
>
> Thought he would come here before he hurt himself.
>
> Pt was thinking of hurting girlfriend also since she is hurting him. Girlfriend doesn't want to talk about his depression. She won't participate here.
>
> Pt is on Remeron (15 mg) now. Makes him sleep.
>
> Pt doesn't trust himself.
>
> Increase Remeron dose.
>
> [Signed] R. Gurney [M3]

Nuzum was discharged from Alegent on February 7, 2002. His discharge summary indicated that he had recovered from this instance of severe depression and that his suicidal ideations had subsided. Nuzum had been consistently assessed during his stay for homicidal risk factors, and none were present. Nuzum was prescribed medications, instructed on how to follow up with individual psychotherapy, and encouraged to attend community support.

On February 12, 2002, Nuzum murdered Rowe after she came to his apartment to retrieve a set of car keys. Neither Hsieh nor any employee of Alegent acted to warn Rowe or law enforcement that Nuzum might be dangerous.

The primary issue at trial was how to interpret the indication in Gurney's February 5, 2002, notes that Nuzum "was thinking of hurting girlfriend also since she is hurting him." Gurney testified that she never thought that Nuzum was a threat to Rowe. Gurney said that Nuzum had been consistently worried about losing Rowe, because he thought Rowe would leave him because of his depression. Gurney testified that after Nuzum said he was thinking of hurting Rowe, the medical students and Hsieh went into more detail with Nuzum to find out what he meant by the remark. Gurney recalled that Nuzum was asked

> why he would want to do that; what he meant by it, and [Nuzum] kind of said that he was saddened and frustrated that his girlfriend was not more supportive of him while he was depressed. Kind of wanted him to snap out of it, just

> be happy, and that really made him feel bad. And because of that, [Nuzum] wanted her to feel the same pain that he was feeling.

Gurney said that when she wrote that Nuzum was thinking of hurting Rowe, it indicated "an emotional hurt." Gurney later explained that her notes were only intended to transcribe "kind of the general gist of the whole thing," not "specifically writing out every little thing that they said."

Hsieh similarly testified that Gurney's February 5, 2002, notes were not a verbatim account of what happened, but were an accurate transcription. Hsieh explained that Nuzum's statement that he was "thinking of hurting girlfriend" was actually in response to direct questioning from Hsieh.

> [W]e also talk about — well, now, would it hurt when you injure yourself, and we talk about that he has overdosed on the antifreeze two years before, a month ago. Why would you do that? That was my question. And what were you thinking about when you were injecting the — ingesting the antifreeze? And that's when he said I was thinking about hurting her because she hurt me so much.

Hsieh further explained that this was a common question asked of a suicidal patient—what the patient was thinking when making a suicide attempt. According to Hsieh, Nuzum said that Rowe had hurt him, "[s]o when he took an overdose, it's a way to say — see what you are doing to me? You're hurting me." Hsieh explained that when Nuzum said Rowe was hurting him, Nuzum meant that she had hurt him in an emotional way,

> [a]nd so this is how [Nuzum] presented to let her know and get back at her by his taking an overdose. And we did also talk about it on different occasions. And not why would anybody go that far to do it, and his response was it worked. Every time he attempted suicide, she came back to him.

Hsieh agreed that Nuzum was emotionally hurt and that Nuzum thought by attempting suicide, he would hurt Rowe too.

Hsieh agreed with Gurney's explanation of what was meant by her February 5, 2002, notes. Although the word "emotional" did not appear in the notes, Hsieh testified he did not believe it was necessary at the time, "[b]ecause [of] the way the conversation flew, and basically [it was] very, very clear that that's what he

meant. That's what he meant emotionally. He wanted to get back at her."

However, the plaintiff's expert witness, Charles Wadle, M.D., testified that in his opinion, Nuzum's suicidal ideations had become more lethal and his hospitalizations had gotten closer together, and this reflected a deterioration in Nuzum's condition. Wadle stated that prior to the February 5, 2002, notes, Nuzum had always talked about hurting himself, which he characterized in the context of suicidal behavior, or self-harm. Wadle testified with reference to the February 5 notes that "here [Nuzum's] referencing hurting the girlfriend, which could very likely indicate harming her physically." Wadle conceded, however, that the records contained no other reference to hurting Rowe, or anyone other than Nuzum.

Wadle found no reference in the medical record to Nuzum's attempting to emotionally hurt his girl friend, stating that the notes were "[t]otally void of any documentation of a subsequent conversation to define hurt." Wadle opined that if such a conversation had occurred, it should have been included in the medical records. When asked on cross-examination if Gurney and Hsieh were credible in their testimony regarding the February 5, 2002, notes, Wadle stated that

> [t]heir recollection of such as they have indicated in the deposition is an index of suspicion when they believe it was necessary to go back and qualify the meaning of hurting in an individual who has always used [the] word to imply physical. They went back, asked him, did not document, despite three opportunities, maybe even four, in this medical record. And months to years later, they recall having done that. I don't know if they lied. I don't know if they were just flagrantly aloof when they did this record, but it's not documented in real time for anybody to know what transpired.

Wadle also testified that had the defendants followed what Wadle thought to be the relevant standard of care, a "support system" would have been in place for Nuzum following his discharge and Alegent personnel would have checked with Nuzum to make sure he followed the conditions under which he was discharged. Wadle also testified that the defendants had a "duty to warn" and opined over objection that had Rowe "been forewarned of a threat

to her by . . . Nuzum, she would have had an opportunity to avoid contact with him and may have lived."

In contrast, the defendants' expert witness, Eli Chesen, M.D., testified that in the context of the rest of the notes, and all of Nuzum's treatments, the February 5, 2002, notes

> can only be interpreted that [Nuzum] was wanting to hurt her emotionally, as he had done in a repetitive pattern in previous years. And this is a man who was quite versed and quite skilled in using emotional blackmail making other people feel guilty for the way he felt. And I think this progress note, in the context of all the medical records, and all of the information I have been able to review, would indicate that he's talking about hurting her emotionally, just as she has emotionally hurt him, in his interpretation anyway.

Chesen testified that this pattern of emotional blackmail was described "pretty clearly" in Nuzum's previous hospitalizations. Chesen opined that the defendants had met the standard of care in treating Nuzum.

## ASSIGNMENTS OF ERROR

The defendants assign, consolidated and restated, that the district court erred (1) in failing to grant the defendants' motions for directed verdict and judgment notwithstanding the verdict, on the basis of insufficient evidence of duty; (2) in instructing the jury that the action was a medical malpractice action, and on the standard of care for a medical malpractice action; and (3) in failing to grant the defendants' motions for directed verdict and judgment notwithstanding the verdict, on the basis of insufficient evidence of causation.

## STANDARD OF REVIEW

[1,2] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005). 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. *Id.*

## ANALYSIS

### Legal Background

The threshold inquiry in this appeal is whether the defendants owed the plaintiff a legal duty. See *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). This is our first opportunity to address the issues most closely associated with the California Supreme Court's decision in *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (*Tarasoff*). In *Tarasoff*, the plaintiffs alleged that the defendant therapist had a duty to warn their daughter of the danger posed to her by one of the therapist's patients. The court recognized the general rule that a person owes no duty to control the acts of another. But the court adopted Restatement (Second) of Torts § 315 at 122 (1965), which provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Applying this exception, the *Tarasoff* court held that the relationship between the patient and her therapist was sufficient to support the imposition of an affirmative duty on the defendant for the benefit of third persons. The *Tarasoff* court further held that a therapist's duty to act arises when the therapist determines, or pursuant to the standards of the profession should determine, that the patient presents a serious danger of violence to another.

The vast majority of courts that have considered this issue have accepted the *Tarasoff* analysis. See *Bradley v. Ray*, 904 S.W.2d 302 (Mo. App. 1995) (collecting cases). In *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980), the U.S. District Court for the District of Nebraska correctly predicted that this court would adopt § 315. See, *Bartunek v. State*, 266

Neb. 454, 666 N.W.2d 435 (2003); *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993); *Popple v. Rose, supra*. See, also, *Foley v. Bishop Clarkson Memorial Hospital*, 185 Neb. 89, 173 N.W.2d 881 (1970) (hospital must guard against patient's mental condition discoverable by exercise of reasonable care). Based on that determination, the U.S. District Court concluded that this court would adopt the *Tarasoff* holding as well. *Lipari v. Sears, Roebuck & Co., supra*.

In the wake of *Tarasoff*, however, the California Legislature restricted the scope of *Tarasoff* liability. See Cal. Civ. Code § 43.92 (West Cum. Supp. 2006). Under § 43.92(a), a duty to warn of and protect from a patient's threatened violent behavior arises only "where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." Several states have enacted similar statutes based upon California's example, including Nebraska. See *Bradley v. Ray, supra* (collecting statutes).

## Nebraska Statutes

Neb. Rev. Stat. § 71-1,336 (Reissue 2003) provides, in relevant part:

> (1) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is licensed or certified [as a mental health practitioner] for failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except when the patient has communicated to the mental health practitioner a serious threat of physical violence against himself, herself, or a reasonably identifiable victim or victims.
>
> (2) The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under the limited circumstances specified in subsection (1) of this section. The duty shall be discharged by the mental health practitioner if reasonable efforts are made to communicate the threat to the victim or victims and to a law enforcement agency.

The parties to this appeal tried this case, and filed their appellate briefs, on the assumption that § 71-1,336 was controlling.

That assumption, however, was misplaced. As will be explained in more detail below, the defendant in this case, Hsieh, is a psychiatrist—a physician, licensed pursuant to Neb. Rev. Stat. §§ 71-1,102 to 71-1,107.14 (Reissue 1996 & Cum. Supp. 2000). The Nebraska statutes specify the scope of *Tarasoff* liability for psychologists and "mental health practitioners," but do not provide corresponding statutory language for psychiatrists.

Section 71-1,336 applies, quite specifically, to persons "licensed or certified pursuant to sections 71-1,295 to 71-1,338." Those sections of the Uniform Licensing Law apply to "mental health practitioners," which are described as including "social workers, master social workers, professional counselors, and marriage and family therapists." Neb. Rev. Stat. § 71-1,295 (Reissue 2003). Mental health practice means the provision of treatment, assessment, psychotherapy, counseling, or equivalent activities to individuals, couples, families, or groups for behavioral, cognitive, social, mental, or emotional disorders, including interpersonal or personal situations. Neb. Rev. Stat. § 71-1,307 (Reissue 2003). However,

> [m]ental health practice *shall not include* the practice of psychology or medicine, prescribing drugs or electroconvulsive therapy, treating physical disease, injury, or deformity, diagnosing major mental illness or disorder except in consultation with a qualified physician or a psychologist licensed to engage in the practice of psychology as provided in section 71-1,206.14 . . . .

(Emphasis supplied.) § 71-1,307. In fact, mental health practitioners are prohibited from representing themselves as physicians or psychologists and from representing their services as medical or psychological in nature. Neb. Rev. Stat. § 71-1,308 (Reissue 2003).

It is important to note the difference between psychologists and psychiatrists. Psychology is the science dealing with mental processes, both normal and abnormal, and their effects upon behavior. Taber's Cyclopedic Medical Dictionary 1591 (18th ed. 1997). Psychiatry, on the other hand, is the branch of medicine that deals with the diagnosis, treatment, and prevention of mental illness. *Id.* at 1590. In other words, psychiatrists are medical doctors who specialize in mental illness, while psychologists

belong to a separate discipline devoted to understanding the human mind and, in clinical psychology, concerned with diagnosing and treating mental disorders. See *id.* at 1591.

Psychologists are licensed pursuant to Neb. Rev. Stat. §§ 71-1,206.01 to 71-1,206.35 (Reissue 1996 & Cum. Supp. 2000).

> Practice of psychology shall mean the observation, description, evaluation, interpretation, or modification of human behavior by the application of psychological principles, methods, or procedures for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior and of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, and mental health. The practice of psychology shall include, but not be limited to, psychological testing and the evaluation or assessment of personal characteristics . . . counseling, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavior analysis and therapy; diagnosis and treatment of mental and emotional disorders, alcoholism and substance abuse, disorders of habit or conduct, and the psychological aspects of physical illness, accident, injury, or disability; psychoeducational evaluation, therapy, remediation, and consultation . . . .

§ 71-1,206.08. Section 71-1,206.30 provides in part:

> (1) No monetary liability and no cause of action shall arise against any psychologist for failing to warn of and protect from a client's or patient's threatened violent behavior or failing to predict and warn of and protect from a client's or patient's violent behavior except when the client or patient has communicated to the psychologist a serious threat of physical violence against a reasonably identifiable victim or victims.
>
> (2) The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under the limited circumstances specified in subsection (1) of this section. The duty shall be discharged by the psychologist if reasonable efforts are made to communicate the threat to the victim or victims and to a law enforcement agency.

In contrast to psychologists and other mental health professionals, psychiatrists, as medical doctors, are licensed pursuant to §§ 71-1,102 to 71-1,107.14. Those sections contain no equivalent to §§ 71-1,206.30 or 71-1,336. In short, the duty of psychologists and other mental health professionals to warn and protect third persons is controlled by statute, but a psychiatrist's duty is not addressed by statute, and is still controlled by common law.

After the present appeal was submitted to this court, based upon our consideration of the statutory scheme, we directed the parties to file supplemental briefs addressing whether Hsieh's duty, in his treatment of Nuzum, was controlled by statute. Based upon the reasoning we have set forth above, the parties agree that neither § 71-1,336, nor any other statute, addresses Hsieh's duty in his treatment of Nuzum. The defendants now assert that in the absence of a specifically applicable statute, they owed no duty at all to warn and protect Rowe. The plaintiff insists that in the absence of a statute, the case should have been tried as an ordinary medical malpractice action. We do not accept either of these contentions.

## Duty Analysis

[3-6] The threshold inquiry in any negligence action, including those involving a duty to warn and protect, is whether the defendant owed the plaintiff a duty. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). A duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Id.* Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003); *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). When making that determination a court considers (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. See *id.*

[7] In this case, we are also mindful of the fact that the determination of a legal duty is fundamentally based in public policy considerations, see *Popple v. Rose, supra*, and it is generally the

function of the Legislature to declare what is the law and public policy of this state, see *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005), *cert. denied* 546 U.S. 947, 126 S. Ct. 449, 163 L. Ed. 2d 341. See, also, *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004). Although §§ 71-1,206.30(1) and 71-1,336 "may not be literally applicable, [they are] clearly indicative of legislatively approved public policy." See *Parson v. Chizek*, 201 Neb. 754, 758, 272 N.W.2d 48, 51 (1978). See, also, *Ob-Gyn v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985).

[8] Given our prior endorsement of Restatement (Second) of Torts § 315 (1965), and the clearly articulated public policy expressed in §§ 71-1,206.30(1) and 71-1,336, we conclude that in some circumstances, a special relation may exist between a psychiatrist and patient which imposes a duty upon the psychiatrist to warn or protect a reasonably identifiable victim when a patient has communicated a serious threat of physical violence against that potential victim. However, given the Legislature's decision to limit *Tarasoff* by enacting §§ 71-1,206.30(1) and 71-1,336, we find that the limitations set forth in those sections should also be applied to psychiatrists. The Legislature has made a public policy determination with respect to the *Tarasoff* duty that this court is bound to respect. We see no rational basis for distinguishing the *Tarasoff* duty of psychiatrists from that of psychologists or other mental health practitioners.

Moreover, the analysis of California's identical statutory language, from which the Nebraska statutes were derived, has revealed that the statute is based upon public policy concerns to which our familiar risk-utility test is applicable. See, *Fuhrman v. State, supra*; *Sharkey v. Board of Regents, supra*. The intent of limiting a *Tarasoff* duty to situations in which the patient communicates a serious threat of physical violence was not to overrule *Tarasoff*, but, rather, to preempt an expansive ruling that a therapist can be held liable for the mere failure to predict potential violence by his or her patient. *Ewing v. Goldstein*, 120 Cal. App. 4th 807, 15 Cal. Rptr. 3d 864 (2004). The statutory language represents an effort to strike an appropriate balance between conflicting policy interests. *Id.*

On the one hand, the need to preserve a patient confidence recognizes that effective diagnosis and treatment of a mental illness

or an emotional problem is severely undermined when a patient cannot be assured that a statement made in the privacy of his or her therapist's office will not be revealed. *Id.* On the other hand is the recognition that under limited circumstances, preserving a confidence is less important than protecting the safety of someone the patient intends to harm. *Id.* In other words, the statutory language is the result of balancing risk and utility, considering the magnitude of the risk, relationship of the parties, nature of the risk, opportunity and ability to exercise care, foreseeability of the harm, and public policy interest in the proposed solution. See, *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003); *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

[9] Considering our risk-utility test, and the relevant public policy determinations made by the Legislature, we conclude the same duty should be required of psychiatrists as is required of psychologists and other mental health practitioners. We hold, in accord with §§ 71-1,206.30(1) and 71-1,336, that a psychiatrist is liable for failing to warn of and protect from a patient's threatened violent behavior, or failing to predict and warn of and protect from a patient's violent behavior, when the patient has communicated to the psychiatrist a serious threat of physical violence against himself, herself, or a reasonably identifiable victim or victims. The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under those limited circumstances, and shall be discharged by the psychiatrist if reasonable efforts are made to communicate the threat to the victim or victims and to a law enforcement agency.

## Defendants' Liability

With that established, the issue to be confronted in this case is whether Nuzum actually communicated a serious threat of physical violence to the defendants. In that regard, it is important to note that in striking a balance between the protection of third parties and the preservation of medical confidentiality, the statutory language from which our holding is derived is intended to eliminate a therapist's immunity and sanction an invasion into the therapist-patient privilege only in the narrow circumstance in which actual knowledge of potentially grave bodily injury is presented. *Ewing v. Goldstein, supra.*

[10-13] The phrase "'serious threat of physical violence'" does not refer to the credibility of a patient's stated intentions, the harm likely to be suffered irrespective of his or her intent, or the gravity of the threatened injury. *Id.* at 820, 15 Cal. Rptr. at 874. The psychiatrist's duty to third parties is not premised on a professional standard of care. See *Ewing v. Northridge Hosp. Medical Center*, 120 Cal. App. 4th 1289, 16 Cal. Rptr. 3d 591 (2004). Rather, it rests entirely on the fact finder's determination that each factual predicate of the cause of action is satisfied: the existence of a professional relationship, the psychiatrist's actual belief or prediction that the patient poses a serious risk of inflicting grave bodily injury, a reasonably identifiable victim, and the failure to undertake reasonable efforts to warn the victim and a law enforcement agency. *Id.* The question is whether a serious threat of physical violence was actually "communicated" to the psychiatrist. Thus, a duty to warn and protect arises only if the information communicated to the psychiatrist leads the psychiatrist to believe that his or her patient poses a serious risk of grave bodily injury to another. See *Calderon v. Glick*, 131 Cal. App. 4th 224, 31 Cal. Rptr. 3d 707 (2005).

This does not mean that in an appropriate case, a finder of fact could not conclude that a particular threat of violence was so serious that a defendant could not have believed it to be anything other than credible. See, e.g., *Ewing v. Northridge Hosp. Medical Center, supra*. Nor does it mean that in some instances, expert testimony might not be helpful to the trier of fact in evaluating a defendant's testimony about whether he or she believed a particular threat of violence to be sincere. It simply means that in determining whether a duty to warn and protect is alleged to have arisen under the holding of this case, the focus should be on whether the patient actually communicated a serious threat of physical violence to his or her psychiatrist.

Given that understanding, the evidence in this case is less than clear as to whether Nuzum effectively communicated a serious threat of physical violence. There is little to dispute Hsieh and Gurney's testimony that each understood Nuzum's statements to indicate that he had, when attempting suicide, been attempting to emotionally hurt Rowe. Wadle testified that in his opinion, Nuzum was "most likely" referring to physical violence when he

made the statement at issue, but Wadle conceded that he had no basis to conclude that the defendants believed Nuzum was making such a threat.

However, the jury instructions given in this case illustrate that the parties and the trial court were working with differing, and mistaken, understandings of what the plaintiff was required to prove. The jury was instructed, without objection, of the exact language of § 71-1,336. But the jury was also instructed, again without objection, that this was "an action based upon a claim of malpractice, sometimes called professional negligence" and that under Nebraska law, the question was whether the defendants had used reasonable care, skill, and knowledge possessed and used under like circumstances by members of the profession engaged in a similar practice in the locality or similar localities. Those instructions were inconsistent with both one another and the duty to warn or protect principles set forth above. Given these instructions, and the evidence supporting liability under one instruction but not the other, it is not surprising that the jury was unable to reach a verdict.

We conclude, given the unsettled state of Nebraska law prior to this opinion, and the uncertainty evident at trial about what standards controlled liability in this case, that it would be inequitable to find that the plaintiff failed, as a matter of law, to meet the burden of proof on liability when the record before us was created without a clear understanding of what, precisely, the plaintiff was required to prove. "There was considerable uncertainty not only as to the existence of a legal duty but also as to the scope of any such duty and the appropriate method of discharging that duty." See *Perreira v. State*, 768 P.2d 1198, 1220 (Colo. 1989). Thus, the parties were at a considerable disadvantage in marshalling evidence in support of and in defense of the duty to warn or protect claim in the initial trial.

It would be unfair for this court to answer questions of first impression, then retroactively apply those answers without offering the plaintiff an opportunity to meet the bar that has been set. For this reason, we find no merit to the defendants' first assignment of error, arguing that they were entitled to a judgment as a matter of law based upon the lack of a legal duty to warn and protect. For the same reason, however, we conclude that there is

merit to the defendants' second assignment of error with respect to the jury instructions. Obviously, on retrial, the jury instructions should reflect the principles of duty explained above.

## Proximate Cause

The defendants also argue that they were entitled to a directed verdict on the issue of causation, contending the evidence was insufficient to support a conclusion that any act or omission of the defendants proximately caused Rowe's murder. The defendants argue Wadle's testimony that the defendants' postdischarge provisions for Nuzum were below the standard of care and his opinion that had Rowe "been forewarned of a threat to her by . . . Nuzum, she would have had an opportunity to avoid contact with him and may have lived" are insufficient proof that had the defendants acted to protect or warn Rowe, those efforts would probably have been successful. As a result, the defendants argue that any breach of duty on their part was not the proximate cause of Rowe's death.

[14-16] However, the same difficulties that make it impossible, on this record, to decide the issue of liability as a matter of law also preclude a finding as a matter of law with respect to proximate cause. An action predicated on a duty to warn and protect is essentially a negligence action. See *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). In order to prevail in such an action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. See, *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005); *Popple v. Rose, supra*. In order to prove proximate cause, it is necessary to understand both a defendant's duty, and what the defendant was required to do to discharge that duty—the question is whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty. See *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003). The confusion at trial about the defendants' duty, and how that duty was to be discharged, necessarily affected the parties' ability to adduce evidence relevant to proximate cause.

Furthermore, the evidence reflects that Rowe was murdered at Nuzum's apartment, where she went to retrieve a set of car keys.

When all reasonable inferences are given to the plaintiff, see *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005), we cannot say, as a matter of law, that reasonable jurors could not conclude that had Rowe been told Nuzum had threatened her, she might not have been in a position where she could be killed. See, e.g., *Estate of Long v. Broadlawns Med. Center*, 656 N.W.2d 71 (Iowa 2002); *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska 1986). Cf. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). Thus, we find no merit to the defendants' third and final assignment of error.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court overruling the defendants' motions for directed verdict and judgment notwithstanding the verdict, and remand the cause for a new trial consistent with this opinion.

AFFIRMED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., not participating.

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# STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. JAMES WIDTFELDT, RESPONDENT.

716 N.W.2d 68

Filed June 23, 2006. No. S-04-1400.

1. **Appeal and Error.** Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
2. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
4. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.

5. ____. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that misconduct shall be grounds for (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as the Nebraska Supreme Court may designate; (4) censure and reprimand; (5) temporary suspension; or (6) private reprimand by the Committee on Inquiry or Disciplinary Review Board.
6. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

George H. Moyer, of Moyer, Moyer, Egley, Fullner & Montag, for respondent.

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

PER CURIAM.

## NATURE OF CASE

This case presents the review of the uncontested findings of the referee in an attorney disciplinary proceeding.

## BACKGROUND

James Widtfeldt was admitted to the practice of law in Nebraska in 1978 and has a general practice in Holt County, Nebraska. He has previously been privately reprimanded for representing both sides of a tax case. He is currently under an order of indefinite suspension to be followed by a period of probation for filing irrelevant and abusive motions and pleadings in an unrelated case and for irrelevant and abusive written responses to the Counsel for Discipline reviewing that case. See *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005).

The formal charges currently before us concern Widtfeldt's conduct in two separate probate proceedings (described separately in counts I and II) occurring prior to the current order of suspension. The formal charges alleged that Widtfeldt entered into agreement for, charged, or collected clearly excessive fees, in violation of Canon 2, DR 2-106(A), of the Nebraska Code of Professional Responsibility, and that he knowingly failed to disclose information or had knowingly made a false statement of law or fact during the proceedings, in violation of Canon 7,

DR 7-102, of the Nebraska Code of Professional Responsibility. The Counsel for Discipline also charged Widtfeldt with violation of Canon 1, DR-102(A), of the Nebraska Code of Professional Responsibility, which prohibits the violation of a disciplinary rule, engaging in conduct prejudicial to the administration of justice, or any other conduct that adversely reflects on the lawyer's fitness to practice law. After the appointment of the referee, a hearing was held at which Widtfeldt was present with counsel.

### Count I: Marr Estate

Count I involved the probate proceedings of the estate of Rose M. Marr. The evidence at the hearing showed that Widtfeldt entered into an agreement with the personal representatives of the estate to represent them and to receive attorney fees in the amount of 8 percent of the nonprobate and probate property. Widtfeldt later filed an inheritance tax worksheet with the county court, reflecting a gross estate value of $578,943.51 and an attorney fee of $46,434.22. The personal representatives paid Widtfeldt this amount from the estate assets, but the county court ultimately ordered the fees to be repaid to the estate. Widtfeldt complied with this order.

Widtfeldt testified at that hearing that in the past, his standard fee for estate cases was 2 percent of the gross estate, plus extra sums for extraordinary work. He attempted to explain the 8-percent figure as compensation for conservatorship work at 1 percent per year for 7 years, plus 1 percent for the estate work.

Widtfeldt admitted that a conservatorship was never actually filed and that the "conservatorship work" was done after Marr's death. This work involved doublechecking all the canceled checks issued by Marr's attorneys in fact pursuant to Marr's powers of attorney. Widtfeldt described his work as compiling "an account like a conservator." Widtfeldt testified that he did this pursuant to Marr's predeath wish that Widtfeldt conduct such a review informally, without court oversight, and that Widtfeldt wait to be paid out of the estate for such services. Widtfeldt did not have a formal written agreement with Marr to that effect. Widtfeldt was paid during Marr's lifetime for services such as the drafting of her will, and for a cancellation fee for not completing the guardianship-conservatorship which he had drafted for Marr.

The allegation of misrepresentation in the Marr estate stemmed from the fact that the personal representatives were also each initially afforded, through Widtfeldt, 8 percent of the estate under a similar theory of compensation for their past services to Marr. However, when the petition for their appointment was filed, Widtfeldt stated therein that they were not creditors of the estate. Widtfeldt explained that neither of the personal representatives had a formal compensation arrangement with Marr and that they had told him they were not creditors of the estate. Instead, the compensation was as per Marr's expressed wishes to Widtfeldt that they in fact later be generously compensated.

The referee found, by clear and convincing evidence, that Widtfeldt violated DR 2-106(A) by entering into an agreement for, charging, or collecting an illegal or clearly excessive fee. However, the referee concluded that he could not find by clear and convincing evidence that Widtfeldt had intentionally misled the county court in filing the personal representative applications as he did. The referee explained that the personal representatives' prior services were admittedly done partially out of friendship with Marr and that no terms of payment had been formally agreed upon. Thus, the referee did not find a "creditor" relationship.

### Count II: Kollman Estate

Count II involved the estate of Walter Kollman and Widtfeldt's representation of its personal representatives. Widtfeldt entered into an agreement with the personal representatives for attorney fees in the amount of 5 percent of the estate, with a like percentage designated for the services of each personal representative. An inheritance tax worksheet was eventually presented to and signed by the personal representatives, setting forth a gross estate of $1,419,994.70, attorney fees of $100,999.74 (which was roughly 7 percent of the assets), and personal representatives' fees in the amount of $201,999.47. This sheet was presented to the county attorney, who informed Widtfeldt that he would not approve the worksheet and that Widtfeldt would have to obtain court approval for any such fees.

The worksheet was never filed with the court. Widtfeldt claimed that the reason he never filed this first worksheet was

because it contained errors. He explained that there were mathematical errors, on which he did not elaborate. In addition, Widtfeldt testified that "tempers were fairly high." A litigator had been hired through him for the estate to handle litigation with certain heirs, and Widtfeldt explained that he thought that he was going to have to pay the litigator's expenses out of his own fees because the fees were being informally contested by one of the personal representatives.

Subsequently, Widtfeldt drafted or filed several different and conflicting motions for approval of his fees, ranging from 2 to 5 percent of the estate. Ultimately, the county court, noting that normal fees for estate actions in that area were 1 percent, awarded a 2-percent fee to Widtfeldt and ordered that any excess fees be refunded. Widtfeldt, pursuant to such order, refunded $28,398 of previously paid fees. The aforementioned litigator testified at the disciplinary hearing that a reasonable rate was between 2 to 3 percent.

The misrepresentation allegations of count II related to alleged false statements to the county court in Widtfeldt's pleadings regarding the scheduling of hearings. The Counsel for Discipline however, eventually conceded that Widtfeldt's testimony established that the misrepresentations were unintentional and were a result of administrative error.

The referee found with regard to the false pleadings allegation that the evidence failed to establish any violation. However, the referee found that Widtfeldt had violated DR 2-106(A) by charging, albeit without successfully collecting, an excessive fee.

## Referee Recommendations

The referee recommended that Widtfeldt be publicly reprimanded and that his current indefinite suspension remain in full force and effect without modification. In so recommending, the referee noted that Widtfeldt failed to produce evidence that the events in question were isolated occurrences. The referee did take into consideration Widtfeldt's behavior at the hearing, which the referee described as "contrite and cooperative." At the same time, however, the referee noted that Widtfeldt did not actually admit to any wrongdoing. The referee also took into account Widtfeldt's previous reprimand and his current suspension.

No exceptions were filed to the referee's findings by either party to the proceeding. We sustained the Counsel for Discipline's motion for judgment on the pleadings as to the violations, but not as to the proposed discipline.

## ASSIGNMENTS OF ERROR

In Widtfeldt's brief, he assigns that the referee erred (1) by finding that he contracted for, charged, or collected a clearly excessive fee in the Kollman estate and (2) in determining that Widtfeldt's conduct in the Kollman estate was cumulative of his conduct in the Marr estate.

## ANALYSIS

Widtfeldt's brief focuses on count II and his allegation that he never really intended to collect the 7-percent fee found by the referee to be excessive. The Counsel for Discipline does not assert that any of the subsequent filings of either 2 or 5 percent were clearly excessive given the protracted litigation of the case, and the referee's findings appear to focus on the 7-percent figure.

Widtfeldt accordingly takes issue with the referee's recommendation that he be publicly reprimanded for his conduct related to the Kollman estate. Widtfeldt does not take issue with the referee's recommendation that his current status of indefinite suspension should continue or with the public reprimand in relation to the Marr estate.

[1,2] Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception. *State ex. rel. Counsel for Dis. v. Petersen, ante* p. 262, 710 N.W.2d 646 (2006). When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive. See, *id.*; Neb. Ct. R. of Discipline 10(L) (rev. 2005). In sustaining the Counsel for Discipline's motion for judgment on the pleadings, we have already concluded that Widtfeldt's conduct was in violation of DR 2-106(A) on two separate occasions. We consider Widtfeldt's arguments in his brief to this court to the extent that they are relevant to the appropriate sanction to be imposed from that conduct. We note that the conduct at issue in this case occurred prior to the September 1, 2005, effective date of the

Nebraska Rules of Professional Conduct and is, thus, governed by the now-superseded Code of Professional Responsibility.

[3,4] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Horneber*, 270 Neb. 951, 708 N.W.2d 620 (2006). Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005).

The referee, in recommending a public reprimand, considered the case of *State ex rel. Counsel for Dis. v. Palagi*, 269 Neb. 398, 693 N.W.2d 276 (2005), wherein we publicly reprimanded an attorney for having charged an excessive fee in a wrongful death matter. The attorney was also found to have improperly advanced financial assistance to a client and failed to return the property of clients. Other cases considering the issue of excessive fees are limited, and the circumstances in those cases also presented additional violations of the Code of Professional Responsibility. See, *State ex rel. Special Counsel for Dis. v. Shapiro*, 266 Neb. 328, 665 N.W.2d 615 (2003); *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001); *State ex rel. NSBA v. Miller*, 258 Neb. 181, 602 N.W.2d 486 (1999); *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

Widtfeldt's current order of suspension is subject to reinstatement followed by a period of probation of not less than 1 year. In order to be reinstated under this order, we explained that he will need to establish that counseling has resulted in behavioral changes that will allow him to practice law within the disciplinary rules. At the disciplinary hearing considered in *State ex rel. Counsel for Dis. v. Widtfeldt, supra*, a psychologist concluded that although intelligent, Widtfeldt had narcissistic and obsessive-compulsive personality features which interfered

with his ability to reason through certain issues. However, the psychologist opined that Widtfeldt could complete a plan to modify his behavior so that there was a much greater chance that problems would not reoccur.

[5] Neb. Ct. R. of Discipline 4 (rev. 2004) provides that misconduct shall be grounds for (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as we may designate; (4) censure and reprimand; (5) temporary suspension; or (6) private reprimand by the Committee on Inquiry or Disciplinary Review Board.

[6] In considering the appropriate discipline in this case, we are mindful of the fact that this is not the first instance of misconduct by Widtfeldt. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. *State ex rel. Counsel for Dis. v. Swanson*, 267 Neb. 540, 675 N.W.2d 674 (2004). Although Widtfeldt is currently suspended, we find that his cumulative acts of misconduct merit more of a sanction than is afforded by a public reprimand. We conclude that the appropriate discipline in this case for the two counts of violating DR 2-106(A) is a judgment of suspension for a period of 1 year.

## CONCLUSION

We order that Widtfeldt should be and hereby is suspended from the practice of law in the State of Nebraska for a period of 1 year, effective immediately. Widtfeldt 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.

MILLER-LERMAN, J., not participating.

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## STATE OF NEBRASKA, APPELLEE, V. STANLEY POE, ALSO KNOWN AS STANLEY A. POE, APPELLANT.

717 N.W.2d 463

Filed June 23, 2006. No. S-05-235.

1. **Motions to Dismiss: DNA Testing: Appeal and Error.** A motion to dismiss an action under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Supp. 2001), after testing has been completed is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the court's determination will not be disturbed.

2. **DNA Testing: Appeal and Error.** In an appeal from a proceeding under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Supp. 2001), the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. ____: ____. Decisions regarding appointment of counsel under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Supp. 2001), are reviewed for an abuse of discretion.
4. **Motions to Dismiss: DNA Testing: Appeal and Error.** In order to bring an action under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Supp. 2001), to a conclusion, when the State receives DNA testing results that do not exonerate or exculpate the person, the State should file a motion to dismiss the action, the granting of which is an appealable order.
5. **Constitutional Law: DNA Testing: Right to Counsel.** There is not a constitutional right to appointment of counsel in an action under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Supp. 2001).
6. **DNA Testing: Right to Counsel.** Under Neb. Rev. Stat. § 29-4122 (Supp. 2001), the court has discretion to appoint counsel based on its determination of whether the person bringing the action has shown that DNA testing may be relevant to his or her claim of wrongful conviction.

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

Stanley Poe, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Subsequent to our remand in *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003), the district court for Douglas County appointed counsel and granted Stanley Poe's request for DNA testing of a cigarette butt found at the scene of the robbery for which Poe was convicted. A report on the DNA test results concluded that Poe could not be excluded as the contributor to biological material found on the cigarette butt, and Poe's counsel withdrew. Thereafter, the court held a hearing and entered an order finding that the results were not exculpatory and dismissing Poe's action brought under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Supp. 2001). Poe appeals from this order. We affirm.

## STATEMENT OF FACTS

In 1990, Poe was convicted of robbery. He was found to be a habitual criminal and was sentenced to 15 to 30 years' imprisonment. Poe's conviction was affirmed by the Nebraska Court of Appeals. *State v. Poe*, 1 NCA 379 (1992).

On October 11, 2001, Poe filed a pro se motion for DNA testing pursuant to the DNA Testing Act. Poe requested DNA testing of a cigarette butt found at the scene of the robbery for which he was convicted. The district court denied the motion. Poe appealed to this court. After concluding that the district court had erred when it determined that the cigarette butt was not related to the investigation or prosecution that resulted in Poe's conviction, we remanded the cause to the district court to determine whether Poe was entitled to forensic DNA testing of the cigarette butt and whether Poe was entitled to appointment of counsel. *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003).

On remand, the court appointed counsel to represent Poe. On January 27, 2004, the court entered an order requiring that the cigarette butt be submitted to Orchid Cellmark Dallas (Cellmark) for mitochondrial DNA testing. The court further ordered that if Cellmark was able to generate a DNA profile, then a DNA sample from Poe would be taken and forwarded to Cellmark for comparison. After testing the cigarette butt and Poe's sample, Cellmark issued a report dated July 19, 2004, which concluded, in part, "Based on these results, Stanley Poe . . . cannot be excluded as being the contributor of the male biological material on the cigarette butt."

The court held a hearing in this matter on February 2, 2005, at which hearing it stated that the proceeding was "a final hearing on [Poe's] application having to do with . . . relief" under the DNA Testing Act. The State's attorney stated:

> The tests have come back inconclusive and [Poe's counsel] has withdrawn saying there was nothing else further to do in this matter. State is just asking for a final order at this time dismissing this matter saying that the DNA testing was granted, it was allowed, and did come back inconclusive, meaning there is nothing further to do in this matter.

Cellmark's July 19, 2004, report was admitted into evidence.

Poe appeared pro se and participated in the February 2, 2005, hearing by telephone. Poe stated that his counsel had notified him "in July" that counsel "wanted to withdraw from the case because the case was over." Poe further stated that he found out the case was "not over" when he was informed of the hearing. Poe noted his concern that he was not qualified to represent himself in the matter but, in any event, wished to have the record reflect that he objected to the State's characterization of the report. The court thereafter stated that "[g]iven the circumstances," it would not appoint counsel to represent Poe.

The court on February 3, 2005, entered an order denying "Poe's Application." The court stated that the DNA test results were "inclusive [sic]" and that, for purposes of the DNA Testing Act, the test results were not exculpatory as defined under § 29-4119 and were not favorable to Poe. Poe appeals.

## ASSIGNMENTS OF ERROR

Poe asserts that the court erred in (1) finding that the DNA test results were not exculpatory and not favorable to Poe and in therefore dismissing the action, (2) allowing court-appointed counsel to withdraw prior to the final hearing in this matter, and (3) failing to follow this court's mandate in *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003).

## STANDARDS OF REVIEW

[1] Although the court in its order stated it was denying "Poe's Application," we treat the present appeal as involving a motion to dismiss an action under the DNA Testing Act after testing has been completed. In cases involving a request for postconviction DNA testing, we have stated that a motion for DNA testing is addressed to the discretion of the trial court and that unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006). We have also stated that a motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the trial court and that unless an abuse of discretion is shown, the court's determination will not be disturbed. *State v. El-Tabech*, 269 Neb. 810, 696 N.W.2d 445 (2005). We similarly now hold that a motion to

dismiss an action under the DNA Testing Act after testing has been completed is addressed to the discretion of the trial court and that unless an abuse of discretion is shown, the court's determination will not be disturbed.

[2] In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Dean, supra*.

[3] We review decisions regarding appointment of counsel under the DNA Testing Act for an abuse of discretion. *State v. Dean*, 270 Neb. at 977, 708 N.W.2d at 645 ("district court . . . did not abuse its discretion in denying . . . request for appointment of counsel").

## ANALYSIS

*State Should Move to Dismiss When DNA Test Results Do Not Exonerate or Are Not Exculpatory.*

Before reaching Poe's assignments of error, it is necessary to address an apparent uncertainty regarding the manner in which this case was to be concluded after the DNA test results were received and determined not to be exculpatory or exonerating. We note that § 29-4123 of the DNA Testing Act provides:

> (2) Upon receipt of the results of such [DNA] testing, any party may request a hearing before the court when such results exonerate or exculpate the person. Following such hearing, the court may, on its own motion or upon the motion of any party, vacate and set aside the judgment and release the person from custody based upon final testing results exonerating or exculpating the person.
>
> (3) If the court does not grant the relief contained in subsection (2) of this section, any party may file a motion for a new trial under sections 29-2101 to 29-2103.

Section 29-4123(2), which authorizes a motion to vacate and set aside the judgment, provides clear guidance regarding how parties should proceed when they believe that DNA test results exonerate or exculpate the person. Furthermore, § 29-4123(3) authorizes a motion for new trial if the court does not grant the relief contained in § 29-4123(2). We have held that denial of a motion to vacate the judgment under § 29-4123(2) and denial of a motion for new trial triggered by § 29-4123(3) are appealable orders. *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003).

Unlike the provisions setting forth the procedures relative to DNA results which exonerate or exculpate the person, the DNA Testing Act does not explicitly set forth the manner in which parties are to proceed when they determine that DNA test results do not exonerate or exculpate the person. After the test results in this case were received, Poe's attorney apparently determined that the results did not exonerate or exculpate Poe, and Poe's attorney chose to withdraw from representation without taking further steps to bring the action to a conclusion.

[4] We are aware that parties and courts would have an interest in bringing a conclusion to actions under the DNA Testing Act and that because the DNA Testing Act does not specify the manner in which parties are to proceed when DNA test results do not exonerate or exculpate the person who sought testing, guidance is needed. We note that § 29-4123(1) provides that final DNA testing results are to be "disclosed to the county attorney, to the person filing the motion, and to the person's attorney." Test results are therefore available to the person bringing an action under the DNA Testing Act, that person's counsel, and to the State, represented by the county attorney. We recognize that the person bringing an action under the DNA Testing Act might be reluctant to ask the court to find that the results do not exonerate that individual or are not exculpatory. However, having received the results under § 29-4123(1), the State is in a position to determine that results do not exonerate and are not exculpatory. Therefore, in order to bring an action under the DNA Testing Act to a conclusion, we suggest that when the State receives DNA testing results that do not exonerate or exculpate the person, the State file a motion to dismiss the action. A motion in the nature of a motion to dismiss was made by the State, and the order of dismissal which was entered in this case is an appealable order.

*District Court Did Not Err in Finding That Results Were Not Exculpatory.*

Poe first asserts that the district court erred in finding that the DNA test results were not exculpatory to him and in therefore dismissing the action. The court stated in its order entered February 3, 2005, "For purposes of the Nebraska DNA Testing Act, the forensic test results are not exculpatory, as defined under Neb.Rev.Stat. §29-4119. The test results are not favorable to

Stanley Poe." We conclude that the district court was not clearly erroneous in so finding, see *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006), and that it did not abuse its discretion in dismissing the action.

Poe sought, and was granted, DNA testing of a cigarette butt found at the scene of the robbery for which he was convicted. The cigarette butt was used in Poe's trial as evidence tying Poe to the scene of the robbery. A report prepared by Cellmark regarding the results of the DNA testing was entered into evidence at the February 2, 2005, hearing. The report concluded, in part, "Based on these results, Stanley Poe . . . cannot be excluded as being the contributor of the male biological material on the cigarette butt."

Section 29-4119 defines "exculpatory evidence" as "evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody." If the DNA test results had excluded Poe as being the contributor of DNA on the cigarette butt, such evidence might have been favorable to Poe in that it would have weakened the value of the cigarette butt as evidence tying Poe to the scene of the robbery. However, the Cellmark report concluded that Poe could not be excluded as the contributor, and the testing therefore was not favorable to Poe. We conclude that the district court was not clearly erroneous in finding that the test results were not exculpatory and were not favorable to Poe.

As noted above, the court stated that it was denying "Poe's Application." Because the court had granted Poe's request for DNA testing and because Poe had made no further request or application in this matter after the test results were received, we read the court's order as granting the State's motion, which motion we treat as a motion to dismiss rather than a ruling on an application made by Poe. Because the court was not clearly erroneous in finding that the test results were not exculpatory and were not favorable to Poe, we conclude that the court did not abuse its discretion in granting the State's motion to dismiss. We reject Poe's first assignment of error.

*Court Did Not Abuse Its Discretion by Allowing Counsel to Withdraw and by Declining to Appoint New Counsel.*

Poe next asserts that the district court erred in allowing counsel to withdraw prior to the final hearing in this action. Poe

suggests that new counsel should have been appointed at the February 2, 2005, hearing. We conclude that although it is the better practice to not allow counsel to withdraw prior to the conclusion of the DNA testing action, the court in this case did not abuse its discretion by permitting the withdrawal of counsel and deciding not to appoint new counsel.

According to the bill of exceptions, after receiving the DNA test results, Poe's attorney apparently determined that the results did not exonerate or exculpate Poe, and counsel sought and was permitted to withdraw from representation. The matter was not brought to a conclusion. Counsel's withdrawal was noted at the February 2, 2005, hearing. At the hearing, Poe stated that he did not think he was qualified to represent himself and the court stated that "[g]iven the circumstances," it would not appoint new counsel to represent Poe. We therefore consider Poe's assignment of error as including a claim that the court erred in refusing to appoint new counsel.

Poe asserts that in this DNA Testing Act proceeding, he was deprived of his right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution. We reject this argument.

[5] The U.S. Supreme Court has held that there is no federal constitutional right to an attorney during a postconviction collateral attack. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). We have so held. *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993) (noting that postconviction relief is not part of criminal proceeding itself, is considered civil in nature, and is collateral attack that normally occurs only after defendant has failed to secure relief through direct review of his conviction). An action under the DNA Testing Act is a collateral attack on a conviction and is therefore similar to a postconviction action and is not part of the criminal proceeding itself; therefore, there is not a constitutional right to appointment of counsel in an action under the DNA Testing Act. We note that courts in other jurisdictions have also held that there is no federal right to appointed counsel in DNA testing proceedings. *Trimble v. State*, 157 Md. App. 73, 849 A.2d 83 (2004); *Winters v. Presiding Judge*, 118 S.W.3d 773 (Tex. Crim. App. 2003); *Ard v. State*, 191 S.W.3d 342 (Tex. App. 2006).

The right to counsel in an action under the DNA Testing Act is limited to that provided in the act itself. We note that § 29-4122 of the DNA Testing Act provides in part:

> Upon a showing by the person that DNA testing may be relevant to the person's claim of wrongful conviction, the court shall appoint counsel for an indigent person as follows:
>
> (1) The court shall first contact the chief counsel for the Commission on Public Advocacy to inquire if the commission is able to accept the appointment. If the chief counsel determines that the commission can accept the appointment, then the court shall appoint the commission pursuant to the County Revenue Assistance Act; and
>
> (2) If the chief counsel declines the appointment because of a conflict of interest or the case would exceed the caseload standards set by the commission, then the court shall appoint an attorney licensed to practice law in this state with at least five years experience in felony litigation to represent the indigent person at all stages of the proceedings.

As we read the record, it appears that on remand, the court in this case appointed counsel pursuant to § 29-4122(2).

[6] Under § 29-4122, the court has discretion to appoint counsel based on its determination of whether the person bringing the action has shown that DNA testing may be relevant to his or her claim of wrongful conviction. The court in this case appointed counsel, which indicates that before the testing was granted and completed, the court determined that under § 29-4122, Poe had shown that DNA testing might be relevant to his claim of wrongful conviction. After the tests had been completed and counsel had withdrawn, the court stated that "[g]iven the circumstances," it would not appoint new counsel for the final hearing. The court apparently determined, based on its finding, which we affirm, that the test results were not exculpatory and not favorable to Poe and that Poe could no longer show that the testing was relevant to his claim of wrongful conviction. We conclude that in the instant case, the district court did not abuse its discretion in so finding and in therefore declining to appoint new counsel.

We note that when counsel is appointed pursuant to § 29-4122(2), counsel is to be appointed to represent the person

"at all stages of the proceedings." We therefore observe that it is the better practice in such cases that appointed counsel not be allowed to withdraw until the action has been brought to a conclusion either by granting of the relief requested or by dismissing the DNA testing action. However, because of the apparent uncertainty in this case as to how the parties and the court were to proceed when the unfavorable test results were received and because Poe was no longer able to show that testing was relevant to his claim of wrongful conviction, we conclude that the court did not abuse its discretion in declining to appoint new counsel for the final hearing in this case.

*District Court Did Not Fail to Follow Mandate.*

Finally, Poe claims that the court failed to follow this court's mandate in *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003). Poe does not explain in what respect he believes the district court failed to follow the mandate, and our review of the proceedings on remand indicates no manner in which the court failed to do so. This court's instruction in *Poe* was that on remand, the district court was to determine whether Poe was entitled to forensic DNA testing of the cigarette butt and whether Poe was entitled to appointment of counsel. The court considered both issues, and it appointed counsel and ordered DNA testing. We therefore reject Poe's final assignment of error.

## CONCLUSION

We conclude that the district court did not err in finding that the DNA test results were not exculpatory and that it did not abuse its discretion in dismissing Poe's action under the DNA Testing Act. We further conclude that the court did not abuse its discretion by declining to appoint new counsel for the final hearing and that the court did not fail to follow this court's mandate. We affirm the order dismissing Poe's action under the DNA Testing Act.

AFFIRMED.

McCORMACK, J., not participating.

# LOREE ZACH, INDIVIDUALLY AND AS PARENT, NATURAL GUARDIAN AND NEXT FRIEND OF ANDREW ZACH ET AL., MINOR CHILDREN, APPELLANT, V. PATTI EACKER, AS PARENT, NATURAL GUARDIAN AND NEXT FRIEND OF PRESTON ZACH ET AL., MINOR CHILDREN, APPELLEE.

716 N.W.2d 437

Filed June 23, 2006. No. S-05-290.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. 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.
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.
3. **Statutes: Legislature: Intent.** In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
4. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
5. **Statutes: Legislature: Intent.** Rather than requiring that one provision be given effect to the exclusion of another, the conjunctive connector "and" typically suggests in legislation that more than one subparagraph might apply to any given circumstances.
6. ____: ____: ____. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

James G. Egley, of Moyer, Moyer, Egley, Fullner & Montag, for appellant.

Kathleen Koenig Rockey and Michelle M. Baumert, of Copple & Rockey, P.C., for appellee.

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

STEPHAN, J.

The Public Employees Retirement Board (Board) determined that the noncustodial minor children of deceased Nebraska State Trooper Mark Zach are entitled to share in his retirement death benefits along with his surviving spouse and their four children under Neb. Rev. Stat. § 81-2026(3) (Reissue 1999). The district court affirmed on review, and we affirm the judgment of the district court.

## BACKGROUND

Zach died on September 27, 2002. On the date of his death, Zach was a trooper on active duty with the Nebraska State Patrol. He was a member of the Nebraska State Patrol Retirement System (NSPRS), the general administration of which is vested in the Board. Neb. Rev. Stat. § 81-2019 (Reissue 1999). Zach was survived by his wife, appellant Loree Zach (Loree), and seven children. Zach and Loree had four children who all lived with them at the time of Zach's death. Zach's other three children were from his previous marriage to appellee Patti Eacker (Eacker), with whom they resided. All seven children were under the age of 19 when Zach died. He had listed each of them in a supplemental registration form that he had submitted to the NSPRS on June 30, 2001. NSPRS uses registration and supplemental registration forms as proof of beneficiary status.

On October 18, 2002, Loree filed an application with NSPRS seeking death benefits pursuant to § 81-2026(3). Loree sought benefits on behalf of herself as Zach's surviving spouse and on behalf of the couple's four children who lived with her. Loree did not include the names of Zach's other three children on the application. NSPRS began making annuity payments to Loree at the level of 100 percent of Zach's death benefit.

In December 2002, Eacker sought benefits on behalf of Zach's three other minor children. The NSPRS benefits manager originally found that § 81-2026(3)(a) required that 100 percent of Zach's death benefits be paid to Loree as the surviving spouse and to those children who lived with her; by implication, Zach's three noncustodial children could not share in the benefits. This decision was later reversed by the NSPRS director, who concluded that under § 81-2026(3)(c), the benefit must be divided in an equitable manner to also recognize the interests of Zach's

children who resided with Eacker. The director determined that the adjustment would be applied prospectively and notified both Eacker and Loree of her decision.

Loree appealed, and a hearing was held. The Board denied the appeal based upon the hearing officer's recommendation. Loree filed a petition for review in the district court for Lancaster County, which affirmed the decision of the Board. Loree filed this appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## ASSIGNMENTS OF ERROR

Loree assigns, renumbered, that the district court erred in (1) finding that § 81-2026(3) was ambiguous and subject to construction and (2) finding that Zach's minor children who resided with his former spouse at the time of his death are entitled to death benefits under § 81-2026(3).

## STANDARD OF REVIEW

[1,2] 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. 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. *Mortgage Elec. Reg. Sys. v. Nebraska Dept. of Banking*, 270 Neb. 529, 704 N.W.2d 784 (2005). 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. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000).

## ANALYSIS

The dispute in this case is whether the Board erred in determining that Zach's children residing with Eacker are entitled under § 81-2026(3) to share equally with his other children in annuity benefits due from NSPRS. The matter is one of statutory interpretation.

Allocation of benefits from NSPRS is governed by the Nebraska State Patrol Retirement Act, Neb. Rev. Stat. §§ 81-2014 through 81-2040 (Reissue 1999 & Cum. Supp. 2002). At the time of Zach's death in 2002, § 81-2026(3) governed the relevant survival benefits and read in part:

> Upon the death of an officer before retirement, benefits shall be provided as if the officer had retired for reasons of disability on the date of such officer's death as follows: (a) To the surviving spouse, regardless of the length of time the spouse and officer had been married, and dependent child or children of the officer under the age of nineteen years in such spouse's care, the benefit shall be one hundred percent of the amount of such officer's annuity until such time as the youngest dependent child attains the age of nineteen years after which time the benefit shall be reduced to seventy-five percent of the officer's annuity for the remainder of his or her life or until he or she remarries; (b) if there is no spouse living at the date of the officer's death, his or her child or children, if any, shall continue to receive seventy-five percent of the amount of such officer's annuity until such time as the youngest child attains the age of nineteen years; (c) if there is more than one child of the officer under the age of nineteen years at the date of the officer's death, the benefit shall be divided equally among such children and, as they attain the age of nineteen years, only the child or children under the age of nineteen years shall participate therein; and (d) if there is no child or children of the officer under the age of nineteen years living at the date of the officer's death, the surviving spouse, regardless of the length of time the spouse and officer had been married, shall receive seventy-five percent of the amount of such officer's annuity for the remainder of his or her life or until he or she remarries. If no benefits are paid to a surviving spouse or dependent children of the officer, benefits will be paid as described in subsection (1) of section 81-2031.

For the sake of completeness, we note that § 81-2026 was amended in 2004. 2004 Neb. Laws, L.B. 1097, § 30. As this claim arose prior to the amended version of the statute, we refer

in this opinion to the version of the statute in effect in 2002, unless otherwise noted.

Loree contends that § 81-2026(3) clearly excludes Eacker's children from sharing in Zach's annuity because Zach left a surviving spouse and that only she, as his surviving spouse, and Zach's four children "in such spouse's care," are entitled to benefits under subsection (a). Eacker argues that subsection (c) clearly provides that all of Zach's minor children are to receive benefits, regardless of whose care they are in, or, alternatively, that the provision is ambiguous as to the issue. The district court found that the subsections within § 81-2026(3) acted to create an ambiguity and that the legislative intent supported the Board's finding that all seven of Zach's children were meant to benefit under § 81-2026(3).

### Section 81-2026(3) Is Ambiguous

[3,4] In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000). A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).

[5] We agree with the district court that § 81-2026(3) is ambiguous. The ambiguity arises from the use within the provision of the conjunctive "and," which suggests that more than one subparagraph may apply, and from the use of the phrase "in such spouse's care" in subsection (a), which appears to create a situation contrary to that proposition in the circumstances of this case. Rather than requiring that one provision be given effect to the exclusion of another, the conjunctive connector "and" typically suggests in legislation that more than one subparagraph might apply to any given circumstances. See *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). The phrase "in such spouse's care" used in subsection (a) appears to limit the children who can benefit when a trooper also leaves a surviving spouse, whereas subsection (c) appears to contemplate that all surviving

children will share equally in the benefit. Thus, an ambiguity is created where, as here, there are surviving children who are physically in the custody of the surviving spouse and there are also surviving children in the custody of another person.

INTERPRETATION OF § 81-2026(3)

We further agree with NSPRS and the district court that an interpretation of § 81-2026(3) excluding three of Zach's minor children would be inconsistent with the legislative intent of the statute.

[6] A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *A-1 Metro Movers v. Egr*, 264 Neb. 291, 647 N.W.2d 593 (2002); *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001). The NSPRS was established in 1947 to "provide certain retirement and other benefits" for officers of the Nebraska State Patrol. 1947 Neb. Laws, ch. 211, § 2, p. 687 (codified at Neb. Rev. Stat. § 60-442 (Reissue 1952) and, currently, § 81-2015 (Reissue 1999)). The officer death benefit found in § 81-2026 was initially added in 1953 to provide benefits for an officer's widow and/or children upon the officer's death after retirement. 1953 Neb. Laws, ch. 333, § 2, p. 1093 (codified at Neb. Rev. Stat. § 60-452.01 (Cum. Supp. 1953)). In 1957, the preretirement benefit was added. 1957 Neb. Laws, ch. 276, § 1, p. 1004 (codified at § 60-452.01 (Reissue 1968)). In 1969, the statute was amended to provide that a greater percentage of the annuity be paid out when the trooper left behind both a widow and children. 1969 Neb. Laws, ch. 511, § 8, p. 2095 (codified at § 60-452.01 (Cum. Supp. 1969)). Throughout the history of the statute, it is clear that the Legislature intended that a deceased trooper's annuity would benefit his or her surviving children whether or not the trooper left a surviving spouse. However, the version of the statute in effect in 2002 did not clearly address the circumstance in which some surviving children resided with the deceased trooper's spouse while others resided with a former spouse, resulting in the ambiguity noted above.

We are guided by the Legislature's original intent to provide benefits to the surviving members of a trooper's family. We note that the 2004 amendments to § 81-2026(3) resolve the ambiguity

and specifically address the circumstance where a trooper leaves a surviving spouse with minor children in his or her care, and also leaves minor children in the care of another. 2004 Neb. Laws, L.B. 1097, § 30 (codified at § 81-2026 (Cum. Supp. 2004)). The amended provision is consistent with the Board's decision and the district court's interpretation of the statute in this case which, in turn, is consistent with the original legislative intent.

## CONCLUSION

Section 81-2026, as it existed in 2002, is ambiguous as to the proper distribution of a deceased trooper's annuity where there are surviving minor children who are not all in the care of a surviving spouse. It would be inconsistent with the intent of the Legislature to construe the statute so that Zach's three dependent children residing with his former spouse would be completely cut off from his benefits simply because they were not in the care of his widow. We agree with the district court that the Board correctly construed and applied the statute to distribute benefits to Loree, as Zach's surviving spouse, and to all seven of Zach's surviving minor children. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
MICHAEL J. GUNTHER, APPELLANT.

716 N.W.2d 691

Filed June 30, 2006. No. S-05-586.

1. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
2. **Criminal Law: 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. **Constitutional Law: Right to Counsel: Waiver.** Under U.S. Const. amend. VI and Neb. Const. art. I, § 11, a criminal defendant has the right to waive the assistance of counsel and conduct his or her own defense.

4. ____: ____: ____. In order to waive the constitutional right to counsel, the waiver must be made voluntarily, knowingly, and intelligently.
5. **Right to Counsel: Waiver.** The fact that a defendant has had the advice of counsel throughout his or her prosecution is an indication that the defendant's waiver of counsel and election to represent himself or herself was knowing and voluntary.
6. ____: ____. A knowing and intelligent waiver of the right to counsel can be inferred from a defendant's conduct.
7. ____: ____. A waiver of counsel need not be prudent, just knowing and intelligent.
8. **Constitutional Law: Right to Counsel.** A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure.
9. **Criminal Law: Right to Counsel: Effectiveness of Counsel.** A criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel, and it is not up to the trial court to conduct the defense of a pro se defendant.
10. **Right to Counsel: Effectiveness of Counsel.** A defendant who elects to represent himself or herself cannot thereafter complain that the quality of his or her own defense amounted to a denial of effective assistance of counsel.
11. ____: ____. In order to determine whether a defendant's self-representation rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his or her case in his or her own way.
12. **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.
13. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
14. **Homicide: Intent: Weapons.** The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death.
15. **Sentences: Appeal and Error.** The Nebraska Supreme Court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed in part, and in part remanded with directions.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Michael J. Gunther was charged with first degree murder and use of a firearm to commit a felony in the shooting death of Michael R. Zawodny. At trial, Gunther waived his constitutional right to counsel and represented himself. He was convicted by a jury on both counts. He was sentenced to life imprisonment without the possibility of parole on the murder conviction and to a period of 10 to 20 years' imprisonment on the firearm conviction, to be served consecutively. He now appeals his convictions and his sentence of life imprisonment without the possibility of parole.

## SCOPE OF REVIEW

[1] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005).

[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. Aldaco, ante* p. 160, 710 N.W.2d 101 (2006).

## FACTS

During May 2004, Gunther learned that Sally Kennedy, with whom he had been involved in a romantic relationship, was "sleeping with" other men, one of whom was Zawodny. On May 23, Gunther confronted Zawodny and shot him 11 times.

The State charged by information that on or about May 23, 2004, in Sarpy County, Nebraska, Gunther did purposely and with deliberate and premeditated malice kill Zawodny. Gunther was also charged with use of a firearm to commit a felony. The State did not indicate an intent to seek the death penalty by filing

a notice alleging aggravating circumstances, as required by Neb. Rev. Stat. § 29-1603(2)(a) (Cum. Supp. 2004).

During the pretrial motions, one of Gunther's three attorneys informed the court of Gunther's request that the death penalty be imposed against him. The following colloquy took place between the court and Gunther:

> [The court:] Sir, you are charged in this Information with two counts: One is murder in the first-degree; the other is the use of a firearm to commit a felony. Do you understand what you're charged with, sir?
>
> MR. GUNTHER: Yes.
>
> THE COURT: Now, sir, the possible penalty on Count I — the [S]tate, under our death penalty statute, has not filed an aggravator, so the only — and at this juncture they cannot file an aggravator. Therefore, the only penalty that I can impose, regardless of what your request may be, is life without parole. Now, do you understand that?
>
> MR. GUNTHER: No.
>
> THE COURT: Why do you not understand that, sir?
>
> MR. GUNTHER: Because I want the death penalty.
>
> THE COURT: Well, sir, that is not an option; do you understand that?
>
> MR. GUNTHER: I don't care.
>
> THE COURT: What do you mean, sir?
>
> MR. GUNTHER: Just what I said, I want the death penalty. I'll ask the jury for it.
>
> . . . .
>
> THE COURT: The jury cannot impose it; do you understand that?
>
> MR. GUNTHER: No.
>
> THE COURT: What makes you think the jury can impose it if I'm telling you what the law is, sir?
>
> MR. GUNTHER: I think they can.
>
> THE COURT: They cannot. Only the Court can impose the death penalty, and that's if the — if the jury finds the aggravator.
>
> Under our death penalty statute, the jury does not set the penalty; do you understand that?
>
> MR. GUNTHER: No.

[Counsel for Gunther]: Do you understand the words the Judge is telling you?

THE COURT: Do you understand that I'm telling you what the law is, sir?

MR. GUNTHER: I understand what you're saying, but I understand what I want, too.

THE COURT: Well, but do you understand that that will not happen?

MR. GUNTHER: No.

THE COURT: Why do you not understand that, sir? What makes you think that you can receive the death penalty?

MR. GUNTHER: Because I'm going to give the jury enough evidence.

THE COURT: You understand that the jury will not set the penalty?

MR. GUNTHER: No.

THE COURT: This is a rhetorical go-around at this point.

I'm just telling you, sir, the law is clear, the death penalty is not an option.

Now, on Count II of the Information, the possible penalty is not less than one year nor more than 50 years to be added onto your life sentence without parole, if you're convicted.

Now, do you understand the penalty there, sir?

MR. GUNTHER: Yes.

THE COURT: Okay. Now, let's go into this again. Why do you think that the jury can sentence you to death when I'm telling you the law is clear that they cannot?

MR. GUNTHER: Because I'm going to give them evidence to do it.

THE COURT: Even if I tell you regardless of what evidence you give?

MR. GUNTHER: Even regardless of what you say.

After further discussion regarding pretrial motions, Gunther informed the court, "I want to fire my attorneys." The court questioned Gunther as to why he wanted to fire his attorneys, and Gunther replied, "Because they don't want to get me what I want." Gunther told the court he wanted the death penalty. The court informed Gunther that the death penalty could not be imposed for the reasons previously given, but Gunther continued to

argue the point. The court then read applicable homicide and sentencing statutes to Gunther and explained that because the State had not filed a notice of aggravating circumstances, the death penalty was not available as a sentence in this case. Gunther stated he did not understand and claimed collusion among the court, the prosecutor, and his attorneys. The court reiterated that it could not impose the death penalty in this case.

One of Gunther's attorneys addressed the court, stating:

> I want to make sure the record is clear on the motion to discharge counsel. He does not want our assistance — he believes that there is collusion between us, the prosecution and the Court to deny him the death penalty. He wants to select the jury himself, he wants to address the jury, he wants to make an opening statement himself, he wants to make a closing argument himself, he wants to examine and cross-examine witnesses himself, so — he has expressed this to me and the other defense attorneys over and over again, so I want to make sure that the record is complete about the reasons for the — the motion to discharge the attorneys.

The court then inquired of Gunther whether what his attorney had said was correct, and Gunther responded: "That's correct." Gunther stated he was asking the court to allow him to represent himself.

The court proceeded to ask Gunther whether he knew the date, where he was, how old he was, his birth date, where he was born, his mother's name, whether he had served in the military, other personal facts concerning his family, the names of his siblings, where he had lived the previous 10 years, whether he had been married, and whether he had any children. Gunther competently answered all these questions. The court asked Gunther whether he understood that if he was allowed to represent himself, he could not raise on appeal the fact that no counsel was provided to him. Gunther indicated he understood, and the court instructed him that he would be required to follow the procedures of the court. Gunther agreed to do so as long as he knew what the procedures were.

The court next discussed the peremptory challenges that would be exercised by the parties and the procedure for doing so. Gunther was informed that he would be in charge of his

defense, that he could make an opening statement and a closing argument, and that he would be the only person who presented evidence for the defense and the only person who would cross-examine the State's witnesses. Gunther indicated he understood. The court concluded that Gunther was competent to represent himself and granted his motion to discharge his attorneys; however, the court appointed Gunther's prior attorneys as standby counsel. Prior to the commencement of trial, procedural motions were addressed. The court sustained a reciprocal motion that no witnesses would be permitted in the courtroom while other witnesses were testifying and sustained the State's motion for endorsement of two additional witnesses. Standby counsel were given an opportunity to confer with Gunther about his opening statement, and the trial proceeded with Gunther representing himself.

The State offered the testimony of four witnesses to the shooting of Zawodny. John Hanna, a carnival worker, testified that he knew Gunther and Zawodny and that during the evening of May 23, 2004, he was working at a "Skeeball" game, located at a carnival near Offutt Air Force Base in Bellevue, Nebraska. Between 7:30 and 8 p.m., Hanna saw Gunther walk up the carnival midway, and 10 to 15 minutes later, he saw Gunther approach Zawodny. Hanna next saw Gunther pull a gun, point it at Zawodny, fire a shot at Zawodny's head, and then fire four or five more shots. After Zawodny fell, Gunther stood over Zawodny's feet and "unloaded the gun from head to chest . . . until it wouldn't shoot anymore."

Aaron Fleischmann testified that as he was walking near the carnival area, he saw a man on the ground and another man standing above him, shooting a gun into the first man's back or side. Fleischmann saw three or four flashes of light come out of the gun, and as he ran away, he heard another three or four shots coming from the same area.

Joshua Meinders was a military policeman stationed at Offutt Air Force Base and was off duty the evening of May 23, 2004. He was at the base carnival with his family, and when he heard gunshots, he immediately began running toward the sound. Meinders saw Gunther walk from Zawodny's legs to his head and "put a last round into him."

Christopher Davis, a carnival worker who knew both Gunther and Zawodny, testified that he had talked to Gunther at the carnival around 8:25 p.m. Shortly after the conversation, Gunther walked away and Davis heard gunfire. Davis "went running . . . as fast as [he] could" because his wife and child were in a trailer near the scene of the shooting. Davis heard about six gunshots. When Davis arrived and was about 20 feet from the scene, he observed Gunther standing over Zawodny with a gun. Davis testified that Gunther said to him: "This is the mother fucker been fucking Sally." Gunther then turned around and "pumped the last five rounds" into Zawodny's neck and face.

Dr. Jerry Jones, the forensic pathologist who performed Zawodny's autopsy, testified that there were 11 separate gunshot wounds to the body. There were six wounds to the head and neck, two to the back of the right side of the chest, two to the left side of the abdomen, and one to the left upper inner thigh. Four bullets were recovered from Zawodny's body, two of which were large caliber and two of which were small caliber and consistent with .22-caliber bullets. In Jones' opinion, Zawodny died of multiple gunshot wounds with penetration of the brain, both lungs, and other vital areas of the body. A .38-caliber revolver and a .22-caliber pistol were recovered from the scene of the crime.

During the State's case in chief, Gunther informed the court outside the presence of the jury that he intended to testify after the State rested its case. The court advised Gunther that if he took the witness stand, he would waive his Fifth Amendment right against self-incrimination. Gunther indicated that he was not aware of the provisions of the Fifth Amendment. The court then explained that the Fifth Amendment permits a person to refuse to answer a question on the ground that it could tend to incriminate the person and that because of such privilege, the State could not force Gunther to testify. The court further explained that if Gunther testified, the State could ask him questions, and that if such questions were relevant, Gunther would be required to answer. When asked if he understood what the court had told him, Gunther replied, "I understand that. I understand that." Upon Gunther's request, the court allowed standby counsel to conduct the direct examination of Gunther.

Gunther testified that he met Kennedy in Las Vegas, Nevada, in December 2002. Gunther owned a carnival company in Chicago, Illinois, and Kennedy owned one in Iowa. They met at a convention for persons in the entertainment business. At some point, Kennedy asked Gunther to come to Iowa to help run her carnival. In March 2003, Gunther moved to Iowa, where he managed Kennedy's carnival crew and helped move the carnival from site to site. He also owned some games and a ride in the carnival. He testified that he and Kennedy were "lovers" and that he had "moved in" with her in the fall of 2003.

On May 23, 2004, the carnival was set up near Offutt Air Force Base. Gunther and Kennedy were staying in a camping trailer that was parked in Council Bluffs, Iowa. Gunther testified that during the prior week, he and Kennedy had discussed ending their relationship after Kennedy told Gunther she had "slept with" another man. Gunther said he planned to move back to Chicago the following Monday, May 24.

In the afternoon or early evening hours of May 23, 2004, Gunther was packing his belongings at Kennedy's trailer. He testified that Kennedy then told him she was "sleeping with" three other men, including Zawodny. Gunther said he was "hurt" and "upset" when she told him about the other men.

When Gunther was asked whether he remembered any of the remaining events of May 23, 2004, he replied, "Not really." He thought he remembered talking to Davis on the carnival midway that evening. He said his first clear memory was when he woke up in jail after 3 weeks and kept asking himself why Kennedy had not come to visit him. He testified that he did not remember shooting Zawodny and that he was not aware that Kennedy was dead "until the police told me that I hurt her."

On February 18, 2005, a jury convicted Gunther of first degree murder and use of a firearm to commit a felony. The court sentenced Gunther to life imprisonment without the possibility of parole and to a period of 10 to 20 years' imprisonment on the firearm conviction, to be served consecutively.

## ASSIGNMENTS OF ERROR

Gunther claims the trial court erred (1) in allowing him to waive his right to counsel and to proceed to trial on his own; (2)

in allowing Gunther to proceed as his own counsel but not including him in all proceedings, such as sidebar conferences; (3) "in finding [Gunther] guilty beyond a reasonable doubt"; and (4) in imposing an excessive sentence of life imprisonment without the possibility of parole.

## ANALYSIS

### Waiver of Counsel

[3,4] Gunther claims the trial court erred in allowing him to represent himself. Under U.S. Const. amend. VI and Neb. Const. art. I, § 11, a criminal defendant has the right to waive the assistance of counsel and conduct his or her own defense. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005). In order to waive the constitutional right to counsel, the waiver must be made voluntarily, knowingly, and intelligently. *Id.* See, also, *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Under *Faretta*, it is not a requirement that formal warnings be given by the trial court to establish a voluntary, knowing, and intelligent waiver of the right to counsel. *Delgado, supra*. This court reviews the record to determine whether under the totality of the circumstances, the defendant was sufficiently aware of his or her right to counsel and the possible consequences of his or her decision to forgo the aid of counsel. See *id.* In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review. *Id.*

Gunther claims the totality of the circumstances demonstrates that his waiver of the right to counsel was not made voluntarily, knowingly, and intelligently. He argues that the trial court's inquiry regarding his ability to represent himself was not meaningful and that he had no understanding of the law or the charges he was facing. He also claims that because he asked to waive his right to counsel, the court should have continued the trial to allow him time to prepare.

Gunther told the trial court: "I want to fire my attorneys." Before the request was granted, one of Gunther's attorneys informed the court that Gunther wanted to conduct the trial himself and that he had expressed this desire to his defense attorneys repeatedly. Gunther responded that this was in fact his intention.

The record supports the conclusion that Gunther voluntarily discharged his attorneys. Nothing in the record suggests that Gunther was promised or threatened in any way with regard to the discharge of counsel.

[5] The record establishes that Gunther's waiver was made voluntarily and knowingly. Gunther had previously been represented by counsel, including at his arraignment and at hearings on various pretrial motions. He was represented on the day of trial by the Sarpy County public defender's office and two attorneys from Chicago. Prior to his request to proceed pro se, Gunther discussed with these attorneys his desire to represent himself. He also discussed this decision with his attorneys after the court granted his motion. After granting Gunther's motion to discharge his attorneys, the court appointed the attorneys to act as standby counsel. Standby counsel were present throughout Gunther's trial and sentencing, and they periodically conferred with him. Gunther requested that he be examined on direct by one of the attorneys appointed as standby counsel, and the court granted this request. In *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997), we found that the fact that a defendant has had the advice of counsel throughout his prosecution is an indication that his waiver of counsel and election to represent himself was knowing and voluntary. We find that Gunther voluntarily and knowingly waived his right to counsel.

We conclude Gunther's waiver was made intelligently in that he knew he would be representing himself and that prior to this request, Gunther understood that counsel had been appointed to represent him. Gunther claimed he was at odds with his attorneys because he wanted to seek the death penalty and his attorneys were not able to do so. The trial court explained that under Nebraska law, the death penalty could not be imposed because the State had not filed a notice of aggravating circumstances. Thus, the death penalty was not a possible punishment. Gunther insisted that the jury could give him a death sentence.

Gunther's professed reason for wanting to discharge his attorneys and represent himself was that his attorneys would not get him the death penalty, which is what he wanted. Gunther argues on appeal that he did not understand the law or the charges he was facing. Although Gunther expressed a lack of understanding

with regard to the death penalty, the record reflects that Gunther "understood what the court was telling him but disagreed with it." See *Wilson*, 252 Neb. at 652, 564 N.W.2d at 252. After the trial court explained that the death penalty was unavailable because no notice of aggravating circumstances had been filed, Gunther stated he did not understand. The court inquired as to the reason Gunther did not understand, and Gunther responded, "Because I want the death penalty." Gunther also stated that he did not "care" that the death penalty was not an option and that he wanted it anyway.

Later, the trial court again asked Gunther if he understood what he had been told regarding death penalty law. Gunther responded, "I understand what you're saying, but I understand what I want, too." After the court read the applicable statutes and explained again why the death penalty could not be imposed, Gunther told the court, "I don't care what you're saying."

With regard to Gunther's current argument that he did not understand the charges he faced, his representation to the trial court contradicts this assertion. During pretrial motions, the court informed Gunther that he had been charged with first degree murder and use of a firearm to commit a felony. When the court asked Gunther if he understood these charges, Gunther replied, "Yes."

[6,7] This court has concluded that *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), does not hold that formal warnings must be given by the trial court to establish a voluntary, knowing, and intelligent waiver of the right to counsel. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005). We have also rejected the claim that a formalistic litany is required to show such a waiver was knowingly and intelligently made. *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). In *Green*, we noted that a knowing and intelligent waiver can be inferred from a defendant's conduct and that such a waiver could be made despite the trial court's failure to advise the defendant of the dangers and disadvantages of self-representation. A waiver of counsel need not be prudent, just knowing and intelligent. See *id.*

In *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001), we determined that the defendant had made a knowing and intelligent waiver of his right to counsel in that the trial court found him

to be competent. The defendant was aware of his right to legal representation and discussed self-representation with two attorneys. He was advised of the complexity of the evidentiary objections and the preservation of the objections, and he was informed he would be held to the same standard as a defendant represented by counsel. He was also advised by the trial court that it believed he was making a mistake by electing to proceed pro se.

In the present case, Gunther informed the trial court that he wanted to discharge his attorneys because they would not seek the death penalty. The court repeatedly explained to Gunther that the death penalty was not a possible penalty, to which he responded that he believed the court was in collusion with the prosecution and his attorneys. One of Gunther's attorneys then informed the court that Gunther did not want the assistance of counsel because he believed there was collusion to deny him the death penalty. Counsel informed the court that Gunther wanted to select and address the jury, wanted to examine and cross-examine the witnesses himself, and had repeatedly expressed these desires to his attorneys. Gunther acknowledged that this statement by counsel was correct and that he was asking to represent himself.

The trial court then proceeded to determine whether Gunther was sufficiently oriented to the proceedings and advised him that if he was allowed to proceed without counsel, he could not raise on appeal the fact that no counsel was provided to him. Gunther stated that he understood. The court generally outlined how the trial would proceed and informed Gunther that he would be the sole person for the defense to present evidence, examine witnesses, and make opening and closing statements. The court then found Gunther to be competent, granted his motion to discharge his attorneys, and appointed his attorneys as standby counsel.

Gunther argues that in contrast to *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005), the record does not demonstrate that Gunther had any experience in the courtroom. In *Delgado*, the defendant, Henry Delgado, was convicted of kidnapping, first degree sexual assault on a child, and being a felon in possession of a firearm. Before trial, Delgado filed a motion to discharge counsel and gave notice of his intent to proceed pro se. The motion was set for hearing, at which time the trial court examined Delgado regarding self-representation. The questioning revealed

Delgado felt that he had a fairly good understanding of the State's evidence, that he knew what defenses he could present at trial, and that he felt he could adequately cross-examine experts called by the State. He claimed that he had represented himself in federal court in habeas corpus proceedings; that he had sat through an entire jury trial, in which he was the defendant; and that he had reviewed the Nebraska rules of evidence and felt he had enough experience to make proper objections as needed. The trial court concluded Delgado had waived his right to counsel voluntarily, knowingly, and intelligently and appointed trial counsel to serve as standby counsel to assist if Delgado so desired.

On appeal, Delgado assigned as error the trial court's allowing him to waive his right to counsel. He claimed that the court had not offered enough warning regarding the consequences of his decision to proceed pro se and had not sufficiently ensured that he understood the consequences of his decision. He asserted that the advice and warnings given by the court were insufficient to render his waiver of counsel voluntary, knowing, and intelligent.

The issue is not whether Gunther was experienced enough to act pro se but whether he voluntarily, knowingly, and intelligently waived his right to have counsel represent him. This court reviews "the totality of the circumstances" appearing in the record. See *Delgado*, 269 Neb. at 147, 690 N.W.2d at 794. "[T]he key inquiry is whether the defendant was sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel." *State v. Wilson*, 252 Neb. 637, 649, 564 N.W.2d 241, 251 (1997). The record before us indicates that Gunther knew and understood the charges against him. The trial court informed him of the possible sentences if he was convicted. The court questioned Gunther and found him competent to represent himself.

We conclude that Gunther was sufficiently aware of his right to have counsel. Three defense attorneys had already represented him in earlier related proceedings. The trial court told Gunther it was appointing his prior defense team as standby counsel. The U.S. Supreme Court has noted that standby counsel may be appointed "to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."

*Faretta v. California*, 422 U.S. 806, 834, n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The record indicates that standby counsel was present throughout the trial and intermittently participated in the trial on Gunther's behalf.

We further conclude that Gunther was sufficiently aware of the possible consequences of a decision to forgo the aid of counsel. The trial court explained some of the procedural rules, and Gunther indicated he understood and would be bound by such procedures. He was informed of his responsibilities in selecting the jury and that he would be the sole person examining witnesses and presenting evidence for the defense. He understood that if allowed to represent himself, his right to appeal a conviction based on lack of representation would be limited. He conferred with defense counsel about his decision to proceed pro se, both before and after the court granted his request.

Gunther's remaining arguments under this assignment of error amount to assertions that his representation was ineffective. He points out that he did not object to questions asked by the prosecution or to any exhibits offered in evidence and that he asked few questions of the witnesses. Gunther further argues that to ensure a fair trial in light of his last-minute waiver of counsel, the trial court was required to continue the trial to allow him time to prepare, despite the fact that neither he nor standby counsel requested a continuance.

[8-10] A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). The Constitution does not require a court to take over chores for a pro se defendant that would normally be attended to by trained counsel. See *Green, supra*. A criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel, and it is not up to the trial court to conduct the defense of a pro se defendant. See *id*. A defendant who elects to represent himself or herself cannot thereafter complain that the quality of his or her own defense amounted to a denial of effective assistance of counsel. *Faretta, supra*.

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will

> not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law.". . .
>
> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits.

*Faretta*, 422 U.S. at 834-35.

We conclude that Gunther knowingly, intelligently, and voluntarily waived his right to counsel. Under a "clearly erroneous" standard of review, the trial court was not clearly wrong in concluding that Gunther validly waived his right to counsel.

### Alleged Exclusion From Sidebar Conferences

Gunther assigns as error that the trial court, after allowing him to proceed as his own counsel, excluded him from proceedings such as sidebar conferences. The record indicates that after opening statements, a sidebar conference was held outside the presence of the jury, but the record does not reflect what took place during that sidebar. The most that can be said is that the sidebar was requested by standby counsel, as opposed to Gunther. The record shows that Gunther actively participated, along with standby counsel, in other sidebar conferences held outside the jury's presence.

[11] In order to determine whether a defendant's self-representation rights have been respected, "the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). The U.S. Supreme Court has imposed two limits on the extent of standby counsel's unsolicited participation in a trial. First, "the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury." *McKaskle*, 465 U.S. at 178. Second, "participation by standby counsel without the defendant's consent

should not be allowed to destroy the jury's perception that the defendant is representing himself." *Id.*

There is no indication in the record that standby counsel's request for a sidebar conference destroyed the jury's perception that Gunther was representing himself. In addition, the record clearly demonstrates that although standby counsel was present and advised Gunther at times during the trial, Gunther was allowed to control the organization and content of his own defense, make his own motions, argue points of law, participate in voir dire, question witnesses, and address the court and the jury at appropriate points in the trial.

### First Degree Murder Conviction

Despite the language used in the assignments of error section of his appellate brief, Gunther argues later in the brief that the jury erred in finding him guilty beyond a reasonable doubt with regard to the conviction for first degree murder. 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. Aldaco, ante* p. 160, 710 N.W.2d 101 (2006).

The elements of first degree murder as described in Neb. Rev. Stat. § 28-303 (Cum. Supp. 2004) state that a person commits murder in the first degree if he kills another person purposely and with deliberate and premeditated malice. See *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002). The evidence, viewed most favorably to the State, shows that Gunther approached Zawodny and walked with him around the Skeeball game at the carnival. Gunther then shot Zawodny 11 times, although Gunther claimed he did not remember anything about the shooting.

[12-14] Gunther's argument that the jury erred in finding him guilty of first degree murder because he had no memory of shooting Zawodny is without merit. 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 prosecu-

tion, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Aldaco, supra*. When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *Id*. The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

Gunther testified that he knew Kennedy owned firearms and that the weapons used to kill Zawodny belonged to her. Gunther knew where Kennedy kept the .38-caliber revolver, and he saw the .22-caliber pistol in her trailer on Sunday, May 23, 2004. Four eyewitnesses testified to the shooting of Zawodny at the carnival.

The jury listened to the witnesses, including Gunther, examined the evidence, and found that the State had proved beyond a reasonable doubt all the elements necessary to convict Gunther of first degree murder. After reviewing the evidence in a light most favorable to the State, we conclude that a rational trier of fact could have found the essential elements of first degree murder beyond a reasonable doubt. The properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the murder conviction and the conviction for use of a weapon to commit a felony.

### Sentence of Life Imprisonment Without Parole

Following Gunther's first degree murder conviction, the trial court sentenced him to life imprisonment without the possibility of parole. The death penalty could be sought against Gunther only if the information charging him had contained a notice alleging aggravating circumstances. See § 29-1603(2)(a). Since no notice was filed, Gunther's conviction for first degree murder was classified as a Class IA felony, and the court entered a sentence of life imprisonment without parole.

Gunther argues, and the State concurs, that the cause should be remanded for resentencing because the sentence of life imprisonment without the possibility of parole under Neb. Rev.

Stat. § 28-105(1) (Cum. Supp. 2004) was erroneous but not void under our holding in *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005). As we explained in *Conover*, the amendment to § 28-105(1) in the 2002 Third Special Session was not related to or germane to any of the purposes for which the special session was called and had no natural connection to such purposes. Consequently, we held that "the Legislature lacked constitutional authority to amend the language of the statutory penalty for a Class IA felony during the 2002 special session." *Conover*, 270 Neb. at 452, 703 N.W.2d at 904.

[15] This court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced. *Conover, supra*. We remanded the cause in *Conover* with directions to resentence the defendant to life imprisonment on each of his two convictions. We explained this result in the following manner:

> In the context of our ex post facto analyses in *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), and *State v. Gales, supra*, we concluded that the phrase "without parole," as employed in L.B. 1, was severable so as to permit resentencing to life imprisonment under the prior version of the statute if the death penalty was not imposed on remand. Moreover, for the same reason that the Legislature lacked constitutional authority to add the phrase "without parole" to § 28-105(1) during the 2002 special session, it also lacked authority to repeal the version of the statute then in existence which prescribed the penalty for a Class IA felony as life imprisonment. Thus, at the time of Conover's sentencing, the district court had statutory authority to impose a sentence of life imprisonment on each of the two counts of first degree murder, but it lacked authority to add the phrase "without parole." Consequently, the sentences were erroneous but not void. See *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980), and *Draper v. Sigler*, 177 Neb. 726, 131 N.W.2d 131 (1964) (both holding that indeterminate sentence imposed for crime, where not authorized by statute, is erroneous but not void). See, also, *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998).

*Conover*, 270 Neb. at 452-53, 703 N.W.2d at 904-05.

Pursuant to our decision in *Conover*, we remand the cause with directions to resentence Gunther to life imprisonment on the first degree murder conviction.

## CONCLUSION

Under the totality of the circumstances, Gunther's waiver of his right to counsel was made voluntarily, knowingly, and intelligently. The trial court was not clearly wrong in finding that his waiver of counsel was valid. The properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support Gunther's convictions for first degree murder and use of a weapon to commit a felony, and the convictions are affirmed. Gunther's sentence to life imprisonment without parole was erroneous. Thus, we remand the cause with directions that the trial court resentence Gunther to life imprisonment as to the first degree murder conviction. The sentence of 10 to 20 years' imprisonment on the conviction for use of a firearm to commit a felony, to be served consecutively, is affirmed.

AFFIRMED IN PART, AND IN PART
REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V.
GRANT EBERLY, APPELLANT.

716 N.W.2d 671

Filed June 30, 2006. No. S-05-1008.

1. **Motions to Suppress: Appeal and Error.** An appellate court will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous. In making this determination, the 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 considers the trial court observed the witnesses testifying in regard to such motions.
2. ____: ____. Although an appellate court generally upholds suppression motions unless the trial court's findings of fact are clearly erroneous, a different standard applies for exigent circumstances determinations. With exigent circumstances, the two-stage standard described in *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), controls.
3. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.

4. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
5. **Constitutional Law: Warrantless Searches.** Entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant.
6. **Search and Seizure: Search Warrants: Police Officers and Sheriffs.** A police officer who has obtained neither an arrest warrant nor a search warrant cannot make a nonconsensual and warrantless entry into a suspect's home in the absence of exigent circumstances.
7. **Police Officers and Sheriffs: Warrantless Searches.** Exigency determinations are generally fact intensive, but several commonly recognized categories include: (1) "hot pursuit" of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to an occupant.
8. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** The Nebraska Supreme Court has previously summarized the elements of the emergency doctrine as follows: (1) The police must have reasonable grounds to believe an emergency exists and an immediate need for their assistance for the protection of life or property; (2) the search must not be primarily motivated by intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.
9. **Police Officers and Sheriffs: Warrantless Searches: Proof.** Under both exigent circumstances generally and the emergency doctrine specifically, the burden of proof is on the State to show that the warrantless entry fell within the exception, and an objective standard as to the reasonableness of the officer's belief must be applied. In justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.
10. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Intent: Appeal and Error.** In *Brigham City, Utah v. Stuart*, ___ U.S. ___, 126 S. Ct. 1943, ___ L. Ed. 2d ___ (2006), the U.S. Supreme Court held that an officer's subjective motivation is irrelevant in determining whether that officer's actions violate the Fourth Amendment; thus, under the emergency doctrine, the Nebraska Supreme Court will not consider whether a search is primarily motivated by an intent to arrest and seize evidence.
11. **Police Officers and Sheriffs: Probable Cause.** Probable cause merely requires that the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense; it does not demand any showing that this belief be correct or more likely true than false.
12. ____: ____. Because the presence of an emergency, like probable cause, hinges on the reasonable belief of the officers in light of specific facts and the inferences derived therefrom, a court must focus on whether the officers could have objectively believed an emergency existed, not whether, in hindsight, one actually existed.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Mark E. Rappl for appellant.

Jon Bruning, Attorney General, and Michael B. Guinan for appellee.

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

CONNOLLY, J.

While the appellant, Grant Eberly, was away from his home, police were dispatched there to investigate a burglary call. Police entered the home and found a marijuana-growing operation. After obtaining a search warrant, they seized the contraband. Eberly moved to suppress the evidence, but the court found the emergency doctrine justified the warrantless entry. Eberly appeals, arguing that the officers' initial entry violated the Fourth Amendment and its Nebraska equivalent; thus, that information was improperly included in the search warrant affidavit and the evidence seized from the home was illegally admitted into evidence. We affirm because the State met its burden of proving that the emergency doctrine applied.

## BACKGROUND

In July 2004, Eberly shared a home with two other male roommates. While the roommates were gone one day, neighbors saw a young man in Eberly's backyard, heard a loud bang, and saw two young men run away from the house carrying a white bag. A neighbor reported the burglary to the police. The police entered the home to ensure that no victims or suspects remained inside. While inside, officers found a marijuana-growing operation. The officers left the house, secured a search warrant, and seized the evidence.

The State charged Eberly with possessing a controlled substance with intent to deliver. He moved to suppress the evidence obtained during the initial entry, arguing that the officers violated his Fourth Amendment rights. The court found the evidence admissible under the emergency doctrine and dismissed the motion to suppress. The court tried Eberly, taking judicial notice of the

suppression hearing testimony, found him guilty, and sentenced him to 2 years of probation.

## Investigation at Scene

On July 27, 2004, Lincoln police officers Carla Cue and Andrew Nichols responded to a call at a Lincoln, Nebraska, address. At 11:26 a.m., the dispatcher informed them that a neighbor reported a burglary at the residence. The neighbor had described the suspects as a white male wearing a white T-shirt and khaki shorts and a black male wearing a "jumpsuit." The dispatcher told Cue and Nichols that the pair carried a white bag and fled, driving a small, two-door white car east on Antelope Creek Road. The dispatcher also provided the name and address of the reporting neighbor.

Before arriving at the house, Cue and Nichols briefly checked the area for anyone fitting the description. Finding no one, they stopped in front of a neighboring house. Cue and Nichols went to the front door first; they noticed nothing unusual, knocked on the door, and received no answer. Officer David Hensel then arrived.

The three officers agreed Hensel would stay at the front door while Cue and Nichols went through the open gate on the side of the house to check the back door. On the way to the back door, a neighbor approached Cue and Nichols. He informed them that earlier, a neighbor had seen a man standing by the back door of the burglarized residence. The man told the neighbor he was waiting for the owner of the house to arrive. Shortly after, the neighbor heard a loud bang, looked through an opening in the fence, and saw two men running from the house. The neighbor also told them that he knew the house's residents, that "three boys" lived there, and that he did not think anyone was home because all of their vehicles were gone.

After speaking with the neighbor, Cue and Nichols went to the back door. They could see the back door had been forced open. Cue noted wood splinters on both the outside and inside of the doorframe and a large piece of doorframe that had completely broken off. Cue and Nichols then loudly announced themselves as police officers several times, received no answer, and entered. With weapons drawn, Cue and Nichols checked both the ground and basement levels of the house.

Cue explained that she did not know whether any suspects or victims remained in the home. They found no suspects or victims, but found a marijuana-growing operation. Cue and Nichols then left the house, called their supervisor, and applied for a search warrant to seize the marijuana. The search warrant incorporated information derived from Cue and Nichols' initial entry. Officers executed the search warrant and seized the evidence. The State then charged Eberly with possessing a controlled substance with intent to deliver. Eberly moved to suppress all evidence ultimately obtained through Cue and Nichols' warrantless entry as violating the Fourth Amendment and its Nebraska counterpart.

### Suppression Hearing

After a hearing, the district court denied the motion to suppress, finding that the emergency doctrine justified the warrantless entry because the officers "had no way of knowing how many, if any one remained in the house" and "[t]he fact that there were or were not cars parked in the driveway would not be completely dispositive of the matter." It further found that the loud bang described by the neighbor was the sound of the door being breached, but "it could just as well have been a gun shot or evidence of an assault or fight," and that surrounding the house awaiting a warrant would not be a practical solution. The trial court took judicial notice of the evidence presented at the suppression hearing, and Eberly preserved his objection to the evidence. The court then convicted Eberly of possessing a controlled substance with intent to deliver and sentenced him to 2 years of probation.

## ASSIGNMENTS OF ERROR

Eberly argues that the district court erred by overruling his motion to suppress and admitting at trial evidence of the marijuana-growing operation because the officers' initial entry was unsupported by exigent circumstances. He argues that because the initial entry was illegal, the information obtained during that entry—the sight of contraband—could not be used in the search warrant affidavit. Without that information, the search warrant lacked probable cause, and thus the court should not have admitted at trial the evidence seized from Eberly's home.

## STANDARD OF REVIEW

[1] An appellate court will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous. In making this determination, the 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 considers the trial court observed the witnesses testifying in regard to such motions. *State v. Ball, ante* p. 140, 710 N.W.2d 592 (2006).

[2] Although we generally uphold suppression motions unless the trial court's findings of fact are clearly erroneous, the Eighth Circuit applies a different standard for exigent circumstances determinations. In *U.S. v. Ball*, 90 F.3d 260, 262 (8th Cir. 1996), the court applied the two-stage standard described in *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), stating:

> The first part of the analysis involves only a determination of the historical facts leading up to the warrantless search. The second part of the analysis requires a decision whether these historical facts, when viewed from the standpoint of an objectively reasonable police officer, support the ultimate conclusion reached by the district court, i.e. that probable cause existed or that exigent circumstances were present. . . . *Ornelas* instructs that the second part of the analysis, the ultimate conclusions reached by the district court, must be reviewed de novo.

(Citations omitted.) We agree with the Eighth Circuit that this is the appropriate standard of review and apply it to this case.

## ANALYSIS

Eberly argues that Cue and Nichols violated his Fourth Amendment rights by entering his home without consent, a warrant, or sufficient exigent circumstances; thus, their observations were illegally obtained and cannot support the search warrant later acquired.

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

> issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Nebraska Constitution provides similar protection. See Neb. Const. art. I, § 7.

[3,4] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. *State v. Voichahoske, ante* p. 64, 709 N.W.2d 659 (2006). The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *Id.*

[5,6] But the U.S. Supreme Court has "consistently held that the entry *into a home* to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." (Emphasis supplied.) *Steagald v. United States*, 451 U.S. 204, 211, 101 S. Ct. 1642, 68 L. Ed 2d 38 (1981). " '[I]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.' " 451 U.S. at 512, quoting *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). A police officer who has obtained neither an arrest warrant nor a search warrant cannot make a nonconsensual and warrantless entry into a suspect's home in the absence of exigent circumstances. See, *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990); *State v. Resler*, 209 Neb. 249, 306 N.W.2d 918 (1981).

[7] Exigency determinations are generally fact intensive. See *U.S. v. Tibolt*, 72 F.3d 965 (1st Cir. 1995). But several commonly recognized categories include:

> "(1) 'hot pursuit' of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to [an occupant]."

*Id*. at 969. See, also, *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990), and *State v. Resler, supra*. This fourth circumstance is also called the "emergency doctrine."

[8] The trial court justified Cue and Nichols' entry using the emergency doctrine. This court has previously summarized the elements of the emergency doctrine as follows: (1) The police must have reasonable grounds to believe an emergency exists and an immediate need for their assistance for the protection of life or property; (2) the search must not be primarily motivated by intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. See *State v. Plant, supra*.

[9] Under both exigent circumstances generally and the emergency doctrine specifically, we have stated that two principles must be kept in mind:

> "(1) Since the doctrine is an exception to the ordinary Fourth Amendment requirement of a warrant for entry into a home, the burden of proof is on the state to show that the warrantless entry fell within the exception. . . . (2) An objective standard as to the reasonableness of the officer's belief must be applied.
>
> " '. . . [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?'. . ."

(Citations omitted.) *State v. Resler*, 209 Neb. at 255, 306 N.W.2d at 922-23.

The State relies on the emergency doctrine to justify the officers' warrantless entry. Eberly disputes only the first two elements of the emergency doctrine. He argues first that the officers could not reasonably believe that additional suspects or occupants remained in the house, needing assistance, and that even if suspects remained in the house, the officers could have prevented

their escape by securing the doors while a warrant was obtained. Second, he argues that even if someone remained in the house, needing emergency assistance, the emergency doctrine does not apply because the officers entered the house to search for evidence of a burglary.

[10] But we need not address his second contention because the U.S. Supreme Court recently clarified in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006), that an officer's subjective motivation is irrelevant in determining whether that officer's actions violate the Fourth Amendment. The Court stated that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances viewed, *objectively*, justify [the] action.'" 126 S. Ct. at 1948. Thus, under the emergency doctrine, we no longer consider whether a search is primarily motivated by an intent to arrest and seize evidence.

Under the revised test, we conclude that the State met its burden of proving the emergency doctrine justified the officers' warrantless entry. Cue and Nichols could reasonably believe that additional suspects or occupants remained in the house, needing assistance. Here, the evidence showed that Cue and Nichols knew when they entered the house that (1) a burglary had been reported; (2) a neighbor talked to one of the suspects before the break-in; (3) one of the suspects told the neighbor he was waiting for the owner of the house to arrive; (4) shortly after talking to the suspect, the neighbor heard a loud bang; (5) after the noise, two suspects fled carrying a white bag; (6) the suspects drove east on Antelope Creek Road; (7) officers heard no response and no noises from inside the house despite knocking and announcing their presence several times; (8) the back door was forced open; (9) the neighbor knew the residents of the house and did not believe anyone was home because their cars were all gone; and (10) no cars were parked in the driveway or on the street in front of the house.

Cue described her reasons for entering the house as follows:

> A We can't assume that there isn't or is someone in the house. Any delay in making that effort to interview witnesses or to interview the callers, if there would have been a victim in that residence and we waited five to ten minutes,

> that could be the difference of us being able to come to their aid, or them not surviving, if they were injured.
>
> Q But isn't it true, Officer, that you have to have some reasonable belief to believe that someone is inside the residence to justify that entry?
>
> A The reasonable belief is that you don't. Just because there were no cars, you can't assume that there wasn't anybody in the residence.

Similarly, Nichols testified that he and Cue did not believe that any residents or suspects were in the house when they entered, but they were not sure. Nichols said they entered the house because: "It was an unsecure[d] building at the time; we had no way of knowing for sure what was in the building, if anything, whether it be another suspect, whether it be an injured party. So we went inside to secure the building."

The first requirement of the emergency doctrine is that the police have valid reasons for the belief that an emergency exists—a belief which must be grounded in empirical facts rather than subjective feelings. See *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991). But the emergency doctrine analysis here is similar to probable cause. Compare *State v. Ball, ante* p. 140, 710 N.W.2d 592 (2006), with *State v. Resler*, 209 Neb. 249, 306 N.W.2d 918 (1981). Here, we ask, Would the facts available to the officer at the moment of entry " ' " 'warrant a man of reasonable caution in the belief' " ' " that entry was appropriate? See *State v. Resler*, 209 Neb. at 255, 306 N.W.2d at 923.

[11,12] In *State v. Ball, supra*, we noted that probable cause merely requires that the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense; *it does not demand any showing that this belief be correct or more likely true than false*. Further, we noted:

> "Police officers are not required to be legal scholars. This means, among other things, that the arresting officer's knowledge of facts sufficient to support probable cause is more important to the evaluation of the propriety of an arrest than the officer's understanding of the legal basis for the arrest."

*Id*. at 154, 710 N.W.2d at 605, quoting *Williams v. Jaglowski*, 269 F.3d 778 (7th Cir. 2001). Because the presence of an emergency,

like probable cause, hinges on the reasonable belief of the officers in light of specific facts and the inferences derived therefrom, we must focus on whether Cue and Nichols could have objectively believed an emergency existed, not whether, in hindsight, one actually existed.

We also note that other jurisdictions have found sufficient exigent circumstances or emergency when a police officer reasonably believes that a burglary is in progress or was recently committed. See, e.g., *People v. Berow*, 688 P.2d 1123 (Colo. 1984). See, also, Annot., 64 A.L.R.5th 637 (1998) (collecting cases).

*State v. Bakke*, 44 Wash. App. 830, 723 P.2d 534 (1986), applied such a rule to a case with similar facts. In *Bakke*, the defendant's neighbor reported a burglary in progress to the police at 5:18 p.m. The neighbor saw two male juveniles running from the back door of the defendant's home. When officers arrived, they learned the homeowner's identity from the neighbor and learned that the homeowner could not be contacted because he was at work. The officers observed that the back window of the house was broken, creating an opening large enough for a juvenile to fit through, and saw muddy tracks suggesting someone had recently entered the house. While in the house, the officers found marijuana plants and paraphernalia. They also found other evidence of contraband and secured a search warrant to collect it. On review, the Washington Court of Appeals found the warrantless entry was justified as an emergency because police reasonably believed the home had been burglarized.

The Washington Court of Appeals quoted *Com. v. Fiore*, 9 Mass. App. 618, 403 N.E.2d 953 (1980), as stating the general rule:

> "It seems clear to us that a house break without more—as set out in the affidavit—raises the possibility of danger to an occupant and of the continued presence of an intruder and indicates the need to secure the premises. In such circumstances '[t]he right of the police to enter and investigate in an emergency without the accompanying intent to either search or arrest is inherent in the very nature of their duties as peace officers.'. . ."

*State v. Bakke*, 44 Wash. App. at 835, 723 P.2d at 537. Accord *United States v. Barone*, 330 F.2d 543 (2d Cir. 1964). Further,

the *Bakke* court reasoned that "[a]mple evidence existed of a recent forcible entry, but the presence or absence of suspects within the premises or the likelihood of damage to the interior could not be ascertained without entering the house." 44 Wash. App. at 838, 723 P.2d at 538. Similarly, the court explained that "[w]hile the police had been told by the neighbors that two male juveniles had been observed running from the back door area of [the defendant's] house, they did not know for certain whether a burglar was still inside the house." *Id.* at 837, 723 P.2d at 538. Thus, the court was reluctant to " 'second-guess' " the officers' decision to enter the defendant's house, finding that the emergency doctrine justified the warrantless entry and limited intrusion. *Id.* at 835-36, 723 P.2d at 537.

The district court here conducted a similar analysis. It concluded:

> The "bang" described by a neighbor was the door being breached. As was pointed out by the State, it could just as well have been a gun shot or evidence of an assault or fight. Surrounding the house and waiting while the warrant was obtained would not have been a practical solution to the problem. Had someone been inside wounded or injured there could be further deterioration while waiting for the warrant to be executed.
>
> "The Court therefore finds that the emergency doctrine which is to allow police officers to enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance", is applicable to this case. *State v. Plant*, 236 Neb. 317 (1990).

We agree. As in *State v. Bakke*, 44 Wash. App. 830, 723 P.2d 534 (1986), we refuse to second-guess the officers' decision to enter the house to determine whether anyone remained inside, needing aid. Although the neighbor informed the police that two suspects had fled and that the residents were not home, the officers could not be sure that no one remained inside. Moreover, as the district court concluded, the loud bang described by the neighbor could easily have been a gunshot or evidence of other violence; thus, the officers justifiably entered the home to address the situation.

We also reject Eberly's argument that securing the house while awaiting a warrant would have been an adequate response. Because the loud bang indicated the possibility of injury, waiting for a warrant to enter would be unreasonable. Cue stated that "if there would have been a victim in that residence and we waited five to ten minutes, that could be the difference of us being able to come to their aid, or them not surviving, if they were injured." The possibility that someone injured remained in the house justified the warrantless entry; that same possibility made securing the house and waiting for a warrant unreasonable under the circumstances.

Because Eberly does not dispute the final remaining element of the emergency doctrine, the scope of the officers' search, we need not address it. 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. *White v. White, ante* p. 43, 709 N.W.2d 325 (2006). We thus conclude that the emergency doctrine, as revised, justified the officers' warrantless entry.

## CONCLUSION

When applying the two-stage standard described in *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), we conclude that the trial court properly admitted the disputed evidence. Because of the recent burglary and loud bang reported by the neighbor, the officers could reasonably believe there was an emergency at hand, requiring their assistance. Further, Eberly does not contest the scope of the officers' search. Because we conclude that the emergency doctrine justified the warrantless entry and the court properly admitted the evidence obtained from that entry, we affirm the district court's order.

AFFIRMED.

# STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. KARA J. VASQUEZ, APPELLEE AND CROSS-APPELLANT.

716 N.W.2d 443

Filed June 30, 2006. No. S-05-1019.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
3. **Prosecuting Attorneys: Judgments: Appeal and Error.** Under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), prosecuting attorneys 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 and strictly following the procedures provided in the statute.
4. **Statutes: Appeal and Error.** Review under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004) is to provide an authoritative exposition of the law to serve as precedent in future cases.
5. **Sentences: Appeal and Error.** When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.
6. **Statutes.** Statutes relating to the same subject matter are construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
7. **Statutes: Intent.** When construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
8. **Statutes: Drunk Driving: Sentences: Probation and Parole.** When reading Neb. Rev. Stat. §§ 60-6,196(c) and 29-2262(2)(b) (Cum. Supp. 2002) and 28-106 (Cum. Supp. 2000) together, it is clear that those who receive jail time as a condition of their probation for a third-offense driving under the influence conviction must receive at least 10 days in jail, but no more than 90 days.
9. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
10. **Sentences: Appeal and Error.** When 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.
11. **Criminal Law: Pleas: Sentences.** Failing to properly inform a defendant of the penalty range of the crime for which he or she is charged does not justify modifying the sentence; instead, the failure may supply grounds to invalidate the guilty plea if the defendant was truly unaware of the possible penalty when entering his or her plea.

12. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
13. **Double Jeopardy.** The application of Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2004) turns on whether the defendant has been placed in jeopardy by the trial court, not by whether the Double Jeopardy Clause bars further action.
14. **Double Jeopardy: Sentences.** Modifying a sentence on review does not violate double jeopardy.
15. **Double Jeopardy: Juries: Pleas.** Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.
16. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
17. **Criminal Law: Appeal and Error.** As a general rule, the right to appeal in a criminal case can only be exercised by the party to whom it is given, and only a person aggrieved by a judgment may appeal from it.

Appeal from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge, on appeal thereto from the County Court for Sarpy County, ROBERT C. WESTER, Judge. Exception sustained, and cross-appeal dismissed.

Jon Bruning, Attorney General, and James D. Smith, and Greg M. Ariza and Gretchen McGill, Deputy Sarpy County Attorneys, for appellant.

Joseph L. Howard, of Gallup & Schaefer, for appellee.

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

CONNOLLY, J.

In January 2005, the appellant, Kara J. Vasquez, pled guilty to driving under the influence (DUI). The Sarpy County Court enhanced the offense, using two earlier DUI convictions under the Omaha Municipal Code. Vasquez objected to using the prior convictions for enhancement, citing *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003). The county court rejected this argument, recognized the convictions, found this offense to be her third offense, and sentenced Vasquez to probation with 90 days in jail as a condition.

Vasquez appealed the county court's decision to the Sarpy County District Court, disputing the enhancement and alleging

an excessive sentence. The district court affirmed the county court's enhancement decision, but altered the conditions of confinement from 90 days in jail to 10 days with credit for 3 days served. The State then took exception to the district court's decision, initiating proceedings under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), which allows the State to take exception to trial court decisions. Vasquez then cross-appealed the district court's enhancement decision.

We find that the probationary condition of 90 days in jail was within the statutory guidelines and that the county court did not abuse its discretion when issuing the sentence. Thus, the district court erred by modifying the sentence. We sustain the State's exception and dismiss Vasquez' cross-appeal as improper for the reasons stated below.

## BACKGROUND

On July 15, 2002, Sarpy County officers stopped Vasquez. After administering field sobriety tests, officers arrested Vasquez and took her to the Sarpy County Law Enforcement Center, where they administered an Intoxilyzer test. The test results showed Vasquez had a .116 blood alcohol content.

In January 2005, Vasquez pled guilty to DUI. Before doing so, the county court informed her that if placed on probation for a third-offense DUI conviction, her driver's license would be impounded for at least 1 year, any vehicle in which she had an ownership interest would be immobilized, and she would receive a "$600 fine, *10 days in jail*, or 480 hours of community service." (Emphasis supplied.) The State offered copies of two prior convictions under the Omaha Municipal Code to enhance the penalties. The first conviction occurred in February 1997, and the second in June 2000. Vasquez opposed using those convictions for enhancement, arguing that the Omaha Municipal Code's penalty provisions did not conform to the State DUI provisions under *State v. Loyd, supra*. Nonetheless, the county court recognized the convictions, finding this offense to be her third offense, and sentenced Vasquez to probation with 90 days in jail as a condition.

Vasquez appealed the county court's decision to the Sarpy County District Court, disputing the court's enhancement and alleging an excessive sentence. The district court affirmed the

county court's enhancement decision, finding that Vasquez attempted to collaterally attack the prior convictions, but altered the probationary conditions from 90 days in jail to 10 days with credit for 3 days served. In doing so, the district court stated that the sentence was "within the statutory authority," but did not explicitly find that the county court abused its discretion when issuing the sentence. Instead, the district court referred to the county court's reasoning that Vasquez could serve the 90 days during her summer break from school and then stated:

> The problem now is that if the jail sentence is affirmed the Defendant will miss her opportunity to better herself. The Court finds that with the long period of probation the Defendant could serve a lot more jail time if she violates her probation.
>
> The minimum time under statute is 10 days.
>
> The Court finds that the Probation Order should be affirmed except the jail time should be 10 days with credit for 3 days served.
>
> Upon reviewing the record on appeal from the Sarpy County Court, the presentence investigation and after the presentation of arguments, the Court, being fully advised in the premises, finds the conviction and sentence should be affirmed except that portion that provides for a 90 day jail sentence and only a 10 day jail sentence with credit for 3 days spent is affirmed.

The State took exception to the district court's decision under § 29-2315.01. Vasquez then cross-appealed the district court's enhancement decision.

## ASSIGNMENTS OF ERROR

The State assigns, rephrased, that the district court erred by modifying the county court's sentence because it failed to find an abuse of discretion. On cross-appeal, Vasquez argues the district court erred by finding that her two prior convictions under the Omaha Municipal Code were valid prior convictions for enhancement purposes.

## STANDARD OF REVIEW

[1] The meaning of a statute is a question of law. *Lamar Co. v. Omaha Zoning Bd. of Appeals, ante* p. 473, 713 N.W.2d 406

(2006). 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.*

## ANALYSIS

The State took exception to the district court's order, which modified Vasquez' probationary condition of 90 days in jail to 10 days in jail with credit for 3 days served. Vasquez then cross-appealed, arguing that both lower courts erred by using her DUI convictions under the Omaha Municipal Code to enhance her current offense.

### STATE'S EXCEPTION

[2-4] Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *In re Interest of Sean H., ante* p. 395, 711 N.W.2d 879 (2006). Here, the State appealed the district court's decision under § 29-2315.01, which provides such an exception. Under § 29-2315.01, prosecuting attorneys "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" and strictly following the procedures provided in the statute. See, *In re Interest of Sean H., supra*; *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000). The review is to provide an authoritative exposition of the law to serve as precedent in future cases. See *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004).

[5] The State argues that the district court erred by altering Vasquez' sentence, because as an appellate court, its review was limited to errors appearing on the record or an abuse of discretion. When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Vasquez contends that the probation provisions of Neb. Rev. Stat. § 60-6,197.03(3) (Reissue 2004) mandate that Vasquez be given 10 days in jail and that thus, the county court's 90-day jail condition fell outside the statutory guidelines. At the time of the offense, § 6,197.03(3) was codified as Neb. Rev. Stat.

§ 60-6,196(c) (Cum. Supp. 2002). The relevant portions of § 60-6,196(c) provided:

> (c) If such person has had two convictions in the twelve years prior to the date of the current conviction . . . such person shall be guilty of a Class W misdemeanor . . . .
>
> *If the court places such person on probation or supends the sentence for any reason*, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of one year and shall order that the operator's license of such person be suspended for a like period unless otherwise authorized by an order issued pursuant to section 60-6,211.05 and shall issue an order pursuant to 60-6,197.01 with respect to all motor vehicles owned by such person, and *such order of probation shall also include, as conditions, the payment of six-hundred-dollar fine and either confinement in the city or county jail for ten days or the imposition of not less than four hundred eighty hours of community service*[.]

(Emphasis supplied.) When read alone, Vasquez' argument appears persuasive. The probation provisions of § 60-6,196(c) seem to require either 10 days in jail or at least 480 hours of community service.

However, § 60-6,196(c) clashes with Neb. Rev. Stat. § 29-2262(2)(b) (Cum. Supp. 2002). Section 29-2262 provides in relevant part:

> (2) The court may, as a condition of a sentence of probation, require the offender:
>
> . . . .
>
> (b) To be confined periodically in the county jail or to return to custody after specified hours but not to exceed (i) *for misdemeanors, the lesser of ninety days or the maximum jail term provided by law for the offense* . . . .

(Emphasis supplied.)

[6] The State argues that the language of § 60-6,196(c) establishes a mandatory minimum probationary condition of 10 days in jail and that § 29-2262(2)(b) establishes 90 days as the maximum jail time permissible as a probationary condition. Because statutes relating to the same subject matter are construed

so as to maintain a sensible and consistent scheme, giving effect to every provision, we read § 60-6,196(c) in tandem with § 29-2262(2)(b). See *Curran v. Buser, ante* p. 332, 711 N.W.2d 562 (2006).

But because § 29-2262(2)(b)(i) states that confinement in jail for misdemeanors cannot exceed "*the lesser of ninety days or the maximum jail term provided by law for the offense*," (emphasis supplied), we must determine the maximum term provided for the offense. Under Neb. Rev. Stat. § 28-106 (Cum. Supp. 1998), the maximum jail time provided for a third-offense DUI conviction is 1 year. Because 90 days in jail is the lesser of the two, the maximum probationary condition allowed under § 29-2262(2)(b)(i) is 90 days.

Further, the legislative history for § 60-6,196(c) supports this reading. The Legislature adopted the 10-day jail condition through 1999 Neb. Laws, L.B. 585, so the State could secure federal highway funds. The legislative history clearly refers to the 10-day condition as a floor and not a ceiling. See, Introducer's Statement of Intent, L.B. 585, 96th Leg., 1st Sess. (Feb. 8, 1999); Bill Summary, Transportation Committee, 96th Leg., 1st Sess. 1-2 (Feb. 8, 1999); Committee Statement, 96th Leg., 1st Sess. 2 (Feb. 8, 1999). Both the bill summary and committee statement explicitly state that for third-offense DUI convictions: "If the offender is given probation, the *mandatory minimum jail sentence is increased to ten days*, a new provision allowing a minimum of 480 hours of community service is added, and the court is given permissive authority to impound the motor vehicles owned by the offender."

[7] When construing a statute, we must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. See *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005).

[8] Thus, we read §§ 60-6,196(c), 29-2262(2)(b), and 28-106 together and conclude that those who receive jail time as a condition of their probation for a third-offense DUI conviction must receive at least 10 days in jail, but no more than 90 days. Having established that the county court's sentence was within

the statutory guidelines, we must consider whether an abuse of discretion existed.

The State argues that the district court failed to explicitly find that the county court abused its discretion when sentencing Vasquez to 90 days in jail and that the district court's analysis demonstrates that it reviewed the sentence de novo. By contrast, Vasquez argues that the district court's ruling and rationale implicitly demonstrate a finding that the county court abused its discretion.

It is clear that the district court did not modify the county court's sentence because it believed the sentence was outside the statutory guidelines. In its order, the district court stated "the sentence is within the statutory authority" and "[t]he minimum time under statute is 10 days." Therefore, unless sentencing de novo, the district court must have believed the county court abused its discretion when imposing the sentence.

[9,10] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. See *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). When 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. See *id*. Neither the district court's order nor the record presented demonstrate sufficient grounds to justify a finding that the county court abused its discretion.

[11,12] Vasquez also notes that the county court advised her that 10 days was the maximum possible jail sentence and argues the district court's sentence modification merely corrected that error. Vasquez, however, misunderstands the significance of this error. Failing to properly inform a defendant of the penalty range of the crime for which he or she is charged does not justify modifying the sentence; instead, the failure *may* supply grounds to invalidate the guilty plea if the defendant was truly unaware of

the possible penalty when entering his or her plea. See *State v. Jackson*, 220 Neb. 656, 371 N.W.2d 679 (1985). But Vasquez does not ask this court to vacate her guilty plea, and an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. See *White v. White, ante* p. 43, 709 N.W.2d 325 (2006). Thus, we need not address this issue further.

[13,14] For the reasons above, we find merit in the State's exception to the district court's ruling. Disposition of the case is therefore governed by Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2004). It 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 application of § 29-2316 turns on whether the defendant has been placed in jeopardy by the trial court, not by whether the Double Jeopardy Clause bars further action. Compare *State v. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006) (noting that constitutional Double Jeopardy Clause bars retrial in criminal prosecution only where (1) jeopardy has attached in prior criminal proceeding, (2) defendant is being retried for same offense prosecuted in that prior proceeding, and (3) prior proceeding has terminated jeopardy), with § 29-2316 (requiring only that defendant be placed in jeopardy). See, also, *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004), and *State v. Falcon*, 260 Neb. 119, 615 N.W.2d 436 (2000) (asking only whether jeopardy attached). Thus, even though modifying a sentence on review

does not violate double jeopardy, under § 29-2316, that is not the inquiry. See *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998) (stating that guarantee against double jeopardy neither prevents prosecution from seeking review of sentence nor restricts length of sentence imposed upon retrial after defendant's successful appeal in noncapital cases). Instead, we look to whether jeopardy attached.

[15] Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea. See, *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). In this case, jeopardy attached when the county court accepted Vasquez' guilty plea. Thus, under § 29-2316, the district court's judgment cannot be reversed or affected in any way. This is true even though the district court erred by modifying the county court's sentence. Although this court could modify the district court's sentence if this appeal had been brought under Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2004), the Legislature specifically limited this court's authority to do so under § 29-2316.

Yet, we note that the State did not and could not bring these proceedings under § 29-2320. Under § 29-2320, a prosecuting attorney may appeal sentences imposed in *felony* cases when he or she reasonably believes the sentence is excessively lenient. Under Neb. Rev. Stat. § 29-2323 (Reissue 1995), this court may set aside an excessively lenient sentence and either impose a greater sentence or remand the cause.

[16] However, under § 29-2316, we have no such power. As previously stated, absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *In re Interest of Sean H., ante* p. 395, 711 N.W.2d 879 (2006). In this context, the Legislature provided two avenues for such reviews: exception proceedings and excessively lenient sentence appeals. As stated above, this court's authority to affect a judgment prompting exception proceedings is limited when jeopardy has attached. Further, the Legislature specifically chose to exempt misdemeanor sentences from excessive leniency review. It is not within the province of the courts

to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *K N Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003). Accordingly, we are powerless to affect the district court's erroneous sentence modification.

To summarize, because jeopardy attached when the county court accepted Vasquez' guilty plea, our decision does not affect her but determines the law in any similar cases now pending or that may subsequently arise.

VASQUEZ' CROSS-APPEAL

[17] We next consider Vasquez' cross-appeal. Vasquez contends jurisdiction exists because the State timely filed notice of appeal and because she properly asserted her cross-appeal under Neb. Ct. R. of Prac. 9D(4) (rev. 2001). Neb. Ct. R. of Prac. 1(E) (rev. 2000) governs cross-appeals, stating that "[t]he proper filing of an appeal shall vest in an appellee the right to a cross-appeal against any other party to the appeal. The cross-appeal need only be asserted in the appellee's brief as provided by Rule 9D(4)." Further, rule 9D(4) provides:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

But as a general rule, the right to appeal in a criminal case can only be exercised by the party to whom it is given, and only a person aggrieved by a judgment may appeal from it. See *State v. Sports Couriers, Inc.*, 210 Neb. 168, 313 N.W.2d 447 (1981).

The State initiated this appellate proceeding by filing an exception to the district court's sentence modification; Vasquez then asserted a cross-appeal, arguing that the court could not enhance her sentence using her prior convictions. Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004) requires an appellant to file a notice of appeal within 30 days after the court renders the judgment appealed from. Vasquez filed no such notice and did nothing to pursue this issue until the State filed its exception proceeding. While Vasquez generally complied with this court's rules for cross-appeals, we cannot allow criminal defendants to

circumvent the Legislature's appellate procedures in this way. We conclude that a criminal defendant cannot assert a cross-appeal in an exception proceeding.

## CONCLUSION

For the reasons stated above, we sustain the State's exception and dismiss Vasquez' cross-appeal.

EXCEPTION SUSTAINED, AND CROSS-APPEAL DISMISSED.

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# IN RE GUARDIANSHIP AND CONSERVATORSHIP OF KARIN P., AN INCAPACITATED PERSON. JOHN P., APPELLEE, V. PAULA P., APPELLANT.

716 N.W.2d 681

Filed June 30, 2006. No. S-05-1056.

1. **Estates: Appeal and Error.** An appellate court reviews probate cases 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, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Guardians and Conservators.** Pursuant to Neb. Rev. Stat. § 30-2620 (Cum. Supp. 2004), a full guardianship may be established if the probate court finds by clear and convincing evidence that a full guardianship is necessary for the care of the incapacitated person.
4. ____. In guardianship proceedings, when two persons have equal priority, the Nebraska Probate Code directs the court to appoint the person "best qualified to serve" as guardian.
5. ____. A rationale behind guardianship and conservatorship proceedings is to promote the best interests of the incapacitated person.
6. **Guardians and Conservators: Visitation.** Placing the establishment of a visitation schedule in the guardian is anticipated by the statutory duties assigned to a guardian with full powers.
7. ____: ____. Placing the establishment of visitation in the guardian is not an unauthorized delegation of judicial authority.
8. **Attorney Fees: Appeal and Error.** A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion.
9. **Guardians Ad Litem: Fees: Appeal and Error.** In considering a trial court's order concerning the payment of guardian ad litem fees, the allowance, amount, and allocation of guardian ad litem fees is a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not be set aside on appeal in the absence of an abuse of discretion by the trial court.

10. **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.

Appeal from the County Court for Lancaster County: JACK B. LINDNER, Judge. Affirmed.

Diane B. Metz for appellant.

Chad L. Bowman, of Bowman & Krieger, Attorneys at Law, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

John P. filed a petition in the county court for Lancaster County to have a guardian and conservator appointed for his adult daughter, Karin P. In his petition, John nominated himself to serve as Karin's guardian and conservator, claiming he had priority for appointment because he was Karin's natural father and had been her custodial parent until she reached the age of majority. Paula P., Karin's mother and John's former wife, filed an objection and cross-petition in which she, inter alia, objected to the appointment of a guardian for Karin; alleged that if a guardian was appointed, the guardianship should be a limited guardianship; and asserted that if a guardian was appointed, she should serve as guardian. Following an evidentiary hearing, the county court found that Karin needed a guardian and conservator. The court further determined that Karin's guardian needed full, rather than limited, powers. The court found that John was "best qualified" to serve as Karin's guardian and appointed John as Karin's permanent guardian and conservator. Paula appeals, claiming that the county court erred in establishing a full, rather than a limited, guardianship for Karin; in finding that John was "best qualified" to serve as Karin's guardian; in failing to establish a regular visitation schedule between Karin and Paula; and in ordering Paula to pay certain attorney and guardian ad litem fees. We conclude that under the facts of this case, the county

court did not err in establishing a full guardianship for Karin and in appointing John as Karin's guardian. We further conclude that given John's guardianship powers, the county court did not err in declining to establish a specific visitation schedule between Karin and Paula. Finally, we conclude that given the record in this case, the county court did not err in ordering Paula to pay certain attorney and guardian ad litem fees. We affirm.

## STATEMENT OF FACTS

Karin is the daughter of John and Paula. She was born on May 5, 1985. John and Paula were divorced in 1994, and John was awarded physical custody of Karin, subject to Paula's right of visitation.

The record on appeal details an extensive history of disagreements between John and Paula as to Karin's upbringing. In summary, John and Paula have repeatedly disagreed as to Karin's mental, physical, and functional abilities. The record reflects that Karin suffers from generalized anxiety disorder; pervasive developmental disorder, not otherwise specified; and borderline intellectual functioning. A psychological evaluation performed on Karin in December 2003 and January 2004, a copy of which is in the record, indicates that Karin has a "mildly delayed verbal ability, nonverbal ability in the borderline range, academic achievement generally in the mildly delayed to borderline range, and oral language skills in the borderline range." The same psychological evaluation reflects that

> Karin has not developed peer relationships appropriate to her developmental level, has difficulties with social and emotional reciprocity, displays an impairment in her ability to initiate or sustain conversation with others, and displays some repetitive verbal behavior. She [has] difficulty coping with change.

According to the evaluation, "Karin's difficulties are further compromised by her cognitive skill level and receptive and expressive language deficits, which impact her comprehension of communication and instruction and her skill for responding appropriately during interactions."

Karin attended public school in Lincoln, Nebraska, where she was enrolled in both mainstream and special education classes. In early 2004, while Karin was in 12th grade, John and Paula,

together with several of Karin's teachers, Karin's speech pathologist, and the head of the special education department, attended an individualized education program (IEP) meeting to assess Karin's educational progress and goals. During the meeting, the professionals involved believed that Karin's participation following high school in a program referred to as "Vocational Opportunity in Community Experience" (VOICE) was indicated. VOICE is an educational program designed to provide training for 18- to 21-year-old students who have not yet received their high school diplomas and have disabilities. At the end of the program, qualified students receive their diplomas.

In summary, John believed that the VOICE program would improve Karin's skills to live and work independently. Paula was opposed to Karin's participation in the VOICE program. Although Paula acknowledged that Karin had certain disabilities, Paula believed that Karin essentially functioned socially and developmentally similar to persons her same age. Paula wanted Karin to receive her diploma in the spring of 2004, rather than wait for the completion of the VOICE program, and thereafter enroll in Metropolitan Community College in Omaha, Nebraska.

On May 5, 2004, John filed a petition seeking the establishment of a guardianship and conservatorship for Karin. In his petition, in addition to setting forth the nature of Karin's disabilities, John alleged, inter alia, that a guardianship was necessary because "Paula . . . who is in denial of [Karin's] Borderline Intellectual Functioning, will prevent [Karin] from qualifying for the special vocational training she needs and is entitled to receive from the Lincoln Public Schools through twenty-one (21) years of age." Paula filed an objection and cross-petition, in which she, inter alia, objected to the appointment of a guardian for Karin; alleged that if a guardian was appointed, the guardianship should be a limited guardianship; and alleged that if a guardian was appointed, she should serve as guardian.

Following the filing of John's petition, the county court appointed John to serve as Karin's temporary guardian and conservator. The court also appointed an attorney for Karin. On July 20, 2004, Karin's court-appointed attorney filed a motion to withdraw, stating in the motion that Karin "no longer requests representation" and that "it is no longer in the best interest of [Karin]

for continued representation." The county court sustained the motion to withdraw. Without seeking court approval, Paula subsequently retained another attorney to represent Karin. As a result of an objection raised by Karin's new attorney, Karin's longtime guardian ad litem was removed, and the county court appointed a successor to serve as Karin's guardian ad litem during the guardianship and conservatorship proceedings.

John's petition and Paula's objection and cross-petition came on for an evidentiary hearing beginning on January 6, 2005. A total of nine witnesses testified over the course of the 3-day hearing, and numerous exhibits were received into evidence. On August 2, the county court entered its order establishing a guardianship and conservatorship for Karin. The court determined that both John and Paula had equal statutory priority for appointment, found that John was "best qualified" to serve, and appointed John to be Karin's permanent conservator and guardian with full statutory powers, subject to the conditions that John ensure that Karin receive regular counseling and, further, that John establish a regular visitation schedule between Karin and Paula, provided that visitation was in Karin's best interests. The county court ordered the parties to split the guardian ad litem fees and ordered Paula to pay Karin's attorney fees. Paula appeals from the county court's order.

We note that on appeal, Paula does not challenge the county court's establishment of a conservatorship for Karin or the county court's appointment of John as Karin's conservator. Accordingly, we do not consider rulings relative to the conservatorship.

Additional facts will be set forth below where pertinent to our analysis.

## ASSIGNMENTS OF ERROR

On appeal, Paula assigns four errors, which we restate as three. Paula claims, restated, that the district court erred (1) in establishing a full, rather than a limited, guardianship for Karin and in finding John was "best qualified" to serve as Karin's guardian; (2) in failing to establish and schedule court-ordered visitation between Karin and Paula; and (3) in failing to order that John share in paying Karin's attorney fees and in ordering Paula to pay one-half of the guardian ad litem fees.

## STANDARDS OF REVIEW

[1,2] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001). 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. *Stover v. County of Lancaster, ante* p. 107, 710 N.W.2d 84 (2006).

## ANALYSIS

*The County Court Did Not Err in Establishing a Full, Rather Than a Limited, Guardianship for Karin and in Concluding That John Is "best qualified," Pursuant to Neb. Rev. Stat. § 30-2627(c) (Cum. Supp. 2004), to Serve as Karin's Guardian.*

On appeal, Paula admits that based on "the testimony of the experts in this case . . . a guardianship . . . was necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of Karin." Brief for appellant at 23. Although Paula does not dispute that a guardianship is appropriate for Karin, Paula claims that a limited guardianship would have been more suitable and that Paula, rather than John, was better qualified to act as Karin's guardian.

With regard to the establishment of a limited or full guardianship, Neb. Rev. Stat. § 30-2620 (Cum. Supp. 2004) sets forth the probate court's general power to appoint a guardian. It provides, in relevant part, as follows:

> The court may appoint a guardian if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person alleged to be incapacitated. If the court finds that a guardianship should be created, the guardianship shall be a limited guardianship unless the court finds by clear and convincing evidence that a full guardianship is necessary.

In the instant case, the county court found by clear and convincing evidence that Karin was incapacitated and that the appointment of a guardian was desirable in order to provide

"protective care" for Karin. The county court also found that given the evidence, a full, rather than a limited, guardianship for Karin was required. As noted above, Paula does not dispute that Karin needs the supervision of a guardian. Paula contends, however, that there was not clear and convincing evidence presented that a full guardianship was more appropriate for Karin. We disagree. The record contains evidence regarding Karin's capabilities, and given this record, we conclude that the court did not err in finding by clear and convincing evidence that a full guardianship for Karin was necessary.

The record on appeal contains the testimony of Lorrie Bryant, Ph.D., a clinical psychologist who had been providing therapy to Karin since 1999. Bryant testified during the hearing concerning Karin's condition and her abilities. According to Bryant, at the time of the guardianship hearing, Karin was not functionally able to find a place to live or to enter into a lease agreement for housing, to arrange for medical care for herself, to understand or be able to give necessary consents and releases relative to herself, to apply for governmental assistance, to enter into contracts, or to receive and manage money.

Moreover, the record contains copies of a report and a supplemental report prepared by the successor guardian ad litem. In her report, dated January 4, 2005, the successor guardian ad litem stated "Karin exhibits <u>severe qualitative deficits in reciprocal social interaction</u>" and "<u>marked qualitative deficits in verbal and nonverbal communication and in imaginative activity</u>." As a result, the successor guardian ad litem stated that "Karin's disabilities have resulted in: marked restriction of activities of daily living; severe difficulties in maintaining social functioning; and, marked difficulties in maintaining concentration, persistence and pace." By way of example, the guardian ad litem reported that Karin could not follow "simple illustrated cooking instructions (add water, mix, bake)" on a boxed meal. The successor guardian ad litem also reported a situation when Karin missed the bus at her high school. Karin was unable to devise an alternative means to get home, and when a school administrator offered to take Karin home, Karin had difficulty giving the administrator directions to her home. In her report, the successor guardian ad litem stated that she

> does not believe this is a case in which is it appropriate to limit the . . . Guardian's powers in the manner requested by the Cross-Petition. Karin's disability broadly affects her ability to make decisions that are in her best interest. . . . The Guardian Ad Litem recommends the appointment of a . . . Guardian with full statutory powers.

In her supplemental report, dated June 6, 2005, the successor guardian ad litem stated that she "continues to believe Karin . . . is in need of a . . . Guardian with full statutory powers."

[3] Pursuant to § 30-2620, a full guardianship may be established if the probate court finds by clear and convincing evidence, as it did in this case, that a full guardianship is necessary for the care of the incapacitated person. An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001). Based upon our review of the record in this case, we conclude that the county court's decision to appoint a guardian with full guardianship powers conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, see *Stover v. County of Lancaster, ante* p. 107, 710 N.W.2d 84 (2006), and we conclude the county court did not err in finding that a full guardianship was necessary.

Paula also contends that the county court erred in failing to appoint her, rather than John, as Karin's guardian. Neb. Rev. Stat. § 30-2627 (Cum. Supp. 2004) sets forth the requisites for who may serve as a guardian. With certain exceptions not relevant here, § 30-2627(a) provides that "[a]ny competent person or a suitable institution may be appointed guardian of a person alleged to be incapacitated . . . ." Section 30-2627(b) sets forth the priorities for the appointment of a guardian and provides as follows:

> Persons who are not disqualified [elsewhere in this statute] and who exhibit the ability to exercise the powers to be assigned by the court have priority for appointment as guardian in the following order:
>
> (1) A person nominated most recently by one of the following methods:

(i) A person nominated by the incapacitated person in a power of attorney or a durable power of attorney;

(ii) A person acting under a power of attorney or durable power of attorney; or

(iii) A person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the incapacitated person;

(2) The spouse of the incapacitated person;

(3) An adult child of the incapacitated person;

(4) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(5) Any relative of the incapacitated person with whom he or she has resided for more than six months prior to the filing of the petition;

(6) A person nominated by the person who is caring for him or her or paying benefits to him or her.

Section 30-2627(c) states that the appointment of a guardian shall be in the best interests of the incapacitated person and sets forth the considerations to be taken into account by the court when selecting a guardian. Section 30-2627(c) provides in relevant part: "The court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having lower priority or no priority. With respect to persons having equal priority, the court shall select the person it deems best qualified to serve."

[4] Under § 30-2627(b)(4), John and Paula have equal priority to serve as Karin's guardian. When two persons have equal priority, the Nebraska Probate Code directs the court to appoint the person "best qualified to serve" as guardian. § 30-2627(c). Given the record in this case, we conclude that the county court did not err in appointing John as Karin's guardian.

The record reflects that prior to the commencement of these guardianship and conservatorship proceedings, John had been Karin's custodial parent for more than 10 years, and that while serving as her custodial parent, John had demonstrated an understanding of Karin's abilities and limitations and had provided for her educational and daily living needs. Bryant testified regarding

instances that illustrated John's care of Karin. Based on her testimony, John had a good understanding of Karin's condition. Bryant testified to the effect that John appeared to be attentive to Karin's needs, that he had a good understanding of Karin's capabilities and special needs, and that he had appropriate expectations regarding Karin. Bryant believed and the record shows that John was working toward Karin's best interests.

Barbara Weckman also testified. Weckman is a special education teacher. She was Karin's IEP manager for 3 years while Karin attended high school. As an IEP manager, Weckman was responsible for ensuring that Karin received the special education services she needed. She was also responsible for assisting in the development of Karin's IEP plan, which plan set forth education goals and objectives for Karin. Weckman stated that while Karin was in school, Weckman had frequent contact with John regarding Karin. Weckman testified to the effect that John was attentive to Karin's needs and that he had a good understanding of Karin's abilities.

Susan Hill was Karin's VOICE instructor at the time of the guardianship hearing. Hill testified to the effect that she had observed John in his interactions with Karin and that John was concerned about Karin's well-being, was responsible, and was attentive to her needs.

The record also contains evidence concerning Paula and her understanding concerning Karin's abilities. The record reflects that Paula is a loving and caring parent. The record further reflects, however, that Paula's estimation of Karin's capabilities at the time of the guardianship hearing did not correspond with the opinions developed by the professionals involved in Karin's care and education. Bryant testified concerning Paula's evaluation of Karin's abilities. In summary, Bryant testified to the effect that Paula assessed Karin's "adaptive behaviors" and her daily living, communication, and self-care skills "higher than other evaluation data would suggest."

Weckman testified regarding a 2004 IEP meeting held at the high school, the purpose of which was to determine Karin's education plan after high school. During the meeting, Weckman, as well as the head of the special education department, Karin's

speech pathologist, and John, all agreed that Karin should participate in the VOICE program as the next step in her education. Paula, however, disagreed with the VOICE plan and wanted Karin to go directly to Metropolitan Community College. Weckman essentially testified that in her opinion, Karin was not capable of succeeding in a community college setting.

Finally, the successor guardian ad litem noted that Paula had unrealistic expectations concerning Karin's abilities. In her January 4, 2005, report, the successor guardian ad litem stated that Paula

> still has difficulty recognizing Karin's limitations. In the course of my investigation I have come to the opinion that foregoing the opportunities provided by the VOICE program [and instead] "main-streaming" Karin into the Community College classes . . . would be imprudent; I do not believe Karin is capable of successfully performing in a Community College environment at this point. I am also concerned that [Paula] reported to me that she has allowed Karin to stay out "until midnight" with same-age peers; I believe this puts a young woman like Karin in danger.

In her supplemental report, the successor guardian ad litem recommended that John, rather than Paula, be appointed Karin's guardian.

The record reflects that John has developed experience in caring for Karin in the 10 years that he has had custody of Karin. Numerous witnesses testified as to John's care for Karin. Moreover, John's appointment as guardian was supported by the successor guardian ad litem. The county court's decision naming John as Karin's guardian conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Given the evidence presented in this case, we cannot say that the county court erred in concluding that John was "best qualified" to serve as Karin's guardian. Paula's first assignment of error is without merit.

*The County Court Did Not Err in Declining to Establish and Schedule Court-Ordered Visitation Between Karin and Paula.*

On appeal, Paula claims that the county court erred when it declined to establish a specific visitation schedule between Karin

and Paula. Paula asserts that a visitation schedule similar to the schedule that had been entered following the dissolution of John and Paula's marriage would be appropriate. We conclude that Paula's assignment of error is without merit.

[5] As noted above, the county court named John as Karin's guardian, with full powers, subject to the requirement that John establish a visitation schedule for Karin and her mother, "[p]rovided it is in Karin's best interest[s]." The court's order is consistent with the statutory grant to John of full guardianship powers and with the statute governing the general powers of a guardian. See Neb. Rev. Stat. § 30-2628(2) (Cum. Supp. 2004) (stating that guardian "shall make provision for the care, comfort, and maintenance of [the] ward"). Moreover, the court's order is consistent with the rationale behind guardianship and conservatorship proceedings to promote the best interests of the incapacitated person. Compare *In re Guardianship of Donley*, 262 Neb. 282, 289, 631 N.W.2d 839, 844 (2001) (noting that "an action to appoint a conservator is not an adversarial proceeding, but, rather, is a proceeding to promote the best interests of the person for whom the conservatorship is sought").

[6,7] In analyzing Paula's assignment of error relating to visitation, we believe that placing the establishment of a visitation schedule in the guardian is anticipated by the statutory duties assigned to John as a guardian with full powers. We further believe that placing the establishment of visitation in the guardian is not an unauthorized delegation of judicial authority. Compare *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988) (in dissolution action, order authorizing child support office to set visitation is delegation of judicial authority unauthorized by Nebraska statute); *Deacon v. Deacon*, 207 Neb. 193, 200-01, 297 N.W.2d 757, 762 (1980) (in action involving disputes regarding frequency and duration of parental visitation privileges subsequent to marital dissolution, order conferring authority on psychologist to determine visitation is "an unlawful delegation of the trial court's duty . . . to determine questions of . . . visitation"), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002); *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978) (in dissolution action, visitation agreements and stipulations pursuant

to statute remain subject to court approval throughout minority of child).

The record in this case shows that John intends to permit visitation between Karin and Paula and that he had proposed a visitation schedule during these proceedings. Consistent with the order of appointment, if Paula disputes the visitation schedule established by John because it is not in Karin's best interests, Paula can apply to the court for a change in guardianship on the basis that John is not acting in Karin's best interests. We conclude that the county court's order with regard to visitation conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Paula's second assignment of error is without merit.

*The County Court Did Not Err in Declining to Order John to Share in the Cost of Karin's Attorney Fees and in Ordering Paula to Pay One-Half of the Guardian Ad Litem Fees.*

For her third assignment of error, Paula challenges the county court's order regarding the payment of attorney and guardian ad litem fees. We conclude this assignment of error is without merit.

With regard to the payment of appointed attorney and guardian ad litem fees in guardianship and conservatorship proceedings, Neb. Rev. Stat. § 30-2620.01 (Cum. Supp. 2004) provides, in relevant part, as follows:

> The reasonable fees and costs of an attorney, a guardian ad litem, a physician, and a visitor appointed by the court for the person alleged to be the incapacitated shall be allowed, disallowed, or adjusted by the court and may be paid from the estate of the ward if the ward possesses an estate or, if not, shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action.

[8-10] We have stated that a trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion. *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004). In considering a trial court's order concerning the payment of guardian ad litem fees, we have noted that the allowance, amount, and allocation of guardian ad litem fees is a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not be set aside on appeal in the absence of an

abuse of discretion by the trial court. See *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986). 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. *State ex rel. Jacob v. Bohn, ante* p. 424, 711 N.W.2d 884 (2006).

With regard to Karin's attorney fees, the record reflects that Karin had court-appointed counsel, whose representation was later terminated. The record further reflects that Paula personally hired an attorney to represent Karin and failed to seek further court-appointed counsel for Karin. Given this record, we conclude that the county court did not abuse its discretion in refusing to order John to share in the payment of Karin's attorney fees.

With regard to the guardian ad litem fees, as noted by the county court in its order, John filed the petition in this case, and Paula filed a cross-petition. In this regard, we consider John and Paula each as a "petitioner" pursuant to § 30-2620.01. Given the record in this case, we conclude that the county court did not abuse its discretion in ordering John and Paula, in accordance with § 30-2620.01, to each pay one-half of the guardian ad litem fees. Accordingly, we find no merit to this assignment of error.

## CONCLUSION

For the reasons stated above, we affirm the county court's order establishing a full guardianship and conservatorship for Karin, naming John as Karin's permanent guardian and conservator, and ordering Paula to pay certain attorney and guardian ad litem fees. We also affirm the county court's refusal to enter a specific visitation schedule between Karin and Paula. Accordingly, we affirm the county court's order in this case in its entirety.

AFFIRMED.

# HUY LE AND MELISSA LE, INDIVIDUALLY AND AS PARENTS OF THANH LE, APPELLANTS, V. THOMAS LAUTRUP, APPELLEE.

716 N.W.2d 713

Filed July 7, 2006. No. S-04-743.

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. **Equal Protection: Statutes: Proof.** The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause.
3. **Equal Protection: Statutes.** The principle of equal protection guarantees that similar persons will be dealt with similarly by the state, but does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation. The equal protection guarantee simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
4. ____: ____. In an equal protection challenge, when a fundamental right or suspect classification is not involved, the act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose.
5. **Equal Protection.** Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.
6. **Equal Protection: Legislature: Statutes.** In the context of equal protection, when the Legislature seeks to inaugurate reforms in the area of economics or social welfare, it need not choose between attacking every aspect of the problem or not attacking the problem at all. Instead, it is sufficient if the action taken is rationally based and free from invidious discrimination.
7. **Equal Protection: Statutes.** In economics and social welfare, a statute does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. The fact that other legislative classification schemes could have been selected does not mean that the scheme chosen is constitutionally infirm.
8. **Constitutional Law: Legislature: Statutes: Presumptions: Appeal and Error.** In every constitutional challenge, there attaches the presumption that all acts of the Legislature are constitutional, with all reasonable doubts resolved in favor of constitutionality. In reviewing a statute, the Nebraska Supreme Court does not pass judgment on the wisdom or the necessity of the legislation or whether the statute is based upon assumptions which are scientifically substantiated. Even misguided laws may nevertheless be constitutional.
9. **Constitutional Law: Statutes: Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Daniel P. Chesire, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellants.

Michael G. Mullin and Michaela A. Messenger, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for amicus curiae Nebraska Association of Trial Attorneys.

Robert T. Grimit and Molly M. Egley Brummond, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for amicus curiae Nebraska Insurance Information Service.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Thanh Le was injured in a one-vehicle accident. The vehicle was driven by Thanh's grandfather, Thomas Lautrup. Thanh's parents, Huy Le and Melissa Le, filed a negligence action against Lautrup in the district court for Douglas County. In their petition, the Les challenged the constitutionality of Nebraska's guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 1995), which limited Lautrup's liability to damage caused by his gross negligence or intoxication. Intoxication was not an issue in this case.

The district court rejected the Les' challenge to the constitutionality of § 25-21,237 and, in response to Lautrup's demurrer, dismissed the Les' theories of recovery based on simple negligence. The action went to trial on the sole remaining theory of gross negligence, and the jury found in Lautrup's favor. The Les appeal. We conclude that the district court did not err in rejecting the Les' challenge to the constitutionality of § 25-21,237, and we affirm.

## STATEMENT OF FACTS

On June 20, 2001, Thanh Le, then 15 years old, was a passenger in the back seat of a vehicle driven by Lautrup. Lautrup and

Thanh were returning to Omaha, Nebraska, from a family fishing and camping trip at Calamus Lake near Burwell, Nebraska. While driving on Highway 91 in Platte County, Nebraska, Lautrup's vehicle drifted off the right side of the highway and the right wheels of the vehicle left the paved surface. Lautrup attempted to correct his course, but the right wheels hit the edge of the pavement, causing Lautrup to lose control of the vehicle and causing the vehicle to roll. Thanh was thrown from the vehicle and was injured. Police investigators determined that Lautrup had not been drinking, that he had not fallen asleep, and that he was not speeding prior to the accident, but that a momentary inattention on Lautrup's part contributed to the accident. At the time of the accident, neither Thanh nor his parents lived with Lautrup nor were they financially supported by Lautrup.

The Les filed an action against Lautrup on February 21, 2002. In an amended petition, the Les set forth three theories of recovery: (1) negligence in the operation of the vehicle, (2) gross negligence within the meaning of § 25-21,237, and (3) negligence in failing to ensure that Thanh was properly secured by a seatbelt. The Les alleged in their petition that Lautrup's liability could be predicated on negligence without the need to prove gross negligence under § 25-21,237 because § 25-21,237 was unconstitutional to the extent it pertained to the grandparent-grandchild relationship.

Section 25-21,237, as amended in 1981, controls this case. Section 25-21,237 provides:

> The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such motor vehicle.
>
> For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor but shall not be construed to apply to or include any such passenger in a

> motor vehicle being demonstrated to such passenger as a prospective purchaser. Relationship by consanguinity or affinity within the second degree shall include parents, grandparents, children, grandchildren, and brothers and sisters. Should the marriage of the driver or owner be terminated by death or dissolution, the [affinal] relationship with the blood kindred of his or her spouse shall be deemed to continue.

Lautrup demurred to the two theories of recovery based on simple negligence and argued that recovery on such basis was barred by § 25-21,237. The Les responded to the demurrer by arguing that § 25-21,237 was unconstitutional. The district court concluded that § 25-21,237 was constitutional and that it prevented recovery on the basis of simple negligence. The court therefore dismissed those theories of recovery based on simple negligence. The case proceeded to trial solely on the basis of gross negligence. The jury found in favor of Lautrup. The Les appeal.

## ASSIGNMENTS OF ERROR

The Les assert that the district court erred in failing to find § 25-21,237 to be unconstitutional and in dismissing their theories of recovery based on simple negligence.

## 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 court below. *Ptak v. Swanson, ante* p. 57, 709 N.W.2d 337 (2006).

## ANALYSIS

The Les assert that § 25-21,237 is unconstitutional and that the district court erred when it concluded that their theories of recovery based on simple negligence must be dismissed and that they were required to prove gross negligence by Lautrup in order to succeed on their petition. We conclude that the Les have failed to establish that § 25-21,237 is unconstitutional and that therefore, the district court did not err when it concluded that § 25-21,237 was not unconstitutional and dismissed their theories of recovery based on simple negligence.

The guest statute, as amended in 1981 and found at § 25-21,237, controls this case. In *Botsch v. Reisdorff*, 193 Neb.

165, 226 N.W.2d 121 (1975), this court rejected a constitutional challenge to an earlier version of the guest statute which was then codified at Neb. Rev. Stat. § 39-6,191 (Reissue 1974). Prior to the Legislature's amendment of the guest statute in 1981, this court rejected various invitations to reconsider *Botsch* and to declare the guest statute unconstitutional. See, *Cushing v. Bernhardt*, 210 Neb. 272, 313 N.W.2d 688 (1981); *Beebe v. Sorensen Sand & Gravel Co.*, 209 Neb. 559, 308 N.W.2d 829 (1981); *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980); *Circo v. Sisson*, 193 Neb. 704, 229 N.W.2d 50 (1975); *Lubash v. Langemeier*, 193 Neb. 371, 227 N.W.2d 405 (1975).

The Legislature amended the guest statute in 1981. Prior to the amendment, the statute had pertained to all nonpaying guests; that is, nonpaying guests were precluded from bringing suit based on simple negligence. After the amendment, the guest statute pertained to only nonpaying guests who were related to the driver within the second degree of consanguinity which was defined to include parents and children, grandparents and grandchildren, and brothers and sisters. In 1998, this court rejected a constitutional challenge to the post-1981 version of the guest statute. *Coburn v. Reiser*, 254 Neb. 495, 577 N.W.2d 289 (1998).

The Les argue that *Coburn* is not controlling because the question of constitutionality was not fully explored and was not necessary to the disposition of that case. We recognize that *Coburn*, relying on pre-1981 authority, summarily concluded that the guest statute was not unconstitutional without discussion of the bases for the challenge in *Coburn* or the fact that the statute had been amended subsequent to the time that prior challenges had been rejected. We therefore believe it would be helpful to consider whether the current guest statute is constitutional in light of the arguments offered by the Les.

On appeal, the Les argue that the guest statute violates three provisions of the Nebraska Constitution: the due process and equal protection clauses of Neb. Const. art. I, § 3, and the special privileges and immunities clause of Neb. Const. art. III, § 18. Neb. Const. art. I, § 3, provides: "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." Neb. Const. art. III, § 18, provides: "The Legislature shall not pass local or special laws . . .

[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever." We consider the constitutionality of § 25-21,237 under Neb. Const. art. I, § 3, and art. III, § 18.

*Section 25-21,237 Does Not Violate Neb. Const. art. I, § 3.*

[2] Although the Les assert that the statute violates both the due process and the equal protection clauses of the Nebraska Constitution, their arguments focus mainly on the equal protection aspects of Neb. Const. art. I, § 3, and we therefore focus our analysis on the equal protection clause. The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause. *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005). We conclude that the Les have not proved that § 25-21,237 violates Nebraska's equal protection clause.

[3,4] The principle of equal protection guarantees that similar persons will be dealt with similarly by the state, but does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation. *Waste Connections of Neb., supra*. The equal protection guarantee simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike. *Id*. In an equal protection challenge, when a fundamental right or suspect classification is not involved, the act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose. *Id*.

[5] Despite the Les' argument that we should apply a higher standard of scrutiny, we determine that no fundamental right or suspect classification is involved here and that therefore, the rational basis test applies. Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. See *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). The rational relationship standard, as the

most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives. *Mason v. State*, 267 Neb. 44, 672 N.W.2d 28 (2003). When determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results. *Gourley, supra*.

Applying these standards to the current version of the guest statute, we conclude that § 25-21,237 does not violate the equal protection clause of the Nebraska Constitution. In our cases prior to 1981 concluding that the guest statute was constitutional under an equal protection analysis, the primary legitimate governmental interests behind the guest statute were identified as "the promotion of hospitality, and the prevention of fraud and collusion." *Botsch v. Reisdorff*, 193 Neb. 165, 170, 226 N.W.2d 121, 126 (1975). In *Botsch*, this court found a rational relationship between these governmental interests and the guest statute as it then existed.

In the present case, in response to the Les' challenge, Lautrup acknowledges that hospitality may no longer be an important interest with respect to the guest statute. Instead, Lautrup relies mainly on the objective of prevention of fraud and collusion as legitimate governmental interests justifying the present version of the guest statute. Lautrup makes further subsidiary arguments, not repeated here, in support of the constitutionality of § 25-21,237. Lautrup also notes that because lawsuits based on intoxication or gross negligence are still permitted under § 25-21,237, it cannot be said that all suits between grandparents and grandchildren are precluded under this statute.

We have reviewed the legislative history of the 1981 amendment to the guest statute. Our review of the legislative history of the 1981 amendment indicates that the prevention of fraud and collusion, rather than hospitality or any other interest, was the main stated justification for the Legislature to retain the guest statute with respect to certain relatives when it repealed the statute as it related to other guests. We have reviewed the current version of the guest statute and the associated legislative history and conclude that the statute's terms are rationally related to

the stated interest of preventing fraud and collusion. As noted above, the former version of the guest statute was upheld by this court as rationally related to the legitimate governmental interest of preventing fraud and collusion. See *Botsch, supra*. The current version of the statute differs from the earlier version in that instead of precluding suits based on simple negligence by all nonpaying guests, it now precludes suits based on simple negligence if brought by nonpaying relatives within the second degree of consanguinity. The group encompassed by the current statute is a subset of the group encompassed by the previous guest statute. Because the universe of nonpaying guests in general has been found rationally related to preventing fraud and collusion, it logically follows that in the absence of compelling developments, a rational subset of that universe remains rationally related to that interest. With respect to the legitimate governmental interest of preventing fraud and collusion, the subset of nonpaying relatives within the second degree of consanguinity is a rational subset of the universe of nonpaying guests. The Legislature could rationally have concluded that close relatives were more likely than other guests to collude with the driver in order to perpetrate a fraud. In rejecting an equal protection challenge to a guest statute that similarly limited its scope to close relatives, the Court of Appeals of Indiana noted that in so limiting the scope,

> [t]he legislature may have perceived a greater risk of collusive lawsuits among family members, than among mere acquaintances. Also, a jury may be particularly inclined to indulge in the "Robin Hood" tactic of robbing from the "rich" insurance companies to give to the "poor" victims where the parties are from the same family.

*Davidson, by Floyd v. Davidson*, 558 N.E.2d 849, 851 (Ind. App. 1990). We conclude that the 1981 amendment of the guest statute to limit the scope to nonpaying relatives within the second degree of consanguinity was rationally related to the stated legitimate purpose of preventing fraud and collusion.

We note that after reviewing the legislative history of the 1981 amendment, the dissent in this case concludes that the "only reason" the guest statute was retained as to close relatives was "because of a political compromise—not because of any

recognized or asserted classification that is related to a legitimate state interest." The dissent then cites *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989), for the proposition that "[p]olitical compromise as a justification, in and of itself, simply does not establish that the classification is rationally related to a legitimate governmental purpose." In *Distinctive Printing & Packaging Co.*, we rejected a party's argument that "necessary political compromise in and of itself provides a rational basis for legislative classification." 232 Neb. at 851, 443 N.W.2d at 571. However, we further noted that "in determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results." *Id.* at 852, 443 N.W.2d at 571. We therefore recognized that legislative classifications are often the result of political compromise and determined that although political compromise itself is not a rational basis for legislative classification, a legislative classification that is the result of political compromise may still be justified by an independent rational basis. As stated above, we conclude that the 1981 amendment to § 25-21,237 was rationally related to a legitimate governmental purpose, and evidence that the amendment was in part the result of political compromise does not alter that conclusion.

[6] The Les make various arguments to the effect that the guest statute is unconstitutional because it does not cover all situations in which a driver and passenger might collude and it does not apply to other situations not involving motor vehicles in which persons might collude to defraud insurance companies. However, in the context of equal protection, when the Legislature seeks to inaugurate reforms in the area of economics or social welfare, it need not choose between attacking every aspect of the problem or not attacking the problem at all. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). Instead, it is sufficient if the action taken is rationally based and free from invidious discrimination. *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981). We find no indication that the Legislature's decision to minimize opportunity for fraud and collusion by limiting application of the guest statute to certain relatives was a result of invidious discrimination.

[7] Further, in economics and social welfare, a statute does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). The fact that other legislative classification schemes could have been selected does not mean that the scheme chosen is constitutionally infirm. *Id.* As long as the classification scheme chosen by the Legislature rationally advances a reasonable and identifiable governmental objective, a court must disregard the existence of other methods that other individuals might have preferred. *Id.* We do not view the Legislature's actions with respect to the guest statute as amended in 1981 to be wholly irrelevant or unrelated to the stated objectives, and we, therefore, cannot conclude that the Legislature's actions violated Nebraska's equal protection clause.

[8] The Les also make various arguments to the effect that the guest statute is not good public policy. In every constitutional challenge, there attaches the presumption that all acts of the Legislature are constitutional, with all reasonable doubts resolved in favor of constitutionality. *Otto, supra.* In reviewing a statute, we do not pass judgment on the wisdom or the necessity of the legislation or whether the statute is based upon assumptions which are scientifically substantiated. Even misguided laws may nevertheless be constitutional. *Id.* Therefore, our inquiry under equal protection analysis is not whether we agree with the wisdom or necessity of the law, but whether the law is rationally related to a legitimate governmental interest.

We conclude that the current version of the guest statute is rationally related to the legitimate governmental interest of preventing fraud and collusion. Such interest supports the statute against the Les' equal protection challenge. We therefore conclude that § 25-21,237 does not violate Neb. Const. art. I, § 3.

*Section 25-21,237 Does Not Violate Neb. Const. art. III, § 18.*

The Les also challenge § 25-21,237 as special legislation in violation of the special privileges and immunities clause of Neb. Const. art. III, § 18. We conclude that § 25-21,237, as amended in 1981, does not constitute special legislation.

[9] We have described the purpose of the constitutional safeguard against special legislation as follows:

> By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. . . . General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. . . . It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted.

*Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 844-45 (1991). The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

Special legislation analysis is similar to an equal protection analysis, and often the two are discussed together because, at times, both issues can be decided on the same facts. *Gourley, supra*. As a result, language normally applied to an equal protection analysis is sometimes used to help explain the reasoning employed under a special legislation analysis. *Id*. But the focus of each test is different. The analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. This is different from an equal protection analysis under which the state interest in legislation is compared to the statutory means selected by the Legislature to accomplish that purpose. *Id*.

When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in

the kind of improper discrimination prohibited by the Nebraska Constitution. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. *Id.*

The general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation. Classification is proper if the class at issue has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act. *Id.*

The Les make no argument that § 25-21,237 created a closed class, and therefore, our special legislation analysis focuses on whether the guest statute created an arbitrary and unreasonable method of classification. We concluded above that § 25-21,237 was rationally related to a legitimate governmental interest and therefore did not violate the equal protection clause of the Nebraska Constitution. Similar considerations and analysis lead us to conclude that the guest statute does not create an arbitrary and unreasonable method of classification in violation of the Nebraska Constitution's ban on special legislation.

As noted above, this court rejected constitutional challenges to the pre-1981 version of the guest statute. That version made a classification of passengers based on whether they were paying passengers or nonpaying guests, and we concluded, inter alia, that the guest statute as it related to nonpaying persons was constitutional. See *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975). The current version of the statute narrows the classification of nonpaying guests to certain nonpaying relatives thought to be more inclined to collude with drivers. As discussed above, the purpose of the statute is to prevent fraud and collusion, and we believe that there is a substantial difference in circumstances surrounding nonpaying relatives as distinguished from other nonpaying persons such that creation of a classification limited to the nonpaying relatives identified in § 25-21,237 is not arbitrary or unreasonable.

The guest statute is not the type of law prohibited by the special legislation clause. It does not arbitrarily benefit or grant "special favors" to a specific class and it operates uniformly as to all nonpaying relatives within the second degree of consanguinity. We conclude therefore that the guest statute, § 25-21,237, does not violate the prohibition on special legislation under Neb. Const. art. III, § 18.

## CONCLUSION

We conclude that the Les failed to establish that the current version of the guest statute, § 25-21,237, violates the Nebraska Constitution, and we therefore conclude that the district court did not err when it concluded that § 25-21,237 was constitutional. The district court did not err when it dismissed the Les' theories of recovery based on simple negligence. Accordingly, we affirm.

AFFIRMED.

GERRARD, J., dissenting.

I disagree with the majority's determination that the Nebraska guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 1995), does not violate the equal protection clause of the Nebraska Constitution. The guest statute, as amended in 1981, is not rationally related to a legitimate governmental purpose, as required under equal protection principles, and is therefore unconstitutional. Accordingly, I respectfully dissent.

The majority correctly notes that this court has previously addressed the constitutionality of the Nebraska guest statute, finding no violation of the equal protection clause. See, i.e., *Cushing v. Bernhardt*, 210 Neb. 272, 313 N.W.2d 688 (1981); *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980); *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975). However, the only occasion in which this court has had the opportunity to examine the guest statute since its amendment in 1981 was in *Coburn v. Reiser*, 254 Neb. 495, 577 N.W.2d 289 (1998). In *Coburn*, we disposed of the issue regarding the constitutionality of the guest statute by citing to preamendment cases, such as *Botsch, supra*, summarily finding the guest statute to be constitutional. This was error on our part; most specifically, I concede that I erred in joining the judgment in *Coburn* based on this reasoning. We should have performed an analysis of the amended version of the guest statute within the equal protection

framework, independent of analyses made by this court in evaluating the preamendment version of the statute. The majority has now engaged in such an analysis in this appeal; however, I disagree with the conclusion reached by the majority after applying the appropriate analysis.

In an equal protection challenge, when a fundamental right or suspect classification is not involved, the act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose. *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005). The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause. *Id.* The Les have met their burden in this case.

Among the arguments made on appeal, the Les argue that this court should follow the reasoning of *Whitworth v. Bynum*, 699 S.W.2d 194 (Tex. 1985), in which the Texas Supreme Court determined that its guest statute—also limited in application to persons related within the second degree of consanguinity or affinity—violated the state equal protection clause because the classifications drawn by the statute were not rationally related to a legitimate state interest. In *Whitworth*, the court acknowledged that the legislative purpose behind the guest statute was to prevent collusion between an insured party and a guest. *Id.* Thus, the court stated, the guest statute "creates a presumption that all automobile passengers suing a driver who is within the second degree of affinity or consanguinity do so collusively." *Id.* at 197. The court stated:

> We refuse to indulge in the assumption that close relatives will prevaricate so as to promote a spurious lawsuit. . . . Dishonest individuals will always attempt to circumvent the intent of the statute by lying, while honest citizens are penalized when the truth brings them within the statutory scope denying them a negligence cause of action.

*Id.* The court concluded that the classifications drawn by the guest statute were not rationally related to a legitimate state interest and that, thus, the state guest statute was unconstitutional. *Id.*

I agree not only with the reasoning of the Texas Supreme Court, but with the rationale of a host of other states that have found their state guest statutes unconstitutional because of a lack

of a rational relationship between such statutes and collusion prevention. The "collusion prevention" rationale is simply inadequate to justify, in equal protection terms, the elimination of all automobile guests' (related within the second degree of consanguinity or affinity) rights to recover for negligence. Although the guest statute may prevent those rare collusive suits connived by automobile drivers and their "related" passengers to defraud insurers, Nebraska's classification scheme is far too gross and overinclusive to be justified by this end, since the statute bars the great majority of valid suits along with the rare fraudulent claim.

In *Brown v. Merlo*, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P.2d 212 (1973), the California Supreme Court concluded that the state guest statute violated equal protection principles, finding in part that the distinction drawn by the statute was not rationally related to its purpose of eliminating collusive lawsuits. The statute at issue in *Merlo* was similar to the pre-1981 Nebraska guest statute, limiting actions for damages brought by nonpaying passengers to those alleging intoxication or willful misconduct of the driver. In *Merlo*, 8 Cal. 3d at 873, 106 Cal. Rptr. at 401, 506 P.2d at 225, the court explained:

> The theory behind this "compensation" classification appears to be that the driver who gives a free ride to a passenger does so because of a close relationship with his guest; because of the presumed closeness of this relationship, the driver may falsely admit liability so that his guest may collect from the driver's insurance company. To combat this risk of potential fraud, the guest statute eliminates all causes of action in negligence for automobile guests.

The court concluded that "it is unreasonable to eliminate causes of action of an entire class of persons simply because some undefined portion of the designated class may file fraudulent lawsuits." *Id.* at 875, 106 Cal. Rptr. at 402, 506 P.2d at 226. The New Mexico Supreme Court agreed, adding that the guest statute does little to prevent collusion, since the parties can lie about whether compensation was paid and thereby avoid the bar of the statute, just as they could perjure themselves about the negligence issue if the guest statute did not exist. *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975). Further, the North Dakota Supreme Court added that

> [i]n all other cases, we rely upon the standard remedies of perjury, the efficacy of cross-examination, the availability of pretrial discovery, and the good sense of juries to detect false testimony if it should occur. We do not withdraw the remedy from all injured persons in order to avoid a rare recovery based upon false testimony.

*Johnson v. Hassett*, 217 N.W.2d 771, 778 (N.D. 1974).

The *Merlo* court explained that the guest statute imposed an overinclusive classification scheme:

> Instead of confining its disability to those who actually institute collusive suits, the provision reaches out beyond such persons and burdens the great number of honest automobile guests. . . . We believe that in barring suits by all automobile guests simply to protect insurance companies from some collusive lawsuits, the guest statute exceeds the bounds of rationality and constitutes a denial of equal protection.

8 Cal. 3d at 877, 106 Cal. Rptr. at 403-04, 506 P.2d at 227-28. See, also, *Nehring v. Russell*, 582 P.2d 67 (Wyo. 1978); *Laakonen v. District Court*, 91 Nev. 506, 538 P.2d 574 (1975); *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974).

Although the cases cited above address statutes more akin to the earlier version of Nebraska's guest statute, the same logic extends to the current language of the statute. Section 25-21,237 bars nonpaying passengers related to the driver within the second degree of consanguinity or affinity from filing lawsuits for damages against the driver unless the damages are alleged to have been caused by the intoxication or gross negligence of the driver. The classification presumes that all drivers and passengers related within the second degree of consanguinity or affinity will collude in negligence actions for damages caused by the drivers. However, such a broad presumption penalizes the vast majority of passengers who do not engage in such fraudulent behavior and disregards the procedural safeguards in our justice system designed to determine the truth of damage claims.

Furthermore, persons who are of a mindset to engage in collusion will not be deterred by the statute but are likely to instead offer that the passenger provided compensation for the ride; that

the driver was intoxicated while operating the vehicle; or that the driver was grossly negligent in operating the vehicle, any of which would place them outside the scope of the statute. In other words, the statute has the perverse effect of punishing those who are honest, while doing nothing to stop those who are willing to lie. Thus, "collusion prevention" is hardly a rational basis for applying a blanket provision barring passengers from bringing general negligence claims against drivers to whom they are related.

The Legislature itself did not present a rational basis for adopting the classification at issue in Nebraska's current guest statute. In that regard, I disagree with the majority's reading of the legislative history of the 1981 amendment. In discussing 1981 Neb. Laws, L.B. 54, the bill that ultimately amended Nebraska's guest statute, limiting its application to family members, the senator responsible for introducing the bill explained essentially that the bill was a compromise, narrowing the statute's application but also accommodating the interests of insurance companies. The senator promised not to propose a complete repeal of the guest statute, if the insurance industry would accept a limited repeal, narrowing the class of limited claims to those brought by guest passengers that were "relatives" of the owner and operator of the vehicle. If the insurance industry refused to accept the compromise, the senator vowed to seek a complete repeal of the guest statute and stated that it would be "a no holds barred contest, this year, next year and however long it takes." Judiciary Committee Hearing, L.B. 54, 87th Sess. 2 (Jan. 28, 1981). There was no discussion of a history of collusive claims amongst "relatives" in Nebraska or the effect, if any, of these types of claims on automobile insurance rates in the State of Nebraska. There was no pretense when the Legislature considered the 1981 amendment to Nebraska's guest statute—the amendment process was pure politics at its finest.

During the floor debate on L.B. 54, the sponsoring senator stated:

> [T]o remove even the vestige of a possibility of say, alleged collusion, between a father and a daughter or whatever, I accepted that as the compromise necessary to sell the insurance companies or one of the many elements I utilized in

> dealing with the insurance companies because that was the necessary final piece, very simply.

Judiciary Committee, 87th Sess. 1144 (Feb. 24, 1981).

Thus, prior to 1981, the Nebraska guest statute limited claims brought by any nonpaying passenger against an owner or operator of a motor vehicle. The legislative history reveals that this language was favorable to the automobile insurance industry because liability with respect to nonpaying guests was limited to those guests that could prove damages caused by gross negligence or intoxication. In an effort to avoid opposition by the insurance industry, the 1981 amendment to the guest statute proposed a limited repeal, narrowing the class of limited claims to those brought by guest passengers related to the owner or operator as spouse or within the second degree of consanguinity or affinity. In other words, in exchange for the insurance industry's acquiescence, the law was only partially repealed, eliminating some but not all of its irrational application.

In that regard, the majority quotes the Indiana Court of Appeals for the assertions that the Legislature " 'may have perceived' " a greater risk of collusion among family members, or a risk that juries would unfairly compensate injured family members at the expense of insurance companies. I find these assertions unpersuasive. First, the legislative record is inconsistent with the claim that the Legislature perceived a greater risk of collusion among family members. Further, it is hard to conclude such a perception was rational, in the absence of any evidence before the Legislature providing any facts upon which a perception could have been based, or upon which the Legislature could have concluded that the statute would actually be effective at preventing collusion or fraud. Finally, I see no basis for any unsupported claim that a jury's inclination to attack the "deep pockets" of a "rich" insurance company may be more pronounced when the plaintiffs are related to one another. Nebraska law does not allow evidence of liability insurance or policy limits to be admitted into evidence. See *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004). In short, the majority's hypotheses about what the Legislature might have been thinking are not compelling.

Under the rational basis standard, equal protection is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. See *State v. Garber*, 249 Neb. 648, 545 N.W.2d 75 (1996). Based on a thorough review of the legislative history of L.B. 54, the classification accomplished through the amendment was the result of pure political compromise. The only reason certain family members remain subject to the limitations of the guest statute is because of a political compromise—not because of any recognized or asserted classification that is related to a legitimate state interest. Political compromise as a justification, in and of itself, simply does not establish that the classification is rationally related to a legitimate governmental purpose. See *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

For that reason, I also disagree with the majority's contention that because we approved the constitutionality of the pre-1981 guest statute in *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975), we are somehow required to approve of the classification created by the 1981 amendment. The majority contends that because the *Botsch* court found a rational relationship between all nonpaying guests and preventing fraud and collusion, "it logically follows that in the absence of compelling developments, a rational subset of that universe remains rationally related to that interest." That is only true if the "subset" of nonpaying guests at issue is based upon a *classification* that bears a rational relationship to a legitimate governmental purpose. After all, "nonpaying guests whose last names begin with a vowel" would be a subset of the "universe" of nonpaying guests, yet we would hardly approve of such an arbitrary classification. Since the classification set forth in the 1981 amendment was based on little more than raw political compromise, I find it to be equally capricious.

While I recognize the necessary and appropriate deference that should be given to the Legislature when this court performs a rational basis analysis on an equal protection claim, at some point, the judiciary must draw the line and truly require that the legislative classification is *somehow* rationally related to a legitimate governmental purpose. The current guest statute has crossed that line. Certainly, the prevention of wholesale fraud and collusion is a legitimate governmental objective; however, the legislative

record does not reflect that this was the objective of the classification created in 1981. In any event, limiting recovery for *all* family members is not rationally related to that objective, as it rests on the unreasonable presumption that *all* family members will collude, and does not serve to prevent actual collusion.

For the foregoing reasons, I conclude that the classifications drawn by § 25-21,237 are not rationally related to a legitimate state interest and are thus violative of the equal protection clause of the Nebraska Constitution. Consequently, I would reverse the district court's judgment dismissing the Les' theories of recovery based on simple negligence and remand the cause for a new trial as to those issues.

HENDRY, C.J., and MCCORMACK, J., join in this dissent.

HENDRY, C.J., dissenting.

I was not a member of the court when *Coburn v. Reiser*, 254 Neb. 495, 577 N.W.2d 289 (1998), was decided; with that exception noted, I join in Justice Gerrard's dissent.

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JERRY PACHUNKA, APPELLANT, V.
ROGERS CONSTRUCTION, INC., APPELLEE.

716 N.W.2d 728

Filed July 7, 2006. No. S-04-1470.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage.
3. **Negligence: Pleadings: Proof: Trial.** When a defendant pleads the affirmative defense of assumption of risk in a negligence action, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may be submitted to the jury.
4. **Negligence.** Assumption of risk is predicated upon the plaintiff's voluntary exposure to the known danger caused by the defendant's negligence. If a plaintiff is deprived of a choice in the matter, the risk is not assumed, even though it may be encountered.
5. ____. A plaintiff's assumption of risk is not voluntary if the defendant's tortious conduct has left him or her no reasonable alternative course of conduct in order to avert harm to himself or herself.

6. **Jury Instructions: Evidence.** The jury may be instructed upon only those theories of the case which are supported by competent evidence.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for a new trial.

Terry M. Anderson and Steven M. Lathrop, of Hauptman, O'Brien, Wolfe & Lathrop, P.C., for appellant.

J. Joseph McQuillan and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

Jerry Pachunka brought the present negligence action against Rogers Construction, Inc., for injuries suffered as a result of a fall while exiting a house built by Rogers Construction. A jury found in favor of Rogers Construction, and Pachunka timely appealed. We moved the case to our docket pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## BACKGROUND

In March 2001, Pachunka was employed by Rogers Realty Company as a sales agent. As part of his job duties, Pachunka was required to show model houses built by Rogers Construction to prospective buyers. The houses were in various stages of construction at the time they were shown by Pachunka. On March 23, Pachunka was inspecting a house that was under construction at the time to make sure it was ready for viewing by a potential buyer. The house was the only one available of that particular model.

Because of muddy conditions, a walkway made up of excess construction lumber was laid on the ground to provide access to the house. On that particular day, there was also a board angled from the walkway to the front stoop of the house, which stood approximately 16 inches off the ground, creating a ramp up to the stoop. Although there was another entrance through

the garage, Pachunka was not provided a key for that entrance. Consequently, in order to enter the house, Pachunka had to either use the ramp or walk through the mud and step up onto the stoop. At trial, Pachunka testified that a back condition prevented him from stepping up or down that far; therefore, it was necessary for him to use the ramp, which he used without incident while entering the property. However, while exiting the house on the ramp, Pachunka slipped and fell. Pachunka suffered injuries to his ankle as a result.

Pachunka filed suit against Rogers Construction and Rogers Development, Inc., for damages caused by their alleged negligence. The action was dismissed as to Rogers Development during trial and proceeded against Rogers Construction as the sole defendant. As part of its defense, Rogers Construction asserted the affirmative defense of assumption of risk. Before submission of the case to the jury, Pachunka made an oral motion to dismiss this defense. Pachunka's motion was denied. Pachunka also requested that the following jury instruction further describing assumption of risk be given to the jury: "A Plaintiff does not assume a risk of harm unless he voluntarily accepts the risk. A Plaintiff's acceptance of a risk is not voluntary if the Defendant's conduct has left Plaintiff no reasonable alternative course." This request was also denied. The court, instead, gave the following instruction on the burden of proof for assumption of risk:

> In connection with the defense of "assumption of risk" the burden is upon the Defendant to prove, by the greater weight of the evidence, each and all of the following:
>
> 1. That the Plaintiff knew of and understood the specific danger;
>
> 2. That the Plaintiff voluntarily exposed himself to danger; and
>
> 3. That the Plaintiff's injury occurred as a result of his exposure to that danger.
>
> 4. That the Plaintiff had some other reasonable course of egress.

Following objections by Pachunka to the submission of the defense of assumption of risk to the jury and the exclusion of his proposed jury instruction, the case was submitted to the jury. The jury was given the choice between three verdict forms.

Verdict form No. 1 stated that both the plaintiff and the defendant have met their burdens of proof and allocated the percentage of negligence between the parties. Verdict form No. 2 stated, "We . . . find that the Plaintiff has met his burden of proof and that the Defendant has not." Verdict form No. 3 stated, "We . . . find that the Plaintiff has not met [his] burden of proof and find in favor of the Defendant." The jury chose verdict form No. 3 and returned a verdict in favor of Rogers Construction.

After the jury returned its verdict, Pachunka filed a motion for new trial on the grounds, inter alia, that the court erred in submitting the defense of assumption of risk to the jury and in failing to submit Pachunka's proposed instruction on assumption of risk. The trial court denied Pachunka's motion. Pachunka now appeals.

## ASSIGNMENTS OF ERROR

Pachunka assigns as error the trial court's submission of the defense of assumption of risk to the jury and its failure to submit to the jury Pachunka's proposed jury instruction on assumption of risk.

## STANDARD OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Shipler v. General Motors Corp., ante* p. 194, 710 N.W.2d 807 (2006).

## ANALYSIS

### Assumption of Risk Defense

[2,3] Pachunka claims that the trial court erred in submitting the defense of assumption of risk to the jury. Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). See, also, Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995). When a defendant pleads the affirmative defense of assumption of risk in

a negligence action, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may be submitted to the jury. *Everts v. Hardcopf-Bickley*, 257 Neb. 151, 595 N.W.2d 911 (1999).

Pachunka asserts that Rogers Construction failed to establish that his use of the ramp was voluntary because he was given no reasonable alternative course to using the ramp. We agree.

[4] Assumption of risk is predicated upon the plaintiff's voluntary exposure to the known danger caused by the defendant's negligence. If a plaintiff is deprived of a choice in the matter, the risk is not assumed, even though it may be encountered. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994).

The evidence reflects that Pachunka was required to enter the house as part of his employment and that he was only able to do so through the front door. The evidence further reflects that in order to access the front door, Pachunka had to either use the wooden ramp or step up onto the stoop. However, because of a back problem, it was necessary for Pachunka to use the ramp.

[5] Rogers Construction contends that although Pachunka entered the house through the front, he could have exited the house through the garage and thereby avoided his fall. We have stated that a plaintiff's assumption of risk is not voluntary if the defendant's tortious conduct has left him or her no reasonable alternative course of conduct in order to avert harm to himself or herself. See *Makovicka v. Lukes*, 182 Neb. 168, 153 N.W.2d 733 (1967). The evidence shows that Pachunka was given access to the property only through the front door and that in order to exit through the garage, it would have been necessary for Pachunka to slog through the mud to reach the wooden walkway. But, Rogers Construction testified that the walkway had been built specifically to avoid the mud. We cannot say that this is a reasonable alternative. We therefore conclude that Pachunka did not voluntarily assume the risk of using the ramp and that the court erred by submitting the issue to the jury.

Rogers Construction claims that any error resulting from the submission of the assumption of risk defense to the jury was harmless, since the jury did not reach the issue of assumption of risk. Rogers Construction relies on *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997). In

*Hoover*, we held that any error in giving contributory negligence instructions was harmless where a special verdict form separated the issue of the defendant's negligence and the plaintiff's contributory negligence and the jury returned a verdict in favor of the defendant on the issue of the defendant's negligence. We explained that because the jury never reached the issue of contributory negligence, any error related to the instruction on that defense was harmless.

In the instant case, the jury was presented with three verdict forms. The first was a contributory negligence form which allocated the percentage of negligence between the parties, the second found that the plaintiff had met his burden of proof and the defendant had not, and the third found that the plaintiff had not met his burden of proof and found in favor of the defendant.

By returning the third verdict form, it is clear that the jury never reached the issue of contributory negligence. However, the same cannot be said with regard to the issue of assumption of risk. Because the jury was not presented with a separate verdict form addressing the issue of assumption of risk, it is impossible for us to tell whether or not the jury reached that issue. The jury could have found, as suggested by Rogers Construction, that Pachunka did not meet his burden of proof. On the other hand, it is entirely possible that the jury found that Pachunka had met his burden of proof, but so had Rogers Construction with regard to its assumption of risk defense, and that having no other alternative, utilized the third verdict form to convey its findings.

Because we are unable to determine that the jury never reached the issue of assumption of risk, we cannot conclude that submitting the defense of assumption of risk was harmless. We therefore reverse and remand this matter for a new trial. See *Everts v. Hardcopf-Bickley*, 257 Neb. 151, 595 N.W.2d 911 (1999) (stating submission of issue which evidence is insufficient to sustain affirmative finding is generally prejudicial and results in new trial).

### Assumption of Risk Jury Instruction

[6] Having determined that the trial court erred in submitting the issue of assumption of risk to the jury, we likewise conclude that the court erred in instructing the jury on the issue. The jury may be instructed upon only those theories of the case

which are supported by competent evidence. See *Shipler v. General Motors Corp., ante* p. 194, 710 N.W.2d 807 (2006).

## CONCLUSION

We conclude that the trial court erred by submitting the defense of assumption of risk to the jury where the evidence did not establish that the risk was voluntarily assumed. We similarly conclude that the court erred by instructing the jury on the issue. We therefore reverse the judgment and remand the matter for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

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INA GROUP, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT AND CROSS-APPELLEE, V. JOHN H. YOUNG AND MICKEY J. YOUNG, HUSBAND AND WIFE, APPELLEES, AND CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

INA GROUP, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT AND CROSS-APPELLEE, V. FRANCIS LEONARD, SR., AND JOHN DOE AND MARY DOE, REAL NAMES UNKNOWN, APPELLEES, AND CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

INA GROUP, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT AND CROSS-APPELLEE, V. ROBERTO CASTILLO, APPELLEE, AND CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

INA GROUP, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, FORMERLY KNOWN AS IRONWOOD NE, LLC, APPELLANT AND CROSS-APPELLEE, V. CARL H. BEJERIS AND JOHN DOE AND MARY DOE, REAL NAMES UNKNOWN, APPELLEES, AND CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

INA GROUP, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT AND CROSS-APPELLEE, V. MARIA MATA ET AL., APPELLEES, AND CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

# INA GROUP, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT AND CROSS-APPELLEE, V. JOSEPH J. NEBBIA AND JOHN DOE AND MARY DOE, REAL NAMES UNKNOWN, APPELLEES, AND CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

# INA GROUP, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT AND CROSS-APPELLEE, V. CHAD T. RAINS ET AL., APPELLEES, AND CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

# INA GROUP, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT AND CROSS-APPELLEE, V. BRIAN KEITH DACUS AND JOHN DOE AND MARY DOE, REAL NAMES UNKNOWN, APPELLEES, AND CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

716 N.W.2d 733

Filed July 7, 2006. Nos. S-05-231, S-05-268, S-05-338, S-05-348, S-05-414, S-05-415, S-05-421, S-05-650.

1. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below.
2. **Taxation: Property: Liens.** General taxes are a first lien upon the real estate upon which they are levied, and special assessment liens are subject to general tax liens.
3. **Foreclosure: Property: Tax Sale: Liens: Title.** Property sold at a tax foreclosure to satisfy the lien of general taxes cannot be sold subject to the lien of special assessments, and title passes to a purchaser by such a sale free and clear of all such liens.
4. **Foreclosure: Property: Tax Sale: Governmental Subdivisions.** A county purchasing and foreclosing a tax sale certificate on real estate does so as trustee for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of the proceeds.
5. **Tax Sale: Title.** The title conveyed under a tax sale is not derivative, but is a new title in the nature of an independent grant by the sovereign authority, and the purchaser takes free from any encumbrances, claims, or equities connected with the prior title.
6. **Taxation: Property: Liens: Words and Phrases.** A "perpetual lien" is not intended to continue delinquent taxes in force against real estate after a statute has barred a right of action.
7. **Property: Liens: Foreclosure: Taxes: Limitations of Actions.** Real estate can be discharged from a perpetual lien by payment, sale for taxes, or the neglect of the purchaser to foreclose the lien until after the statute of limitations has run.
8. **Judicial Sales: Property: Liens: Foreclosure: Taxes.** Tax liens arising subsequent to the sale of a tax certificate, but prior to the commencement of the foreclosure proceeding, are included in the foreclosure decree and satisfied by the proceeds of the sheriff's sale.

9. **Judicial Sales: Property: Foreclosure: Taxes.** The subsequent taxes that a purchaser at a sheriff's sale in the foreclosure of a tax certificate is required to pay before confirmation of the sale are limited to those levied and assessed on the property "under foreclosure," i.e., taxes assessed and levied after commencement of the foreclosure proceeding.
10. **Foreclosure: Taxation: Statutes.** "Subsequent taxes" within the meaning of Neb. Rev. Stat. § 77-1913 (Reissue 2003) do not include taxes that were assessed and levied prior to the commencement of the foreclosure proceeding.

Appeals from the District Court for Douglas County: W. MARK ASHFORD, J RUSSELL DERR, SANDRA L. DOUGHERTY, JOHN D. HARTIGAN, JR., PATRICIA A. LAMBERTY, GERALD E. MORAN, and JOSEPH S. TROIA, Judges. Judgments in Nos. S-05-268, S-05-348, S-05-414, S-05-415, and S-05-650 affirmed. Judgments in Nos. S-05-231, S-05-338, and S-05-421 reversed, and causes remanded for further proceedings.

Shanna L. Cole, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellant.

Rosemarie B. Lee, Assistant Omaha City Attorney, for appellee City of Omaha.

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

GERRARD, J.

The question presented in these appeals is whether, in a foreclosure on a tax sale certificate, liens for municipal special assessments are extinguished if the proceeds of the sale are insufficient to satisfy all the tax liens upon the property.

## STATUTORY FRAMEWORK

While the facts of these consolidated cases are not complicated, they arise in the context of a rather complicated statutory scheme. Before discussing the specific facts of the instant cases, it will be helpful to review the statutory framework, Neb. Rev. Stat. ch. 77, arts. 2, 18, and 19 (Reissue 2003, Cum. Supp. 2004, & Supp. 2005).

General ad valorem taxes levied on real property are due and payable on December 31 of each year, following the date they are levied, and beginning on December 31 the taxes are a first lien on the property taxed. See §§ 77-203 and 77-208. Special

assessments levied by cities, villages, and special improvement districts are also a lien on the real estate, second only to the first lien of general taxes. See §§ 77-209 and 77-1917.01. All these liens are extinguished after 15 years. See § 77-1862.

A county, or a governmental subdivision with a special assessment lien, can petition the district court for a decree of foreclosure on its lien, generally in the same manner as is provided for foreclosure on a real estate mortgage. See §§ 77-1901 and 77-1917.01. See, generally, *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997); *Brown v. Glebe*, 213 Neb. 318, 328 N.W.2d 786 (1983); *KLH Retirement Planning v. Cejka*, 3 Neb. App. 687, 530 N.W.2d 279 (1995). Such a sale cannot be confirmed until 2 years after the sheriff's sale in the foreclosure proceeding. See § 77-1903. However, that "lien method" was not followed in these cases.

Instead, these cases involve the "certificate method" for handling delinquent real estate taxes. Starting March 1 in the year following the levy of delinquent taxes or special assessments, the property is subject to sale. See §§ 77-1801 and 77-1858. The county treasurer publishes a list of all real property subject to sale, with a notice that the property will be sold on a given date, and on that date, the property is offered for sale to purchasers willing to pay the taxes and charges. See §§ 77-1802 to 77-1808. If there are no bidders, then the property can be purchased by the county board or another governmental subdivision. See §§ 77-1809 to 77-1811. If the property remains unsold, then the treasurer can sell the property at a private sale. See § 77-1814.

This is called the "certificate method" because the purchaser of the property receives a certificate, commonly known as a "tax certificate" or "tax sale certificate," describing the property, amount paid by the purchaser, and date that the purchaser will be entitled to a deed. See §§ 77-1818 and 77-1819. If the property is purchased by the county board, the certificate remains in the custody of the county treasurer, who can assign the certificate to any purchaser willing to pay the amount stated on the face of the certificate (plus interest), including another governmental subdivision. See §§ 77-1809 and 77-1810.

The purchaser of the certificate has a perpetual lien for the tax on the real property, and if the purchaser pays any delinquent

taxes subsequently assessed on the property, that amount is added to the lien. See §§ 77-1818 and 77-1819. Certificates can be assigned by endorsement, and the assignee steps into the shoes of the purchaser. See § 77-1822. The owner of the property can redeem the property before delivery of a deed by paying the treasurer the amount shown on the certificate, and all subsequent taxes, along with the interest specified by Neb. Rev. Stat. § 45-104.01 (Reissue 2004), which is currently 14 percent.

There are two courses of action by which the purchaser of a tax certificate may proceed—the purchaser can either wait and obtain a deed of conveyance for the property or obtain an order of foreclosure and compel the sale of the property. The first course of action, obtaining a deed, requires the purchaser to wait 3 years from the date of sale of the property. At any time within 6 months after the 3-year period expires, the treasurer can, upon request, issue a deed of conveyance to the purchaser. See § 77-1837. If the certificate owner waits longer than 3 years 6 months from the sale, the certificate ceases to be valid and the lien of taxes for which the property was sold is discharged. See § 77-1856. But that procedure was not followed in these cases.

Instead, the purchaser in these cases followed the other course of action available to the purchaser of a tax certificate—judicial foreclosure on the certificate. When a tax certificate or tax deed has been issued, the purchaser may surrender the certificate or deed in the district court, within 6 months following the expiration of 3 years from the sale, and proceed as a plaintiff in the district court for a decree of foreclosure on the tax lien represented by the certificate or deed. See § 77-1902. The district court determines the taxes, special assessments, and other liens to which the property is subject, and costs including an attorney fee of 10 percent of the amount due. See § 77-1909. Twenty days following the district court's decree of foreclosure, the plaintiff is entitled to an order of sale, which must be issued within 10 years following the date of the decree. See § 77-1911. After 10 years, no order of sale can issue, the decree is deemed satisfied, and no action shall lie to enforce the tax or special assessment liens included in the decree. See *id.*

When the order of sale issues, the sheriff sells the property in generally the same manner as is provided for a sale on execution

and pays the proceeds to the clerk of the district court. See § 77-1912. Governmental subdivisions may purchase the property. See *id*. Unlike foreclosure under the "lien method," a sale resulting from foreclosure under the "certificate method" can be confirmed immediately after the sheriff's sale. See § 77-1903. Any person entitled to redeem the property can do so before final confirmation of the sale. See § 77-1917.

Regardless of whether the foreclosure was had on a tax lien or tax certificate, if the proceedings were correct and the subsequent taxes have been paid, the district court may enter an order confirming the sale, directing the disposition of the proceeds of the sale, and directing the sheriff to deliver a sheriff's deed to the purchaser for any property not redeemed. See § 77-1913. Even if a private purchaser at a sheriff's sale fails to pay subsequent taxes levied and assessed against the property, the interested governmental subdivision may have a tax certificate issued for the subsequent taxes, and the sale can still be confirmed. See *id*. Upon confirmation of the sale, the treasurer cancels the taxes for the years for which the property was sold, and the sheriff's deed passes title to the purchaser "free and clear of all liens of every nature whatsoever and the interest or interests of all persons over whom the court had jurisdiction." See § 77-1914.

The proceeds of the sale are first used to pay the costs. When the plaintiff is a private person, firm, or corporation, as much as is necessary of the remaining balance is paid to the plaintiff. If the plaintiff is a governmental subdivision, the balance is paid to the treasurer for distribution to the various entitled governmental subdivisions. See § 77-1915. If there is a surplus after satisfying the costs and taxes, the excess is applied in the manner provided by law for disposing of a surplus in the foreclosure of a mortgage on real property. If the proceeds are insufficient to pay the costs and taxes and the plaintiff is a governmental subdivision, then the amount remaining is prorated among the various interested governmental subdivisions. See § 77-1916. The issue presented here is what happens if the proceeds are insufficient, but the plaintiff is not a governmental subdivision.

## FACTUAL BACKGROUND

These eight consolidated cases began with foreclosure complaints filed in the district court by INA Group, LLC (INA),

against various property owners; the City of Omaha, Nebraska (City); and, in two cases, the State of Nebraska. In each complaint, INA alleged that it was the assignee of a tax certificate for a parcel of real property in the City. Each of the complaints alleged that there was a sum of money due to INA on the tax liens represented by the certificates, that INA had spent $100 on a title search for the property, and that INA was entitled to an attorney fees award of 10 percent of the amount due to be taxed. See § 77-1909.

Most pertinently, each of the complaints alleged that the City claimed an interest in the properties by virtue of code enforcement, weed, litter, or building demolition assessments it had levied on the properties. INA alleged that the City's interests were junior and inferior to INA's interests. The complaints sought to have the balance due on the tax sale certificates determined and decreed to be liens upon the real estate, together with attorney fees and costs. INA prayed that if the balances due were not paid within 20 days, each property be sold to satisfy the debt.

The City filed an answer in each case denying that its interests were junior or inferior to that of INA. In each case, INA filed a motion for default judgment or summary judgment, and in each case, the motion was sustained. However, the eight cases had been assigned to seven different judges of the district court, and different results were reached with respect to INA's tax liens and the City's special assessment liens.

In three cases, the court determined that the City's special assessment liens were perpetual and that the buyer at any sale would receive a deed only upon payment of subsequent taxes *and* all the special assessments upon the property. In each of those cases, INA appealed. In the other five cases, the court determined that the City's special assessment liens were junior to INA's interests. In those cases, should the proceeds of the sale be insufficient to satisfy all the outstanding liens, the City's special assessment liens would be extinguished. In those cases, the City appealed.

All eight cases were consolidated on appeal. The Nebraska Court of Appeals ordered that in the consolidated appeals, INA would be treated as the appellant and the City would be treated as the appellee and cross-appellant. We then moved the appeals

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

INA assigns that the district court erred when it determined that (1) the City's lien for special assessments takes priority over INA's lien for general real estate taxes by virtue of a tax sale certificate and (2) if the proceeds from the sheriff's sale are insufficient to cover all special assessment liens, the liens would not be extinguished. The City, as cross-appellant, assigns that the court erred when it determined that the lien of the City by virtue of a special assessment would be extinguished if the proceeds of the sheriff's sale were insufficient to pay the entire balance due.

## STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below. *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005).

## ANALYSIS

Although INA's first assignment of error takes issue with the district court's determinations that the City's special assessment liens had priority over the general tax lien represented by the tax sale certificate, the issue actually presented by this assignment of error seems to be the same as the issue presented by INA's second assignment of error. We do not read any of the district court's orders as directing that the proceeds of any sale should be used to satisfy the City's liens before the general tax liens are satisfied, and the City conceded at oral argument before this court that the proceeds of any sales must first be applied to the general tax liens. Rather, it appears from the record and the briefs that INA's assignments of error on appeal, and the City's assignment of error on cross-appeal, present a single legal issue: whether the City's special assessment liens are extinguished by the sheriff's sale if the proceeds of the sale are insufficient to satisfy all the liens on the property, or whether the City's special assessment liens remain attached to the property.

[2,3] There can be, in fact, no question that under the statutory framework set forth above, general taxes are a first lien upon the real estate upon which they are levied, and that special assessment liens are subject to general tax liens. See, e.g., Neb. Rev. Stat. § 14-557 (Reissue 1997); § 77-1917.01; *Dent v. City of North Platte*, 148 Neb. 718, 28 N.W.2d 562 (1947). It was based upon this logic that we held in *Polenz v. City of Ravenna*, 145 Neb. 845, 18 N.W.2d 510 (1945), that property sold at a tax foreclosure to satisfy the lien of general taxes cannot be sold subject to the lien of special assessments, and title passes to a purchaser by such a sale free and clear of all such liens.

The City argues that *Polenz* is distinguishable because the foreclosing party in that case had been a governmental subdivision and the foreclosing party in these cases is a private party holding a tax sale certificate. The City cites § 77-1916, which provides in relevant part:

> If a surplus remains after satisfying all costs and taxes against any particular item of real property, the excess shall be applied in the manner provided by law for the disposition of the surplus in the foreclosure of mortgages on real property. *If the proceeds are insufficient to pay the costs and all the taxes, when the plaintiff is a governmental subdivision, a municipal corporation, or a drainage or irrigation district, the amount remaining shall be prorated among the governmental subdivisions, municipal corporations, and drainage or irrigation districts in the proportion of their interest in the decree of foreclosure.*

(Emphasis supplied.) Thus, the City argues that in *Polenz, supra*, the liens were extinguished because the foreclosing party, Buffalo County, was obliged to prorate the remaining funds to satisfy the special assessments that were outstanding.

[4] We do not accept the City's argument. First, § 77-1916 is simply an expression of the principle that a county purchasing and foreclosing a tax sale certificate on real estate does so as trustee for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of the proceeds. See, *County of Madison v. Walz*, 144 Neb. 677, 14 N.W.2d 319 (1944); *City of Grand Island v. Willis*, 142 Neb. 686, 7 N.W.2d 457 (1943). The statute explains how insufficient

proceeds should be distributed, but does not support the conclusion that special assessment liens are extinguished only when the plaintiff is a governmental subdivision. Simply put, the City reads too much into § 77-1916.

But more significantly, the City overlooks the reasoning we applied in *Polenz, supra*, which is equally applicable whether or not the plaintiff is a governmental subdivision. We explained that when property is sold at a tax foreclosure to satisfy a lien of general taxes, it passes free and clear of special assessment liens because that is necessary in order for general taxes to remain a first lien.

> In the very nature of things a sale under a foreclosure of a first lien cannot be made subject to any other lien, for to do so would be to make the junior lien a senior lien. It would destroy the very purpose of the legislative provisions making general taxes a first lien. They are made a first lien in order that the funds which support the general functions of government may be secured. The lien for general taxes can only be realized by the sale of the property. If the special assessments remain a lien against the land, after sale to satisfy the paramount lien, then it is obvious that the sale value of the property is reduced by the amount of the junior lien. Such a result was not intended. If the special assessments remain a lien after title passes under the foreclosure proceedings, the result would be that the junior lien could then come forward and destroy the title based on the superior lien. Such a result would nullify the very purpose of the tax foreclosure laws.
>
> To make the first lien of general taxes fully effective, the title must pass, as the legislature declares it shall pass, free and clear of all other liens. Anything short of that would nullify the purposes of the law and the foreclosure proceedings.

*Polenz v. City of Ravenna*, 145 Neb. 845, 849-50, 18 N.W.2d 510, 512 (1945). See, also, e.g., *City Real Estate v. Sullivan*, 116 Colo. 169, 180 P.2d 504 (1947); *County Com'rs. v. Drainage Dist.*, 56 Wyo. 260, 108 P.2d 590 (1940); *Western Beverage Co. v. Hansen et ux.*, 98 Utah 332, 96 P.2d 1105 (1939); *Means v. Incorporated City of Boone*, 214 Iowa 948, 241 N.W. 671 (1932).

[5] In *Polenz, supra*, we further noted the well-established principle that the title conveyed under a tax sale is not derivative, but is a new title in the nature of an independent grant by the sovereign authority, and the purchaser takes free from any encumbrances, claims, or equities connected with the prior title. See, *Dent v. City of North Platte*, 148 Neb. 718, 28 N.W.2d 562 (1947); *Polenz, supra*; *Coffin v. Old Line Life Ins. Co.*, 138 Neb. 857, 295 N.W. 884 (1941). This is why tax sale proceedings operate as a release of real property from liens and taxes included therein, and the sheriff's deed passes title "to the purchaser free and clear *of all liens of every nature whatsoever* and the interest or interests of all persons over whom the court had jurisdiction." (Emphasis supplied.) § 77-1914. See, also, *City Real Estate, supra*; *Western Beverage Co., supra*; *Means, supra*.

In short, contrary to the City's suggestion, our holding in *Polenz, supra*, was not premised upon the fact that the plaintiff was a governmental subdivision. Rather, it was based on the nature of a tax foreclosure proceeding and dictated by our determination that it was necessary for the special assessment liens to be extinguished in order for the priority of the general tax liens to be vindicated. The distinction urged by the City is simply not a meaningful one.

[6] The City also relies upon § 14-557, which provides, in relevant part, that general municipal liens are a first lien upon real estate, and that "[a]ll special assessments regularly levied shall be a perpetual lien on the real estate assessed from the date of levy until paid irrespective of the county in which such real estate is situated, but shall be subject to all general taxes." However, a "perpetual lien" is not intended to continue delinquent taxes in force against real estate after a statute has barred a right of action. *D'Gette v. Sheldon*, 27 Neb. 829, 44 N.W. 30 (1889). Accord, *Spiech v. Tierney*, 56 Neb. 514, 76 N.W. 1090 (1898); *Alexander v. Shaffer*, 38 Neb. 812, 57 N.W. 541 (1894).

[7] Rather, the word "perpetual" was used in the sense that "[t]he lien conferred by the statute is fixed upon the land itself and is primary, overriding all other liens, since a sale thereunder if duly made would extinguish all other claims . . . ." *D'Gette*, 27 Neb. at 836, 44 N.W. at 32. Real estate can still be discharged from a perpetual lien by payment, sale for taxes, or the neglect of

the purchaser to foreclose the lien until after the statute of limitations has run. *Spiech, supra*. See, also, e.g., *Forman Realty Corp. v. Brenza*, 11 Ill. 2d 531, 144 N.E.2d 623 (1957); *City Real Estate v. Sullivan*, 116 Colo. 169, 180 P.2d 504 (1947); *City of Albuquerque v. Middle Rio Grande Conservancy Dist.*, 45 N.M. 313, 115 P.2d 66 (1941); *County Com'rs. v. Drainage Dist.*, 56 Wyo. 260, 108 P.2d 590 (1940); *State v. Day County*, 64 S.D. 370, 266 N.W. 726 (1936). Compare Neb. Rev. Stat. § 46-555 (Reissue 2004) (expressly providing that taxes and assessments levied by water reclamation districts constitute perpetual lien "and no sale of such property to enforce any general, state, county, city, village or school tax or other liens, shall extinguish the perpetual lien of such taxes and assessments").

Finally, the City contends that a purchaser at a tax foreclosure sale must pay subsequent taxes and special assessments prior to delivery of a sheriff's deed, pursuant to § 77-1913, which requires a purchaser to pay "subsequent taxes levied and assessed against the property." In contrast, INA argues that the "subsequent taxes" that must be paid pursuant to § 77-1913 are general taxes, and do not include special assessments. But we have no occasion, in these cases, to consider whether "subsequent taxes" within the meaning of § 77-1913 include special assessments, although that conclusion could certainly be drawn from § 77-1858, which provides in part that "[a]ll provisions of the revenue law now in force with reference to the collection of taxes shall apply with equal force to all taxes and special assessments levied by such county, municipality, drainage district, or other political subdivision of the state." In these cases, the City's special assessments cannot be "subsequent taxes," because they are not "subsequent" within the meaning of § 77-1913.

[8-10] The special assessments at issue here were levied after the sale of the tax certificates, but prior to commencement of the foreclosure proceedings. Tax liens arising subsequent to the sale of a tax certificate, but prior to the commencement of the foreclosure proceeding, are included in the foreclosure decree and satisfied by the proceeds of the sheriff's sale. See § 77-1902. Thus, the subsequent taxes that a purchaser at a sheriff's sale in the foreclosure of a tax certificate is required to pay before confirmation of the sale are limited to those levied and assessed

on the property "under foreclosure," i.e., taxes assessed and levied after commencement of the foreclosure proceeding. See, § 77-1913; *Douglas County v. Village of Ralston*, 133 Neb. 834, 277 N.W. 341 (1938). "Subsequent taxes" within the meaning of § 77-1913 do not include taxes, whether general taxes or special assessments, that were assessed and levied prior to the commencement of the foreclosure proceeding.

## CONCLUSION

In five of these consolidated cases, the district court correctly concluded that the City's special assessment liens were secondary to the general lien represented by the tax certificate and that the special assessment liens would be extinguished by foreclosure and sheriff's sale, regardless of whether the proceeds of the sale were sufficient to pay the special assessments. The court's orders in those cases are affirmed. In the remaining three cases, the court incorrectly concluded that the special assessment liens would remain attached to the property after foreclosure and sale. In those cases, the court's orders are reversed, and the causes remanded for further proceedings consistent with this opinion.

JUDGMENTS IN NOS. S-05-268, S-05-348, S-05-414, S-05-415, AND S-05-650 AFFIRMED.
JUDGMENTS IN NOS. S-05-231, S-05-338, AND S-05-421 REVERSED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

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WILLIAM JAPP AND MARI JAPP, HUSBAND AND WIFE, ET AL., APPELLANTS, V. PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF NEBRASKA, AND DIAL REALTY DEVELOPMENT CORP., A NEBRASKA CORPORATION, APPELLEES.

716 N.W.2d 707

Filed July 7, 2006. No. S-05-398.

1. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision.

3. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
4. **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.
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. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
6. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
7. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.
8. **Natural Resources Districts: Appeal and Error.** The provisions of Neb. Rev. Stat. § 2-3255 (Reissue 1997) are a mechanism for appeal solely from decisions or orders of a board of directors of a natural resources district regarding special improvement projects and are not applicable to decisions of the board that do not arise in the context of special improvement projects.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded for further proceedings.

LeRoy W. Sievers, Rodney M. Confer, Jocelyn Walsh Golden, and Kevin R. McManaman, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellants.

Terry J. Grennan and Michael F. Scahill, of Cassem, Tierney, Adams, Gotch & Douglas, and Jeffrey B. Farnham, P.C., L.L.O., for appellee Dial Realty Development Corp.

Paul F. Peters, P.C., L.L.O., of Taylor, Peters & Drews, for appellee Papio-Missouri River Natural Resources District.

CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The Papio-Missouri River Natural Resources District (PMRNRD) negotiated a purchase of land from Dial Realty Development Corp. (Dial) for the development of a reservoir

and dam. The board of directors of PMRNRD (Board) approved a resolution authorizing PMRNRD's general manager to execute an agreement with Dial for the project. The appellants, area landowners and taxpayers, filed a declaratory action against PMRNRD and Dial, seeking a declaratory judgment that the agreement violated procedures set forth in PMRNRD's policy manual and requesting an injunction preventing PMRNRD from using taxpayer moneys to support the project. During a hearing on the appellants' motion for a temporary restraining order, the district court dismissed the action due to the appellants' failure to meet the 30-day appeal requirement of Neb. Rev. Stat. § 2-3255 (Reissue 1997). The appellants filed this appeal, claiming that the 30-day appeal deadline of § 2-3255 does not apply under the circumstances and that the court erred in dismissing their complaint based on lack of jurisdiction. We agree, and reverse the judgment and remand the cause to the district court for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

PMRNRD entered into negotiations with Dial to purchase from Dial a tract of land located west of 192d Street between Dodge and Blondo Streets in Omaha, Nebraska, for the development of a reservoir and dam (Dam Site 13). On November 18, 2004, despite opposition by several individuals, the Board approved a resolution authorizing PMRNRD's general manager to execute an agreement with Dial to build Dam Site 13. The general manager implemented the resolution by executing the agreement with Dial.

On March 11, 2005, William and Mari Japp, Todd and Jennifer Andersen, Larry and Carine Stava, Kenneth and Dianna Olson, and Jack and Susan Lorsch (collectively the appellants), all resident landowners and taxpayers within the PMRNRD, filed a complaint against PMRNRD and Dial. The appellants sought a declaratory judgment that the actions of PMRNRD violated the bidding procedures prescribed in PMRNRD's policy manual and violated Nebraska law as to the use of public funds for private purposes. The appellants also sought an injunction preventing PMRNRD from spending taxpayer funds on the Dam Site 13 project.

The appellants also filed a motion for temporary restraining order to prevent PMRNRD and Dial from entering into agreements for the purchase and development of Dam Site 13 and

spending taxpayer money in furtherance of such agreements. PMRNRD and Dial filed responses, claiming, in part, that the appellants' complaint and motion were barred by § 2-3255. At a hearing on the appellants' motion for temporary restraining order, the district court dismissed the action for lack of jurisdiction, citing the appellants' failure to appeal the decision of the Board within 30 days, as required by § 2-3255.

The appellants appeal the judgment of the district court.

## ASSIGNMENTS OF ERROR

The appellants assign, summarized, restated, and renumbered, that the district court erred in dismissing their action pursuant to § 2-3255 because (1) PMRNRD did not approve Dam Site 13 as an improvement project area and, thus, § 2-3255 does not apply; (2) even if § 2-3255 applies to Dam Site 13, the appellants chose to file a taxpayer lawsuit to prevent the illegal expenditure of taxpayer funds, which is separate from an appeal of a decision of the Board under § 2-3255; and (3) PMRNRD and Dial failed to establish when or if the Board's decision was entered by the secretary of the Board pursuant to § 2-3255.

[1] The appellants also argue that the hearing was confined to the resolution of the appellants' motion for temporary restraining order and that thus, the appellants were not given an adequate opportunity to respond to and brief the issue of dismissal prior to the district court's order. However, the appellants failed to assign this argument as error, and thus, we will not address it. Errors argued but not assigned will not be considered on appeal. *Demerath v. Knights of Columbus*, 268 Neb. 132, 680 N.W.2d 200 (2004).

## STANDARD OF REVIEW

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *In re Guardianship of Sophia M., ante* p. 133, 710 N.W.2d 312 (2006).

## ANALYSIS

The Legislature created natural resources districts to oversee the conservation, protection, development, and management of Nebraska's natural resources. Neb. Rev. Stat. § 2-3201 (Cum.

Supp. 2004). A natural resources district, governed by a board of directors, has many purposes, including prevention of damages from flood water and sediment, flood prevention and control, water supply for beneficial uses, and drainage improvement and channel rectification. Neb. Rev. Stat. §§ 2-3213 and 2-3229 (Reissue 1997). The statutes that define the duties of a natural resources district distinguish between projects developed by the district that are determined by the board to be of general benefit to the district and those established as improvement project areas that involve projects that result in special benefits to property within the improvement project areas. Neb. Rev. Stat. § 2-3252 (Cum. Supp. 2004). Improvement project areas may be established and the projects authorized after a hearing by the board, as specified in Neb. Rev. Stat. §§ 2-3253 to 2-3255 (Reissue 1997 & Cum. Supp. 2004). See § 2-3252(2).

Section 2-3255, the statute at issue here, is titled "Improvement projects; apportionment of benefits; appeal" and states:

> From any order or decision of the board of directors of the natural resources district, an appeal may be taken to the district court by any person aggrieved . . . . Where the project area is confined to the limits of one county, the appeal shall be taken to the district court of that county. When such project includes lands in two or more counties, the appeal shall be taken to the district court of the county in which the largest portion of the land which is claimed to be affected adversely by the order or decision appealed from lies. The appeal must be taken within thirty days after such decision or order has been entered by the secretary of the board of directors.

The appellants argue that § 2-3255 applies exclusively to improvement project areas and that because Dam Site 13 was not approved as an improvement project area, § 2-3255 does not apply in this case. In contrast, PMRNRD and Dial assert that the appellants had an adequate remedy at law under § 2-3255 and, having failed to utilize that statutory remedy by appealing within 30 days of the entry of the Board's decision, the appellants cannot salvage their claim by seeking a declaratory judgment and injunction. PMRNRD and Dial do not dispute the appellants'

assertion that Dam Site 13 was not approved as an improvement project area.

[3,4] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. See *Caspers Constr. Co. v. Nebraska State Patrol*, 270 Neb. 205, 700 N.W.2d 587 (2005). 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. *Lamar Co. v. Omaha Zoning Bd. of Appeals, ante* p. 473, 713 N.W.2d 406 (2006).

[5] 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. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Shipler v. General Motors Corp., ante* p. 194, 710 N.W.2d 807 (2006). The appellees urge us to focus on the plain meaning of § 2-3255, which provides for an appeal "[f]rom *any* order or decision of the board of directors" (emphasis supplied), including decisions regarding general benefit projects. However, we cannot ignore the context in which § 2-3255 appears.

[6,7] A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *In re Interest of Powers*, 242 Neb. 19, 493 N.W.2d 166 (1992). The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible. *Shipler, supra*. The appellants assert that, reading § 2-3255 along with the statutory sections preceding it, the Legislature clearly intended § 2-3255 to apply solely to improvement project areas. We agree.

Section 2-3252(1) specifically addresses projects determined to be of general benefit to natural resources districts and provides that general benefit projects are to be carried out with "any available funds of the district, including proceeds from the district's tax levy." Sections 2-3252(2) through 2-3255 then provide

detailed requirements for establishing and funding special improvement projects, providing that each natural resources district may establish such areas to carry out projects that result in special benefits to property within the improvement project areas. Notably, subsection (2) of § 2-3252 states that improvement project areas may be established and the projects authorized after a hearing by the board of directors in the manner provided for by §§ 2-3253 to 2-3255. Thereafter, §§ 2-3253 and 2-3254 discuss the procedural process for establishing improvement project areas and apportioning benefits for the allocation of costs. Section 2-3254.01 follows, stating:

> When determining the apportionment of benefits under section 2-3254, the board shall also make a determination as to what portion of the project will result in special benefits to lands and property and such determination, if not appealed as provided in section 2-3255, shall be conclusive as establishing the authority of the district to levy special assessments and issue bonds and warrants for such project.

Sections 2-3254.02 to 2-3254.07 provide further direction regarding improvement project areas and are followed by § 2-3255, the statute at issue here. Section 2-3255 follows the multiple sections discussing improvement project areas, and furthermore, the only mention of the appeal provided under § 2-3255 in the statutory sections preceding § 2-3255 are in the context of improvement project areas.

Based on the statutory scheme employed by the Legislature and the placement of § 2-3255 within that scheme, we conclude that the appeal provided in § 2-3255 applies only to decisions involving improvement project areas. The statutory sections preceding § 2-3255 specify the manner in which landowners can propose an improvement project area and discuss their proposal at a hearing before the board of directors. In addition, the statutes set forth the process of apportioning benefits of a special project and conducting a meeting during which parties may object to the apportionment. The statutes go on to provide additional details regarding the financing of improvement project areas. Finally, the venue provisions *within* § 2-3255 refer to the "project area" in which the improvement is confined—an unmistakable reference to an improvement project area.

[8] Given the specific procedural requirements for establishing improvement project areas and for apportioning benefits of the improvements, e.g., notice and hearing, we find it logical that the Legislature would then provide a specific manner through which to seek review of decisions made pursuant to those statutory sections. In other words, it is sensible that the Legislature would provide a specific appeal procedure from a decision regarding a specially confined, approved, and financed improvement project, but not extend that procedure to "decision[s]" regarding developments of a general benefit to the district, or a whole host of other issues, many of which may or may not require a hearing or notice to the public. Based on our review of the statutory scheme, we determine that the provisions of § 2-3255 are a mechanism for appeal solely from decisions or orders of a board of directors of a natural resources district regarding special improvement projects and are not applicable to decisions of the board that do not arise in the context of special improvement projects.

In this case, Dam Site 13 was not approved as an improvement project area, and thus, the appellants were not required to challenge the Board's decision under § 2-3255. We, therefore, conclude that the district court erred in dismissing the appellants' action for lack of jurisdiction under § 2-3255.

We do not express an opinion on the merits of the appellants' complaint or motion for temporary restraining order, as the district court did not render its judgment based on the merits. Having determined that the district court erred in dismissing the appellants' action for lack of jurisdiction based upon the appellants' failure to appeal under § 2-3255, we need not address the appellants' remaining assignments of error.

## CONCLUSION

Based on the foregoing, we reverse the judgment of the district court dismissing the appellants' complaint for lack of jurisdiction, and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

HENDRY, C.J., and STEPHAN, J., not participating.

# NEBRASKA LEGISLATURE ON BEHALF OF THE STATE OF NEBRASKA, PLAINTIFF, V. C. DAVID HERGERT, REGENT, UNIVERSITY OF NEBRASKA, DEFENDANT.

720 N.W.2d 372

Filed July 7, 2006. No. S-06-425.

1. **Constitutional Law: Public Officers and Employees: Impeachment.** A conviction of impeachment requires the concurrence of two-thirds of the members of the court of impeachment that the civil officer is guilty of one or more impeachable offenses.
2. **Public Officers and Employees: Impeachment.** All civil officers of this state are liable to impeachment for any misdemeanor in office.
3. **Impeachment: Words and Phrases.** An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose.
4. **Public Officers and Employees: Impeachment.** The act or omission for which a civil officer may be impeached and removed from office must relate to the duties of the office.
5. **Constitutional Law: Impeachment: Proof.** Under the 1986 amendment to Neb. Const. art. III, § 17, an impeachment trial is conducted as a civil proceeding and the standard of proof for a conviction of impeachment is clear and convincing evidence.
6. **Impeachment: Proof.** Because criminal conviction is not at stake in an impeachment proceeding, a "beyond a reasonable doubt" standard of proof is not required.
7. ____: ____. In an impeachment proceeding, a civil officer's preincumbency conduct is relevant to show the officer's motives and intent as they relate to the officer's conduct while in office.
8. **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.
9. **Criminal Law: False Reporting.** In the context of an ongoing investigation, false reporting is dependent upon the existence of a legitimate and valid investigation of facts which could constitute a predicate offense.
10. **Criminal Law: False Reporting: Police Officers and Sheriffs.** Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 2004) is intended to prevent persons from providing false information to police officers and other officials who have the authority to investigate actual criminal matters.
11. **Criminal Law: Intent.** Obstruction of government operations can be shown in one of three ways: by showing that the defendant (1) committed some physical act, (2) breached an official duty, or (3) committed some other unlawful act with the intent to obstruct the administration of justice.
12. **Public Officers and Employees: Evidence.** A state officer has a fiduciary duty to the public to provide truthful information during an official investigation of the officer.
13. **Constitutional Law: Statutes: Standing.** A defendant lacks standing to raise a constitutional challenge to a statute or statutory scheme that the defendant has fraudulently

circumvented or avoided when the defendant raises the challenge in a proceeding not intended to enforce the statute.

Impeachment trial before the Supreme Court under the provisions of Neb. Const. art. III, § 17. Judgment of guilty on articles III and V, and order of removal and disqualification from office.

David A. Domina and Claudia Stringfield-Johnson, of Domina Law Group, P.C., L.L.O., for plaintiff.

Christopher M. Ferdico and Jacob P. Wobig, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., and Sean J. Brennan for defendant.

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

PER CURIAM.

## I. NATURE OF CASE

C. David Hergert was elected to the Board of Regents of the University of Nebraska from the seventh district on November 2, 2004. Shortly thereafter, several complaints were filed against Hergert with the Nebraska Accountability and Disclosure Commission (NADC), the state agency charged with administering and enforcing Nebraska's campaign finance laws. The campaign finance laws provide for reporting requirements both before and after the primary and general elections.

In one of the complaints, case No. 04-36, the NADC focused on Hergert's alleged failure to file a required affidavit of campaign spending. This affidavit was required to be filed when Hergert expended 40 percent of his estimated maximum expenditures for the general election (forty-percent affidavit). When a candidate files a forty-percent affidavit, it permits disbursement of public campaign funds to an opposing candidate who is otherwise qualified and has agreed to abide by voluntary campaign spending limits. Because Hergert did not file his forty-percent affidavit until after the general election, public funds were not released to Hergert's opponent for the general election, although the opponent was entitled to public funds. A central issue of the investigation in case No. 04-36 was the "triggering" date requiring Hergert to file the forty-percent affidavit.

The NADC investigated complaints against Hergert throughout the fall of 2004 and into the spring of 2005. Based upon

these complaints, in April 2005, the NADC and Hergert entered into settlement agreements, in which Hergert agreed to pay $33,512.10 in civil penalties and late filing fees for violations of campaign finance laws. As part of the settlement agreements, Hergert admitted in one complaint, case No. 04-36, that he had filed his forty-percent affidavits in both the primary and general elections after the specified time limit for filing the affidavits had expired.

In July 2005, after the settlement agreements were approved, the Nebraska State Patrol initiated an independent investigation of Hergert's campaign activities. On April 12, 2006, the Legislature adopted resolution No. 449, which set forth 10 articles of impeachment against Hergert.

Pursuant to Neb. Const. art. III, § 17, a special session of this court was called to try the articles of impeachment. We focus only upon article III, "False Reporting," and article V, "Obstructing Government Operations." We find Hergert guilty of both.

## II. ARTICLES OF IMPEACHMENT

Legislative resolution No. 449 contains 13 paragraphs of the Legislature's general findings, followed by the 10 articles, which are divided into two sections. Articles I through VI are based on allegations of misconduct occurring on or after January 6, 2005, the date on which Hergert was sworn into office. Articles VII through X are based on allegations of misconduct occurring before January 6. Each article contains multiple allegations and a specific statute or constitutional provision that the Legislature contends was violated by Hergert's misconduct. We summarize the Legislature's charges.

In articles I through VI, the Legislature charges Hergert with the following: (1) falsely swearing his oath of office because his campaign filings allowed him to improperly influence voters and the constitutional oath requires officers to swear they have not committed such acts; (2) violating federal mail fraud statutes through his false and deceptive campaign filings; (3) falsely reporting the date of a material expenditure in his January 11, 2005, campaign statement; (4) in October 2005, making false statements during a State Patrol interview; (5) obstructing government operations by falsely reporting the date of a material expenditure in his January 11, 2005, campaign statement; and (6)

in October 2005, obstructing government operations by making false and intentionally misleading statements during a State Patrol interview.

As noted, the remaining articles of impeachment are related to Hergert's preincumbency conduct. In articles VII through X, the Legislature charges Hergert with the following: (7) intentionally failing to timely file his forty-percent affidavits in both the primary and general election periods; (8) intentionally omitting material expenditures from his October 25, 2004, campaign statement; (9) intentionally accepting loans that exceeded 50 percent of his campaign committee's nonloan receipts; and (10) falsely and intentionally reporting the date that his committee borrowed $44,000.

## III. STATUTORY SCHEME

A candidate for an elective state office is "responsible for filing all statements and reports required to be filed by his or her candidate committee" pursuant to two legislative acts. Neb. Rev. Stat. § 49-1447(2)(b) (Reissue 2004). The first act is the Nebraska Political Accountability and Disclosure Act (NPADA), Neb. Rev. Stat. §§ 49-1401 to 49-14,141 (Reissue 2004). The second act is the Campaign Finance Limitation Act (CFLA), Neb. Rev. Stat. §§ 32-1601 to 32-1614 (Reissue 2004).

Generally, the NPADA requires candidates for elective state office to form candidate committees and file campaign statements with the NADC once the candidate has raised, received, or expended $5,000 in a calendar year. § 49-1445. The NPADA requires candidate committees to file two preelection campaign statements and one postelection campaign statement for both the primary and general elections. See §§ 49-1454 and 49-1459.

Candidates for certain elective state offices, including the office of regent, are also required to file an affidavit stating whether they intend to abide by the voluntary campaign spending limits for the office under the CFLA. See § 32-1604.01(1). Abiding candidates agree to spend no more than 50 percent of the total campaign spending limit during the primary. See § 32-1604(3). For the office of regent, the total campaign spending limit, excluding specified unrestricted spending, is $50,000. *Id.* Therefore, the spending limit for the primary is $25,000.

If a candidate for a covered office files an affidavit stating an intent *not* to abide by the voluntary spending limit, then the candidate must include in the affidavit a reasonable estimate of his or her maximum expenditures for the primary election, which estimate may be amended up to 30 days before the primary election. § 32-1604(5)(a). The nonabiding candidate must also file an estimate for the general election by the 40th day following the primary election, which estimate may be amended up to 60 days before the general election. *Id.* A candidate is free to estimate expenditures at an amount greatly above or below the voluntary spending limit.

For both the primary and general election periods, when the nonabiding candidate expends 40 percent of his or her estimated maximum expenditures, he or she must notify the NADC via the forty-percent affidavit "no later than five days after the forty percent has been expended." § 32-1604(5)(b).

The NADC is required to "[p]rescribe forms for statements and reports that are required to be filed [under both the NPADA and CFLA] and furnish such forms to persons required to file such statements and reports," as well as to distribute these forms to the appropriate local officials. § 49-14,123(2) and (13).

## IV. EVIDENCE PRESENTED AT TRIAL

We begin with a summary of the articles of impeachment that control the disposition of this case. In article III, "False Reporting," the Legislature alleged that after the NADC initiated an investigation into Hergert's campaign activities, he filed a required postelection campaign statement for the general election on January 11, 2005. The Legislature alleged that this campaign statement contained false and deceptive information in violation of Neb. Rev. Stat. § 28-907 (Cum. Supp. 2004). Specifically, the Legislature alleged that Hergert reported in this statement that he incurred an expenditure to the Jackson-Alvarez Group (Jackson-Alvarez) on December 14, 2004, when the expense was actually incurred no later than October 5, 2004.

In article V, entitled "Obstructing Government Operations," the Legislature charged that the January 11, 2005, campaign statement constituted intentional obstruction of government operations, in violation of Neb. Rev. Stat. § 28-901 (Reissue 1995). The Legislature alleged that Hergert knowingly furnished

materially false information in this campaign statement, including the Jackson-Alvarez expenditure, with the intent of impeding a criminal investigation.

In these articles, the Legislature essentially alleges that while the NADC was investigating the triggering date for Hergert's forty-percent affidavit, he falsely reported the date he incurred the Jackson-Alvarez expenditure. The Legislature charges that by falsely reporting the date of this expenditure, Hergert intended to conceal from the NADC the actual date that he exceeded 40 percent of his estimated expenditures in the general election. The Legislature further alleges that this concealment obstructed the investigation into the case focusing on the forty-percent affidavit.

### 1. Evidence Adduced of Events Before Hergert Took Office

The statewide primary election in 2004 was held on May 11. The statewide general election in 2004 was held on November 2.

On February 17, 2004, Hergert filed as a candidate for the Board of Regents. Also on February 17, Hergert filed his statement of financial interests with the NADC, identifying himself as a candidate for the Board of Regents. On March 3, Frank Daley, the executive director of the NADC, sent a letter to Hergert, acknowledging receipt of Hergert's statement of financial interests and notifying Hergert that he would have further responsibilities under Nebraska's campaign finance laws once he raised, received, or spent $5,000 for his candidacy. Daley also informed Hergert that if he had not already received from local officials a copy of the NADC's candidate brochure to assist new candidates in complying with these obligations, he could obtain one from the NADC.

In March 2004, Hergert asked Michael Jacobson, president and CEO of Nebraskaland National Bank in North Platte, Nebraska, to be his committee treasurer. Jacobson initially declined to be Hergert's treasurer because of time constraints. After Hergert promised to prepare the reports and forward them to Jacobson to sign and to send to the NADC, Jacobson agreed to be the treasurer in name only and to allow Hergert to use his name in campaign advertising. Both Hergert and Jacobson then agreed Jacobson would have no responsibility for keeping committee records of receipts, accounts, or expenditures. Jacobson had no authority

regarding the committee's checking account at the Valley Bank and Trust Company in Gering, Nebraska.

On April 13, 2004, the NADC received Hergert's candidate committee's statement of organization. See § 49-1449 (requiring committee to file statement of organization within 10 days of formation). This statement listed Hergert's home address in Mitchell, Nebraska, as the address the committee would use for correspondence between the NADC. The statement listed April 5 as the date the committee had raised, received, or expended over $5,000. The statement also listed Valley Bank and Trust Company as the committee's official depository, listed Jacobson as the committee treasurer, and gave Jacobson's North Platte mailing address. No other committee members were named.

On April 13, 2004, the same day that Hergert filed his statement of organization, he also filed an affidavit with the NADC, swearing that he did not intend to abide by the campaign spending limits and that $65,000 was a reasonable estimate of his maximum expenditures for the primary election. The form affidavit for this report included a statement above the signatory line that the candidate understands he or she must file a forty-percent affidavit when 40 percent of the estimated maximum expenditure has been spent, if the candidate's estimate exceeds $25,000, the voluntary spending limit for the primary.

Also on April 13, 2004, Daley sent a letter to Jacobson at Hergert's home address. Daley informed Hergert that the committee's first primary campaign statement was late. Daley requested that the committee inform the NADC if the committee wished to receive correspondence at an address other than the one provided in the committee's statement of organization. Daley's letter further set forth every reporting period and due date for the primary and general election campaign statements, as follows:

| Report | Due Date | Reporting Period |
|---|---|---|
| 1st Primary | April 12, 2004 | through April 6, 2004 |
| 2nd Primary | May 3, 2004 | April 7, 2004 through April 26, 2004 |
| Post Primary | June 21, 2004 | April 27, 2004 through June 15, 2004 |
| 1st General | October 4, 2004 | June 16 through September 28, 2004 |
| 2nd General | October 25, 200[4] | September 29 through October 18, 2004 |
| Post General | January 11, 2005 | October 19 through December 31, 2004 |

Finally, Daley explained that because Hergert estimated his maximum expenditures for the primary at $65,000, he was required to file his forty-percent affidavit within 5 days of the committee's spending more than $26,000.

In addition to alerting Hergert in March 2004 to the availability of the NADC's candidate brochure, the NADC sent Hergert's committee two publications explaining its responsibilities under Nebraska's campaign finance laws: the "Candidate Committee Treasurer's Guide" and the "CFLA Candidate Brochure." The latter document provided information specific to the office of regent and, again, a calendar of important due dates for the 2004 election. Both documents detailed the NADC's filing requirements with examples.

On April 21, 2004, Daley again wrote Jacobson at Hergert's home address and at Jacobson's mailing address in North Platte, stating that the first campaign statement had still not been filed. Daley reiterated it was Hergert's responsibility to file a forty-percent affidavit within 5 days after spending $26,000 and enclosed a form for that purpose.

On May 5, 2004, Daley wrote directly to Hergert at his home address, stating that Hergert's second primary campaign statement, filed May 3, showed his committee had spent a total of $48,444.10 for the primary campaign. Daley informed Hergert that he had failed to file an affidavit within 5 days of spending 40 percent of his estimated maximum expenditures. Daley requested that Hergert send in the affidavit immediately.

Based on Hergert's May 3, 2004, campaign statement, Don Blank, the incumbent and one of the abiding candidates in the primary, was entitled to, and received, an additional $40,000 in public funds. Because of Hergert's delay in filing his forty-percent affidavit, however, Blank did not receive these public funds until 5 to 6 days before the primary. See § 32-1604(6).

On May 11, 2004, the primary election was held. Of the four nonpartisan candidates, Blank and Hergert advanced. On May 12, the day after the primary election, the NADC received Hergert's delinquent forty-percent affidavit. In the affidavit, he swore that he had spent 40 percent of his estimated maximum expenditures on April 22, 2004. The preprinted forty-percent affidavit is a one-page form. Instructions on the form advise

nonabiding candidates that they must file the affidavit within 5 days after spending 40 percent of their estimated expenditures and that failure to do so renders the candidate subject to criminal prosecution.

On May 24, 2004, the NADC assessed $225 in late filing fees to Hergert's committee for failing to timely file his first campaign statement for the primary election. Hergert was later fined for failing to timely file his late forty-percent affidavit in the primary as part of the April 2005 settlement agreements with the NADC.

On June 21, 2004, the NADC received Hergert's postprimary campaign statement and his estimate of maximum expenditures for the general election. In his estimate, Hergert swore that $25,000 was a reasonable estimate of his expenditures for the general election. Daley testified that given this estimate, Blank, the incumbent regent, would not be entitled to public funds in the general election period because Hergert's estimate did not exceed the $25,000 voluntary spending limit for the general election period. This is true notwithstanding Hergert's expenditures of $61,701.95 for the primary election. On September 3, the last date to amend the estimate, the NADC received an amended affidavit from Hergert, in which he swore that $40,000 was a reasonable estimate. Daley testified that because of the amended affidavit, Blank was entitled to $15,000 in public funds—the difference between the voluntary spending limit and Hergert's estimate—upon Hergert's expenditure of 40 percent of his $40,000 estimate, or $16,000.

On September 7, 2004, Mark Hinman, the deputy director for the NADC, wrote a letter to Hergert's campaign committee at the address identified at trial as Hergert's home address. Hinman reminded the committee that a candidate must file a forty-percent affidavit within 5 days of spending 40 percent of his or her estimated maximum expenditures. Hinman also warned that a candidate who is required to file this affidavit and fails to do so is subject to criminal prosecution.

### (a) Expenditures Triggering Filing of Hergert's Forty-Percent Affidavit

The Legislature's case against Hergert in articles III and V is grounded in his alleged concealment of the actual date that he

expended 40 percent of his maximum estimated expenditures for the general election. The date Hergert expended 40 percent of his estimate was the triggering date requiring Hergert to file his forty-percent affidavit within 5 days. The following facts are relevant to that triggering date:

In late September or early October 2004, Hergert, on the suggestion of a political consultant, approved an expenditure to Jackson-Alvarez to do research on Blank's political activities while a regent. Based on his communications with the consultant, Hergert believed that the research would cost around $7,000 to $8,000.

The evidence shows that Jackson-Alvarez' representative had completed his research at the University of Nebraska by the last week in September 2004. On October 5, Jackson-Alvarez' representative asked for a final cost for copies of records he had requested. On October 6, the university's administrator reported that the remaining copies would be sent "within the day."

On September 30, 2004, the NADC received Hergert's first campaign statement for the general election, covering the period from June 16 to September 28. The statement showed that his committee's total expenditures were $5,544.53 for the period from June 16 to September 28. Total receipts for the period were reported as $5,125.

Hergert received Jackson-Alvarez' report no later than the middle of October 2004. The contents of the Jackson-Alvarez report were used in Hergert's late-campaign advertising against his opponent, Blank. Jackson-Alvarez completed its work before Hergert was invoiced by the vendors that he hired to coordinate or execute Hergert's late-campaign advertisements. Those vendors included: (1) Majority Strategies, which invoiced the committee on October 13, 2004, at Hergert's home address for $10,456.55; (2) Scott Cottington, Inc., which invoiced the committee on October 17 for $36,000; and (3) the Nebraska Press Association, which faxed a quote of $9,847.62 to Hergert on October 19.

October 18, 2004, was the closing date for the second general election campaign statement. See § 49-1411 ("[c]losing date shall mean the date through which a campaign statement is required to be complete"). Although not listed on that campaign

statement, the evidence shows that on October 19, Hergert's committee paid $36,000 to Scott Cottington, Inc., and $10,456.55 to Majority Strategies, and that on October 21, the committee paid $9,847.62 to the Nebraska Press Association. On October 21, Hergert signed a promissory note for $65,100 to Valley Bank and Trust Company for an open line of credit, allowing multiple advances to be drawn against the principal loan amount. Hergert took the loan out specifically because at the time the three above-referenced checks were written for radio, newspaper, and television advertising, the committee's checking account had insufficient funds to cover them.

The evidence shows that the bank was to deposit advances from Hergert's loan into the committee's checking account when checks were presented for payment. The committee's bank statements show that on October 22, 2004, the bank transferred a $44,000 advance from Hergert's loan to the committee's checking account. On the same day, the bank paid and deducted from the committee's checking account the checks made payable to Scott Cottington, Inc., and Majority Strategies, totaling $46,456.55. By November 5, the bank had transferred $62,500 to the committee's checking account in loan advances.

On October 25, 2004, the NADC timely received from Hergert, by Federal Express, Hergert's second general election campaign statement for the period covering "Sept 28 [sic] 2004 TO Oct 18 2004." In the summary of expenditures, the statement showed that total expenditures for the period were $6,456.08 and that total receipts for the period were $5,808.30. The statement, however, did not include the required listing of the committee's unpaid bills and other accrued expenses. Thus, through October 18—the closing date for Hergert's last preelection campaign statement—Hergert's campaign statements showed that the committee's total expenditures for the general election period were $12,000.61 and that its total receipts were $10,933.30.

On November 2, 2004, Hergert was elected to the Board of Regents. On November 3, the NADC received from Hergert two separate reports of late contributions to his campaign. The first late contribution was reported as received on October 26, and listed the $44,000 loan from Valley Bank and Trust Company.

On November 12, 2004, the NADC received by Federal Express Hergert's notarized and fully signed forty-percent affidavit and an attached letter. Although Scott Cottington, Inc., had been paid $36,000 on October 19, Hergert swore that he expended 40 percent, or $16,000, of his maximum estimated expenditures of $40,000 for the general election on October 26, 2004. In the accompanying letter, Hergert stated that he had mailed his forty-percent affidavit to the NADC on October 29, but was advised by a member of the media on November 9 that the NADC had not received his filing. He further stated in the letter that "[t]here is a possibility of this report being misplaced . . ." in his office because October 29 was also the date that several hundred monthly invoices were mailed from his office. As noted, forty-percent affidavits are due "no later than five days after the forty percent has been expended." § 32-1604(5)(b).

Because Hergert's forty-percent affidavit was not filed until after the general election, no public funds were disbursed to Blank for the general election. Daley testified that Hergert's preelection campaign statements did not disclose that he had exceeded 40 percent of his estimated expenditures. See § 32-1604(6) (prohibiting disbursement of public funds to abiding candidate unless nonabiding opponent files forty-percent affidavit or nonabiding opponent's preelection campaign statements or NADC audits reveal that nonabiding opponent made expenditures exceeding 40 percent of his or her maximum estimated expenditures).

(b) NADC Complaints and Investigation

Shortly after Hergert was elected, three separate complaints were filed with the NADC regarding Hergert's conduct during the campaign. These complaints became cases Nos. 04-35, 04-36, and 04-43. An additional complaint was filed in May 2005 but is not relevant to our analysis.

Case No. 04-35 involved Hergert's failure to report the late contribution of $44,000 within 2 days of his committee's receipt of the loan proceeds on October 26, 2004. Case No. 04-43 involved Hergert's unlawful receipt of $49,000 in loans on October 26 and 29. This amount was greater than 50 percent of the committee's receipts from sources other than loans at the time the loans were accepted. See § 49-1446.04(1) (prohibiting candidate

committees from accepting, after 30 days of formation, loans greater than 50 percent of committee's receipts, excluding loan proceeds).

The complaint filed in case No. 04-36 ultimately resulted in the Legislature's charges in articles III and V. On November 4, 2004, Daley received a letter from Blank, alleging facts that, according to Blank, showed (1) Hergert's committee had made expenditures which should have triggered the filing of Hergert's forty-percent affidavit and (2) the committee should have reported those expenditures on Hergert's second campaign report filed on October 25. On Daley's recommendation, the NADC commenced an investigation, which became case No. 04-36, looking into Hergert's alleged violation of § 32-1604(5)(b) because he failed to file a forty-percent affidavit until after the general election. Daley sent the notification of this investigation to Hergert on November 12.

On November 22, 2004, Hergert's attorney, Kermit Brashear, wrote Daley to request more time to respond to the allegations because of the upcoming holidays. In the letter, Brashear stated: "Hergert prepared the 40 Percent Affidavit on behalf of the Committee, and believes in good faith that he placed same with the United States Postal Service on October 29, 2004, addressed to the [NADC]."

On November 30, 2004, pursuant to these three complaints, the NADC commenced an audit of the committee's records, covering the period from June 1 through December 31, 2004. The audit required the committee to provide its records of receipts and expenditures, including: bank statements, contribution records, deposit slips, canceled checks, invoices, billing statements, contracts, and any other records relevant to receipts and expenditures.

On December 9, 2004, William Howland, general counsel for the NADC, wrote to Brashear and specifically responded to Brashear's contention that Hergert believed in good faith he had mailed his forty-percent affidavit on October 29:

> The facts and circumstances surrounding his belief is an area that I am interested in pursuing by way of a deposition of . . . Hergert. I believe that's probably the quickest way to get to the resolution of this matter.

. . . .

. . . I would also like to have you check your calendar and . . . Hergert's for possible dates for a deposition.

On December 21, 2004, Brashear sent to the NADC the committee's records from June 1 through December 8, 2004, including its bank statements, a summary of the committee's banking transactions (i.e., a check register), deposit slips, and copies of invoices through December 8. The NADC investigations were ongoing when Hergert took office on January 6, 2005, and when Hergert filed his postelection campaign statement on January 11.

### 2. Evidence Adduced of Events After Hergert's Assuming Office

On January 6, 2005, Hergert was sworn into office. On January 11, the NADC received Hergert's postelection campaign statement for the general election, covering the period from "October 18 [sic] 2004 TO December 31 2004." Hergert's signature on the report bears a date of January 4. Jacobson's signature was dated January 10. On January 10, after Charlotte Herrell, the office manager for Hergert's businesses, had sent the completed campaign statement to Jacobson to sign and to file, she faxed to Jacobson two pages which were to be substituted and placed in the report before filing. The two substitute pages are identifiable by the fax inscription at the top of each page from "Hergert Milling, Inc.," dated January 10, 2005.

The first substituted page summarizes the committee's receipts, expenditures, and cash balance. The second substituted page is the required listing of the committee's unpaid bills and other accrued expenses. On the second page, Hergert reported that the committee had incurred an unpaid expenditure of $13,272.66 to Jackson-Alvarez on December 14, 2004. According to Hinman's testimony, the two pages are not related, i.e., the total of unpaid expenditures from the unpaid bills section of the campaign statement is not brought forward in the summary page.

Hergert also reported borrowing $62,500 from Valley Bank and Trust Company on October 22, 2004. A typewritten insertion listed $59,907.20 in paid expenditures over $250. These expenditures included: (1) $36,000 paid to Scott Cottington, Inc., on October 19; (2) $10,295 paid to Majority Strategies on October 19; and (3) $9,727.13 paid to the Nebraska Press Association on

October 21. The committee's total expenditures for the period were reported as $75,923.07.

On January 31, 2005, the NADC received Hergert's annual campaign statement for his committee, signed by Hergert and Brenda Spath as the committee's new treasurer. Spath was an employee of one of Hergert's businesses. The annual statement did not list the Jackson-Alvarez expenditure as either a paid or an unpaid expenditure.

On February 15, 2006, Hinman wrote to Spath at Hergert's home address to ask why the reported expenditure to Jackson-Alvarez in the January 11 filing was not listed as either a paid or an outstanding bill in the annual statement. On February 23, the NADC received Spath's response: "[P]lease be advised check 1065 was paid to Jackson-Alvarez Group in the amount of $13,272.66." Spath did not provide a date for this payment or a copy of the check. Contrary to Spath's representation, the record shows the amount of check No. 1065 was actually $13,978.98 and that it was paid out of the committee's checking account on April 21, 2005. The date on the face of the check to Jackson-Alvarez appears to be March 4, 2005. The check notation provides that it was written for "legal fees."

At some point after the NPADA complaints were filed, Daley and Howland met with the Attorney General, who deferred jurisdiction to the NADC in the Hergert investigations. On March 7, 2005, Brashear wrote Howland and offered to settle the existing complaints against Hergert for $34,522.10, on the condition that no criminal charges be initiated, that Hergert's deposition be canceled, and that the offer constitute a complete resolution of all pending matters. On March 8, Howland responded to Brashear in writing. In that letter, Howland stated:

> One last concern that I want to mention is that I noticed that the [January 11 campaign statement] shows a negative balance on the campaign account in the amount of $12,349.83 along with an unpaid bills balance of $13,272.66 both of which will have to be paid from contributions from the candidate or others and **not** from additional loans.

In April 2005, the NADC approved all the settlements, which required Hergert to pay a total of $33,512.10 in late filing fees and civil penalties.

In July 2005, the Nebraska State Patrol initiated an independent investigation and interviewed Hergert on October 8, 2005. During that interview, Hergert claimed that he delinquently filed, on November 3, 2004, the report of the $44,000 late contribution because he had forgotten to sign the report before he left to go on a campaign trip. When asked why he had used October 26, 2004, on the report as the date that he received the $44,000 loan, Hergert stated that he did not prepare the report and relied on his office staff for the accuracy of all his reports. He also attempted to distinguish a line of credit from a loan: "[W]hen that [late contribution] report was due, they [his office staff] just called there and said what is the balance on the note. And took it off the balance. It wasn't a loan that day, that was just the balance of, of the account that day." Similarly, he did not know why the January 11, 2005, campaign statement showed that the bank had loaned his committee $62,500 on October 22, 2004, instead of October 26, because he did not prepare the January 11 report.

Hergert denied knowing that Scott Cottington, Inc., had invoiced his committee on October 17, 2004. He admitted knowing that Jackson-Alvarez had completed its work in early October, admitted his belief that the firm's research would cost $7,000 to $8,000, but stated that he did not report the expense because Jackson-Alvarez had not billed the committee. Hergert also stated that he determined the date of an expenditure was the date a check cleared the bank. He admitted, however, that he did not verify when a check had cleared.

Hergert stated that only the treasurer and those preparing his reports would know whether any of his expenditures were reported after the date they were incurred. He stated that he did not instruct his staff when to report expenses because he had not read the NADC's candidate's handbook. Finally, Hergert stated during the interview that once he learned the NADC had not received his forty-percent affidavit, he and Herrell "tore up the office" looking for the form until he finally instructed her to use a duplicate form from his files. Hergert claimed that a month later, he found the original forty-percent affidavit form in a "chicory file" for one of his businesses.

After the Legislature adopted its resolution of impeachment, the Legislature's counsel deposed Hergert on May 2, 2006.

Hergert testified that he self-directed his campaign, but admitted that he had not made any effort to acquaint himself with the NADC regulations or to read its publications. Hergert testified that he told Herrell to alert him when the committee had spent 40 percent of his estimated expenditures. He repeated his contention that he considered a payment made when it cleared the bank for the purpose of triggering the requirement of sending in his forty-percent affidavit.

Hergert also testified that he had learned since his interview with the State Patrol that he was not required to sign late contribution reports and that he did not know why the $44,000 contribution was reported late. He stated that he did not learn until later that the loan advance had been made on October 22, 2004, instead of October 26.

Hergert admitted receiving the Jackson-Alvarez report by mid-October 2004 and using its contents in his advertising. He further admitted that Jackson-Alvarez had completed its work before he was invoiced by Majority Strategies on October 13 and Scott Cottington, Inc., on October 17, and before the Nebraska Press Association quoted him a price on October 19. He also admitted that Jacobson was not responsible for the content of any of his reports and that he told Herrell what date to put on the forty-percent affidavit. When asked why he choose October 26 as the date to use for his forty-percent affidavit, he stated, "I had received a call from Cottington and said he hadn't received the money, and would I make sure that it was made available, so I determined that that was the date we made it available." Although he admitted that he wrote the $36,000 check to Scott Cottington, Inc., on October 19, he stated that he did not use that date because the check had not cleared the bank.

Hergert denied (1) that he directed Herrell to make corrections to his January 11, 2005, campaign statement; (2) that he directed Herrell to fax the substitute pages to Jacobson on January 10, to place in the January 11 filing; or (3) that he saw the faxed pages before his deposition. When asked about events in October 2004, Hergert testified that he last spoke to someone at Jackson-Alvarez in the middle of October 2004 and that neither he nor anyone in his campaign had communicated with the firm, directly or indirectly, since that time, including all of 2005 and 2006.

Yet, when asked why he had reported the Jackson-Alvarez bill as accrued on December 14, 2004, Hergert responded: "I don't know. We were notified that we owed this amount." But Hergert was unable to say who from Jackson-Alvarez had made the contact, who had received the notification, or whether the contact was made via a telephone call. Hergert stated that he used the date he was notified because he knew the work was completed. Although he delayed payment until March or April 2005 because he contested the amount of the "claim," Hergert did not use the date the check cleared the bank, April 21, 2005, as the date he incurred the expenditure.

During trial, Herrell testified that she determined when to send in the campaign statements and that she used the date a check was written to a vendor as the expenditure date. She testified that she only signed campaign checks at Hergert's direction. In contrast to Hergert's deposition testimony, Herrell stated that she was never told that she should not list an expenditure until she could look at the back of the check to see if it had cleared the bank or until she had received a canceled check from the bank. She testified that Hergert never spoke to her about the forty-percent affidavit being lost, other than to dictate the letter he sent to the NADC accompanying his late filing in November 2004. She also testified that she relied on Hergert to tell her when to send in the forty-percent affidavits and reports of late contributions. Hergert admitted during his trial testimony that he was responsible for the dates of these filings. He again admitted that Jackson-Alvarez had completed its work by the time he received its report in mid-October and maintained that he had never received an invoice from them.

Regarding the January 11, 2005, filing, Herrell testified that she faxed the substituted pages to Jacobson at Hergert's direction. The parties stipulated that Jacobson's assistant would testify, if called as a witness, that she was contacted by telephone and asked to make this substitution before sending the report to the NADC. Herrell also testified that she never saw any invoice from Jackson-Alvarez and that Hergert provided her the information about that expenditure reported in the January 11 campaign statement.

## V. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

### 1. Impeachable Offense: Misdemeanor in Office

[1,2] Article III, § 17, of the Nebraska Constitution sets forth the procedures for impeaching a civil officer of this state and provides in part that "[t]he Legislature shall have the sole power of impeachment, but a majority of the members elected must concur therein." Upon the Legislature's adoption of a resolution of impeachment against any civil officer other than a member of this court, a special session of this court must be called to try the articles of impeachment. A conviction of impeachment requires "the concurrence of two-thirds of the members of the Court of impeachment" that the officer is guilty of "one or more impeachable offenses." Neb. Const. art. III, § 17. Article IV, § 5, provides: "All civil officers of this state shall be liable to impeachment for any misdemeanor in office."

[3] This court first sat as an impeachment court in 1893, for the impeachment trials of members of the board of public lands and buildings, who were accused, inter alia, of failing to oversee the operations of a contractor who defrauded the State. See, *State v. Hastings*, 37 Neb. 96, 55 N.W. 774 (1893); *State v. Leese*, 37 Neb. 92, 55 N.W. 798 (1893); *State v. Hill*, 37 Neb. 80, 55 N.W. 794 (1893). The impeachment proceedings in *Leese* and *Hill* were dismissed because this court has no jurisdiction to try accusations arising from articles of impeachment adopted after a state officer has resigned or his or her term has expired. See, *Leese, supra*; *Hill, supra*. In *Hastings*, however, the court reached the issues on the merits and provided a comprehensive discussion of an "impeachable misdemeanor" under the Nebraska Constitution:

> [T]he vital question in this case [is] what under our constitution amounts to an impeachable misdemeanor? [I]n its solution, we have endeavored to adopt the rule best sanctioned by authority and which is just, alike to the state and its servants. [W]e are constrained to reject . . . the doctrine that an impeachable misdemeanor is necessarily an indictable offense, as too narrow and tending to defeat rather than promote the end for which impeachment as a remedy was designed and not in harmony with the fundamental

> rules of constitutional construction. On the other hand, the contention [that] the term misdemeanor in office is not susceptible of a legal definition, but that every such proceeding should be determined upon the facts in the particular case, is, to say the least, strikingly illogical. . . . The sound rule . . . lies midway between the two extremes. . . . "[*A*]*n impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose*." . . . It may be safely asserted that where the act of official delinquency consists in the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office. But where it consists of a mere error of judgment or omission of duty without the element of fraud, and where the negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state.

(Emphasis supplied.) *Hastings*, 37 Neb. at 114-17, 55 N.W. at 780.

[4] The italicized text in this passage defining an impeachable misdemeanor was later adopted as being "equally applicable today" in *State v. Douglas*, 217 Neb. 199, 202, 349 N.W.2d 870, 874 (1984). The *Douglas* court also clarified that "the act or omission for which an officer may be impeached and removed from office must relate to the duties of the office." *Id.* at 201, 349 N.W.2d at 874. Thus, under both *Hastings* and *Douglas*, three categories of conduct may constitute an impeachable offense by a state officer:

(1) An act that violates a statute, constitutional provision, or oath and is related to the officer's duties;

(2) A simple neglect of duty committed for a corrupt purpose; or

(3) A neglect or disregard of duty that is so gross or flagrant, the officer's willful and corrupt intent may be inferred.

### 2. Standard of Proof

[5] In 1986, the procedural requirements of article III, § 17, were amended to provide, inter alia, that an impeachment trial "shall be conducted in the manner of a civil proceeding" and that the standard of proof for a conviction of impeachment shall be "clear and convincing evidence." 1986 Neb. Laws, L.R. 318.

In his answer and his brief, Hergert argues that the articles of impeachment violate his constitutional right to due process because

> the Legislature is attempting to utilize its power of impeachment to convict . . . Hergert of these crimes outside of a criminal court. [T]his violates the United States Constitution because it seeks to try criminal charges . . . on a standard less than "beyond a reasonable doubt." When the Nebraska Constitution was amended to lower the burden of proof in impeachment cases, the amendment effectively stripped the Court of impeachment of the power to try criminal charges as a matter of first impression.

Closing trial brief for defendant at 28. We interpret Hergert's due process argument as a claim that because the Nebraska Constitution provides merely for a "clear and convincing" standard of proof for impeachment, this court cannot find that an officer is guilty of any article of impeachment based upon conduct described and prescribed by a criminal statute. This claim mischaracterizes the proceeding before us, which is an impeachment trial and not a trial on criminal charges.

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

*Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (quoted in *Lynch v. Nebraska Dept. of Corr.*

*Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994)). In a criminal case, due process requires the prosecution to prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001). In civil cases, however, when a party's interests are substantial, involve more than the mere loss of money, but obviously do not involve criminal conviction, due process is satisfied by an intermediate standard of proof that generally employs terms similar to "clear and convincing." *Addington, supra.*

As a court of impeachment, this court is concerned with Hergert's conduct and the significance of such conduct as it bears on the allegations in the articles of impeachment. We are not concerned with whether such conduct could result in criminal conviction or acquittal under the criminal statutes noted in the articles of impeachment. Our role as fact finders under article III, § 17, is limited to finding whether the Legislature has shown by clear and convincing evidence that Hergert is guilty of "one or more impeachable offenses."

The phrase "misdemeanor in office," as that phrase is used in article IV, § 5, to define an impeachable offense, is a term of art, and the word "misdemeanor" in this phrase is not used as it is in a criminal context. As this court held in *State v. Hastings*, 37 Neb. 96, 55 N.W. 774 (1893), an officer's conduct need not rise to the level of an indictable offense to be considered an impeachable offense.

[6] Additionally, article III, § 17, limits this court's judgment to "removal from office and disqualification" to hold other state offices. Section 17 specifically provides that "the party impeached, whether convicted or acquitted, shall nevertheless be liable to prosecution and punishment according to law." Thus, the Nebraska Constitution explicitly provides that a conviction of impeachment is not the same as criminal conviction and that impeachment sanctions cannot rise to the level of criminal punishment. Because criminal conviction is not at stake in an impeachment proceeding, a "beyond a reasonable doubt" standard of proof is not required. *Addington, supra.*

Our inquiry is limited to whether Hergert violated his duties to the public as a constitutional officer of this state, that is, whether

he has committed a "misdemeanor in office." Whether Hergert should be impeached does not depend upon whether he could be convicted of violating a criminal statute, but upon whether his alleged conduct is " ' "in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest . . . ." ' " *State v. Douglas*, 217 Neb. 199, 202, 349 N.W.2d 870, 875 (1984), quoting *Hastings, supra*. Hergert's due process rights are fully protected by a clear and convincing standard of proof. We reject this constitutional argument.

### 3. Relevancy Objections

During trial, Hergert asked for and was granted a continuing relevancy objection to evidence of his conduct prior to taking office, which objections this court took under advisement. In Nebraska, this issue would not arise if Hergert's conduct had occurred while he was an incumbent seeking reelection because our impeachment statutes specifically provide that a state officer may be impeached "notwithstanding the offense for which said officer is tried occurred during a term of office immediately preceding." Neb. Rev. Stat. § 24-109 (Reissue 1995).

However, even in states where an officer may not be impeached for acts committed in a previous term, a court may nonetheless consider those acts "in so far as they are connected with or bear upon [the officer's] general course of conduct during the second term, for the limited purpose of inquiring into the motive and intent of the respondent as to the acts and omissions charged to [the officer] during the second term." *State, ex rel. Attorney General v. Hasty*, 184 Ala. 121, 126, 63 So. 559, 561 (1913).

[7] We agree with this reasoning and conclude that such reasoning is equally applicable to an officer's preincumbency conduct. Thus, we determine that in an impeachment proceeding, an officer's preincumbency conduct is relevant to the extent it bears upon the officer's pattern of conduct and shows the officer's motives and intent as they relate to the officer's conduct while in office. Thus, this objection is overruled and the evidence will be considered for this limited purpose.

### 4. Articles III and V: False Reporting and Obstruction of Government Operations

Article III alleges "False Reporting," and article V alleges "Obstructing Government Operations." The Legislature's allegations in article III, paragraphs 1, 2, and 4, are virtually identical to the corresponding paragraphs in article V. Therefore, we set out all the paragraphs of article III and only paragraph 3 of article V. In article III, the Legislature alleged:

> 1. During the final calendar quarter of 2004, the Commission initiated one or more investigations of C. David Hergert after receiving two complaints from citizens and initiating an internal complaint within the Commission. The Commission is empowered by law to conduct criminal investigations and has concurrent jurisdiction with the Attorney General to prosecute election crimes as provided by *Neb Rev Stat* § 49-14,126. Hergert was informed of the investigations and entered into a series of submissions of information and communications with the Commission about the matters under investigation.
>
> 2. Thereafter, Hergert prepared or caused to be prepared, signed, and filed on January 11, 2005 his Campaign Statement. This Campaign Statement contained false, deceptive and misleading entries and information including, but not limited to, false reporting of the date when Hergert or his campaign incurred an expenditure of a reported $13,272.66 to the Jackson-Alvarez Group, McLean, Virginia. Hergert reported to the Commission, and citizens of the State, that this expenditure was incurred December 14, 2004; however, the expenditure actually commenced to be incurred no later than October 5, 2004, when Hergert's political consultants confirmed prior requests for public records from the University of Nebraska by giving University officials a Federal Express number to be used to transport the requested information.
>
> 3. Hergert's January 11, 2005 Campaign Statement contained material information Hergert knew to be false. Hergert knowingly furnished this materially false information to the Commission with the intent to impede the

> investigation of an actual criminal matter contrary to *Neb Rev Stat* § 28-907.
>
> 4. Hergert's actions were related, but inimical, to his duties in office, subversive of fundamental and essential principles of government, and were highly prejudicial to the public interest.

Paragraph 3 of article V provides:

> 3. Hergert's January 11, 2005, Campaign Statement constituted intentional obstruction, impairment or perversion of the administration of law or other governmental functions by unlawful acts, including submission of material information to the Commission which Hergert knew to be false. Hergert furnished materially false information to Commission officials with the intent to impede a criminal investigation. Hergert's conduct violated *Neb Rev Stat* § 28-901.

[8] As noted, the Legislature's burden of proof in an impeachment proceeding is clear and convincing evidence. 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. *Hamit v. Hamit, ante* p. 659, 715 N.W.2d 512 (2006).

There are two kinds of evidence, direct and circumstantial. See *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991). Circumstantial evidence is evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred. *Carpenter v. Cullan*, 254 Neb. 925, 581 N.W.2d 72 (1998). Direct evidence is that evidence which proves the fact in dispute directly without inference or presumption. See, *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999); *Bland v. Fox*, 172 Neb. 662, 111 N.W.2d 537 (1961).

Circumstantial evidence is not inherently less probative than direct evidence. *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003). A finder of fact may rely upon circumstantial evidence and the inferences that may be drawn therefrom. See, *Leibhart, supra*; *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003). A fact proved by circumstantial evidence is nonetheless a proven fact. *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323

(1995), citing *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954).

The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Aldaco, ante* p. 160, 710 N.W.2d 101 (2006).

(a) Hergert's Duplicity Before January 6, 2005

The Legislature has built its case on a paper trail of strong circumstantial evidence. The evidence clearly and convincingly establishes that in both the primary and general elections, Hergert intentionally delayed filing his forty-percent affidavits in an effort to ensure that his opponents did not receive, or did not timely receive, public funding. His conduct and inconsistent excuses undercut his credibility.

Hergert's second campaign statement in the primary election period demonstrates that by failing to file the forty-percent affidavit, a nonabiding candidate can manipulate the reporting requirements for campaign statements to keep an abiding candidate from timely receiving public funds. A nonabiding candidate can accomplish this by delaying his or her expenditures and contributions until just after the closing date of the preceding reporting period.

This is what happened in the primary election. As noted, once Hergert expended 40 percent of his estimated expenditures, Blank was entitled to $40,000 in public funds for the primary election—the difference between the $25,000 spending limit and Hergert's $65,000 estimate. But because Hergert failed to file a forty-percent affidavit until after the primary election, the NADC had no notice that Hergert had exceeded 40 percent of his maximum estimated expenditures until the filing deadline for the second campaign statement. Because the NADC's notice of Hergert's expenditures was delayed, public funds were not disbursed to Blank until 5 to 6 days before the primary election.

Hergert's conduct in the general election period was more egregious. Based on Hergert's amended estimate of $40,000 in expenditures, Blank should have been eligible for $15,000 in public campaign funds—the difference between the voluntary spending limit and Hergert's estimate. But because of Hergert's

conduct in the general election, Blank did not receive any public funding.

In the general election, Hergert not only failed to file his forty-percent affidavit until 10 days after the general election, he also omitted key expenditures on his second campaign statement that would have alerted the NADC that he had exceeded 40 percent of his maximum estimated expenditures by the closing date of the second reporting period. By omitting from his October 25, 2004, campaign statement expenditures to Majority Strategies and Scott Cottington, Inc.—services for which he had received invoices and was unquestionably obligated to pay—Hergert intentionally concealed these facts.

Similarly, had Hergert timely reported the $44,000 loan his committee received on October 22, 2004, the NADC would have been alerted to the probable existence of corresponding campaign expenditures. Hergert's omission of material expenditures on his October 25 campaign statement served to keep Blank from obtaining public funding for the general election. Hergert's delinquent reporting of the late $44,000 contribution ensured that the NADC would not question his omission of material expenditures in his October 25 campaign statement.

Hergert's explanations for these omissions are not credible, given his pattern of conduct and inconsistencies. For example, Hergert claimed in his State Patrol interview that his office staff was solely responsible for the accuracy of his campaign filings and, specifically, for the October 26, 2004, date used as the date his committee received the $44,000 loan. In his deposition, he initially testified that he did not know the source for the October 26 date. However, when specifically asked whether he would contradict Herrell's testimony that Hergert gave her the October 26 date to use for the late contribution report and forty-percent affidavit, he admitted that he had provided the date. While Hergert claimed that he and Herrell "tore up the office" searching for his lost forty-percent affidavit, Herrell testified that Hergert had never spoken to her about a lost affidavit other than to dictate the letter he sent to the NADC in November 2004. Hergert claimed in his State Patrol interview that he and Herrell determined the date of an expenditure—for the purpose of triggering the filing of his forty-percent affidavit—was the

date a check cleared the bank. Yet, Hergert admitted that he did not look to see if a check had cleared the bank, and Herrell testified that she had never been told to look for such evidence.

(b) January 11, 2005, Campaign Statement

We now turn to the Legislature's allegation in article III that Hergert knowingly furnished false information to the NADC on January 11, 2005, and the allegation in article V that this false information was intended to impede the NADC's investigation. In Hergert's January 11 campaign statement, he reported that he had incurred an expenditure to Jackson-Alvarez on December 14, 2004. We find that Hergert knew this expenditure was incurred no later than October 12, 2004.

First, Hergert admitted in his deposition and at trial that Jackson-Alvarez had completed its work by mid-October 2004, in time for him to use its contents in his advertising. Hergert specifically admitted in his deposition that Jackson-Alvarez had completed its work before he was invoiced by Majority Strategies on October 13, and Scott Cottington, Inc., on October 17, and before the Nebraska Press Association quoted him a price on October 19. Thus, Hergert had not only incurred the Jackson-Alvarez expenditure by October 13, he was receiving the benefit of the expenditure.

Second, the preprinted instructions on the unpaid bills section of Hergert's campaign statement provide, in relevant part:

> List all unpaid bills, accounts payable and other payments owed by the committee, *i.e.*, accrued expenses for goods, materials, services, or facilities received, for which payment has not been made as of the closing date of this statement. Include any amounts owed to the candidate if the candidate intends to seek reimbursement from the committee. *If the exact amount of an unpaid bill is unknown, report a reasonable estimate of the amount owed.*

(Emphasis supplied.) Notably, in Hergert's first campaign statement, filed on April 21, 2004, Hergert listed an unpaid bill of $9,740 as accrued on April 6. In addition, the unpaid bills section includes a bolded and capitalized "Important" notice, which provides in relevant part: "Candidates for these offices who have not agreed to abide by these limits are reminded that for the purpose

of determining if a candidate has exceeded the estimate of maximum expenditures on file with the Commission, unpaid bills and accrued expenses are considered expenditures."

These instructions are explicit, and Hergert had demonstrated an understanding of them as early as April 2004. If, on his October 25 campaign statement, Hergert had properly estimated his expenditure to Jackson-Alvarez at even $7,000, and properly listed his unpaid invoices, the NADC would have been alerted that he had exceeded the 40-percent mark, or $16,000, no later than October 13, the date he received an invoice from Majority Strategies for $10,456.55. Hergert's failure to review the NADC brochures does not excuse his disregard of instructions on the forms. While Hergert defended his many filing "errors" with the excuse that the NPADA and CFLA requirements were confusing or inconsistent, his deposition testimony shows that he could not have accurately made such an assessment because he failed to inform himself of the requirements in any event. We find that Hergert's omission of the Jackson-Alvarez expenditure from his October 2004 campaign statement was deliberate.

In his January 11, 2005, campaign statement, however, Hergert falsely reported that he incurred the Jackson-Alvarez expenditure on December 14, 2004, thus deflecting the NADC's investigation away from this expenditure. When the NADC initiated an audit of Hergert's failure to file a forty-percent affidavit in case No. 04-36, it had no notice that Hergert had incurred an expenditure to Jackson-Alvarez during October 2004. Its initial investigation into the forty-percent affidavit was focused on the information shown by the committee's banking records. Nothing in the records Hergert provided would have alerted the NADC to the Jackson-Alvarez expenditure, and as noted, check No. 1065 was not written until sometime in 2005.

When Hergert sent his forty-percent affidavit to the NADC, which was received on November 12, 2004, he reported that he had mailed the affidavit on October 29. On November 12, the NADC notified Hergert that it was initiating an investigation for a possible violation of § 32-1604(5)(b). On November 22, through his attorney, Hergert repeated his "good faith" belief that he had mailed his affidavit to the NADC. On December 9, Howland notified Brashear that he intended to explore "the facts

and circumstances surrounding [Hergert's] belief" in a deposition pursuant to the investigation in case No. 04-36. Thus, Hergert was on notice that his intent concerning the forty-percent affidavit was at issue in the NADC's investigation. Moreover, concealment of expenditures in general, and the Jackson-Alvarez expenditure in particular, was relevant to possible criminal charges.

The language in § 32-1604(5)(b) provides, in relevant part, that "[a] candidate who *intentionally* fails to file the required [forty-percent] affidavit within either five-day period [for the primary or the general election period] shall be guilty of a Class II misdemeanor." (Emphasis supplied.)

Thus, Hergert's intentional conduct of filing his forty-percent affidavit late—received on November 12, 2004—and swearing that he had spent 40 percent of his estimated expenditures on October 26, could have subjected him to criminal charges. Given the NADC's record request, Hergert was cornered. He could not conceal the expenditures that he had paid to Scott Cottington, Inc. ($36,000 on October 19), or to Majority Strategies ($10,456.55 on October 19), because those expenditures were shown on his October bank statement. Hergert did not pay Jackson-Alvarez, however, until sometime in March or April 2005 and did not report this unpaid expenditure until January 11. Thus, the date of the expenditure to Jackson-Alvarez represented the only information that Hergert could conceal in an effort to deflect a finding that he had intentionally and knowingly filed a false report as to when he exceeded 40 percent of his estimated maximum expenditures.

On January 10, 2005, after he took office, we find that Hergert directed Herrell to fax two substitute pages to Jacobson to replace in his postelection campaign statement before Jacobson sent the statement to the NADC. The second substituted page was the unpaid bills section, in which Hergert reported that the Jackson-Alvarez expenditure was for "Research/Communications" and incurred on December 14, 2004. We find that the filing was a false representation to the NADC on January 11, 2005, asserting, in effect, that the Jackson-Alvarez expenditure was not relevant to its investigation of the expenditures he made in October 2004 and the actual triggering date for his late forty-percent affidavit filed in November.

Howland's letter to Brashear on March 8, 2005, during ongoing settlement negotiations, indicates that as of that date, Howland's concern about the Jackson-Alvarez expenditure was limited to ensuring that Hergert did not attempt to pay the unpaid bill through an additional loan. It was only after the NADC had approved the settlement agreements with Hergert in April 2005 that the State Patrol initiated an independent investigation, in July 2005, and confronted Hergert about the Jackson-Alvarez expenditure.

Hergert contends that the uncontested evidence shows that he did not know of the actual amount of the Jackson-Alvarez bill until December 2004. However, we are not bound to blindly accept as true all testimony which is not directly contradicted or impeached. The testimony of a witness should be weighed in connection with all the facts in the case. *Pahl v. Sprague*, 152 Neb. 681, 42 N.W.2d 367 (1950).

We find Hergert's explanations for reporting the Jackson-Alvarez expenditure as having been incurred on December 14, 2004, are not credible and contradicted by his own testimony. In his deposition, Hergert initially testified that neither he nor anyone in his campaign had communicated with Jackson-Alvarez in any way since October. However, his only explanation for using the December 14 date was his claim that some unknown person from Jackson-Alvarez had contacted some unknown person in his campaign about money his committee owed the firm. Although Hergert purportedly delayed payment to Jackson-Alvarez because he disputed the amount of its "claim," he nonetheless used the December 14 purported contact date as the date the expenditure was incurred because he knew Jackson-Alvarez' work had been completed in October.

Hergert denied knowing who directed that corrections be made to the January 11, 2005, campaign statement or who directed that the corrections be faxed to Jacobson with instructions to use the substitute pages. Herrell, however, testified that she faxed the substituted pages to Jacobson at Hergert's direction and that Hergert provided the information stated on the unpaid bills section of the January 11 campaign statement. Considering the inconsistencies in Hergert's testimony, we believe Herrell; we do not believe Hergert.

We find that the Legislature has proved by clear and convincing evidence as alleged in article III that while in office, Hergert knowingly furnished materially false information to the NADC on January 11, 2005, when he represented that he had incurred an expense to Jackson-Alvarez on December 14, 2004. See § 28-907. We also note that such conduct is a potential Class IV felony under § 49-14,134 ("any person who files a statement or report required under the [NPADA] knowing that information contained in the statement or report is false . . . shall be guilty of a Class IV felony"). We further find that the false statement was intended to deflect the NADC's investigation into the forty-percent affidavit issue in case No. 04-36 away from this incurred expenditure. Thus, Hergert, as alleged in article V, intended to impede the investigation of an actual criminal matter. We therefore conclude that Hergert is guilty of article III, "False Reporting," and article V, "Obstructing Government Operations."

### 5. Hergert's Arguments

Hergert makes certain legal arguments at odds with our conclusions, and to the extent his arguments are directed toward articles III and V, we address them.

#### (a) Article III

Hergert contends that the NADC was not conducting a criminal investigation at the time he filed his January 11, 2005, campaign statement and that § 28-907(1)(a) cited in article III is intended only to prevent police officers from wasting time by pursuing false leads. Section § 28-907(1)(a) prohibits a person from "[f]urnish[ing] material information he or she knows to be false to any peace officer or other official with the intent . . . to impede the investigation of an actual criminal matter."

[9,10] Although it is not necessary for an actual crime to have been committed, in the context of an ongoing investigation, false reporting is dependent upon "the existence of a legitimate and valid investigation of facts which could constitute a predicate offense." *State v. Ewing*, 221 Neb. 462, 468, 378 N.W.2d 158, 162 (1985). This court has stated that the purpose of § 28-907(1)(a) is "to prevent the public from willfully furnishing erroneous information to law enforcement officers and thus interfering with the performance of their duties." *Ewing*, 221 Neb. at 468, 378 N.W.2d

at 162. Interference with an officer's duties includes false statements that impede an officer's gathering of information. *State v. Nissen*, 224 Neb. 60, 395 N.W.2d 560 (1986). Also, subsection (a) includes "other official[s]" besides police officers. Thus, the statute is intended to prevent persons from providing false information to police officers *and* other officials who have the authority to investigate actual criminal matters. Here, at the time that Hergert filed his false January 11, 2005, campaign statement, the NADC's investigation was ongoing, and the investigation could have resulted in criminal prosecution. See §§ 49-14,123(11), 49-14,133, and 49-14,134. We reject Hergert's argument.

(b) Article V

Relying on the three-justice plurality in *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984), Hergert argues that the Legislature has failed to prove Hergert committed an obstruction of a government operation as alleged in article V by filing his January 11, 2005, campaign statement, because Hergert did not engage in a physical act with intent to impede government operations. Hergert's reading of our case law under § 28-901 dealing with this offense is incorrect. Section 28-901(1) provides:

> A person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty *other than an official duty*, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

(Emphasis supplied.)

In *Douglas*, the three-justice plurality stated that the failure to volunteer information could not offend § 28-901, even if the investigation was thereby deflected, "for the offense [of obstruction of government operations] must consist of physical interference or some unlawful act." 217 Neb. at 216, 349 N.W.2d at 881. In contrast, the dissent in *Douglas* on this article of impeachment rejected the contention that the offense requires an obstruction be committed " 'by force, violence, physical interference or

obstacle.' " *Id.* at 281, 349 N.W.2d at 911 (Shanahan and Grant, JJ., and Moran, District Judge, dissenting).

[11] Hergert contends that this court adopted the plurality's definition of an obstruction in *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994) (concluding that evidence of obstruction of government operations was insufficient). However, in *Fahlk*, we clarified that obstruction of government operations can be shown in one of three ways: by showing that the defendant "(1) committed some physical act, (2) breached an official duty, or (3) committed some other unlawful act with the intent to obstruct the administration of justice." 246 Neb. at 853, 524 N.W.2d at 53. We further stated that *Douglas* established that neither the failure to volunteer information nor words intended to frustrate law enforcement are a physical act that violates § 28-901. But we limited the plurality's statements in *Douglas* to the first prong of the three-part inquiry and went on to analyze the remaining prongs.

To prove obstruction under the second prong, we concluded that the official's misconduct must be a " 'purposeful obstruction of governmental function by breach of official duty.' " *Fahlk*, 246 Neb. at 854, 524 N.W.2d at 53. For the third prong, obstruction by unlawful act can be " 'any affirmative violation of legal duty, whether imposed by criminal statute, tort law, or administrative regulation.' " *Id.* Here, the second prong—breach of an official duty—is the most applicable. We conclude that the Legislature has shown, as alleged in article V, that an "elected [officer] of this state breached his official duty to be truthful during an official investigation and that he thus obstructed government operations." See *Douglas*, 217 Neb. at 281, 349 N.W.2d at 911 (Shanahan and Grant, JJ., and Moran, District Judge, dissenting). We reject Hergert's argument.

(c) Duties in Office

Hergert argues that the filing of the various campaign forms is unrelated to the specific duties of the office of regent. Hergert misapprehends a public officer's duties, which extend beyond the officer's job description. An officer's public duties include the duty to cooperate with investigations. In *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984), this court, sitting as a

court of impeachment, was confronted with accusations similar to those before us. The Attorney General was accused of misrepresenting facts and lying during a sworn interview that was conducted pursuant to an official investigation into his conduct.

[12] Because five members of this court must concur in finding an impeachable misdemeanor, the Attorney General was not convicted. *Id.* However, every member of the court in *Douglas* determined that a state officer has a fiduciary duty to the public to provide truthful information during an official investigation of the officer. According to the four justices, under such circumstances, an officer violates his fiduciary duties by withholding material information, as well as by lying about material information. Regarding the Attorney General's failure to disclose material information, the dissent in *Douglas* stated:

> Throughout the United States, public officers have been characterized as fiduciaries and trustees charged with honesty and fidelity in administration of their office and execution of their duties. . . .
>
> . . . When a relationship of trust and confidence exists, the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud.

(Citations omitted.) 217 Neb. at 256, 349 N.W.2d at 900 (Hastings, Shanahan, and Grant, JJ., and Moran, District Judge, dissenting).

A similar reasoning was relied upon by the dissent to conclude that the Legislature had proved an impeachable misdemeanor based on circumstantial evidence that the Attorney General had lied to an investigator when he claimed not to know of a fact material to the investigation:

> If [the Attorney General] did lie as charged, he did so while in office. If, under *State v. Hastings*, 37 Neb. 96, 55 N.W. 774 (1893), gross negligence in office done corruptly is an impeachable offense, a lie is certainly a corrupt act and is more than negligence.
>
> As noted in the dissenting opinion on [the article of impeachment charging misrepresentation], we determine that defendant's conduct in so lying is a clear breach of his fiduciary duty to the people of the State of Nebraska

> requiring him, as Attorney General, to be honest in his official actions.

217 Neb. at 280, 349 N.W.2d at 911 (Shanahan and Grant, JJ., and Moran, District Judge, dissenting).

The three-justice plurality did not believe the Legislature had proved its allegations of misrepresentation but agreed that an officer has a duty to cooperate in official investigations:

> If [the Attorney General] "did knowingly misrepresent his knowledge of [a material fact,]" *he did so in the execution of his duties, as he was bound to assist in the investigation*; and, accordingly, if the offense be deemed sufficiently serious, he could be removed upon the trial of an impeachment for a "misdemeanor in office" as that constitutional term is judicially construed.

(Emphasis supplied.) *State v. Douglas*, 217 Neb. 199, 210, 349 N.W.2d 870, 878-79 (1984). Relying on an opinion by the New Jersey Supreme Court, the plurality in *Douglas* defined an officer's duties as follows:

> "[Public officers] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. . . . As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and *above all to display good faith, honesty and integrity*. . . . They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. . . .
>
> "These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office."

(Emphasis supplied.) *Douglas*, 217 Neb. at 225-26, 349 N.W.2d at 885-86, quoting *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201 (1952). We agree with these statements

describing an officer's duties and reject Hergert's contention that he could be impeached only for conduct involving functions specific to his office as regent.

(d) Technical Violations

Relying on the three-justice plurality in *Douglas, supra*, Hergert contends that his violations were technical violations of law because many candidates make similar mistakes and the regulations are confusing. It is not clear that this argument is directed toward the January 11, 2005, filing, and to the extent that it is, we conclude it is without merit.

In *State v. Hastings*, 37 Neb. 96, 128, 55 N.W. 774, 785 (1893), this court stated:

> It is better that the state should be confined to the remedy afforded by the Criminal Code and civil action on the bonds of its officers, than an alternative so dangerous and so liable to abuse as impeachment for technical violations of law, errors of judgment, mistake of fact, or even neglect of duty such as disclosed by the proofs in this case.

We agree with this statement and recognize the danger of finding an impeachable misdemeanor for a technical violation of the law. However, the evidence of Hergert's intent regarding the January 11, 2005, filing does not show simple neglect or an error of fact or judgment. Rather, the facts show that Hergert was "willfully blind" to the actual date the Jackson-Alvarez expense was incurred and that Hergert deliberately acted to misrepresent that date. See *Douglas*, 217 Neb. at 280, 349 N.W.2d at 911 (Shanahan and Grant, JJ., and Moran, District Judge, dissenting).

6. Defendant's First Amendment Challenges

In his answer and closing trial brief, Hergert challenges articles of impeachment VII, IX, and X on First Amendment grounds, arguing that various provisions of the NPADA and the CFLA are unconstitutional limitations on campaign expenditures. Relying on *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), Hergert asserts that the forty-percent affidavit requirement of § 32-1604(5)(b), as well as the 50 percent of contributions loan limitation of § 49-1446.04, are unconstitutional constraints on campaign financing and violative of the

First Amendment. Further, Hergert attacks the constitutionality of the CFLA generally on First Amendment grounds, arguing, inter alia, that requiring nonabiding candidates to lock themselves into expenditure estimates unconstitutionally bars a candidate from spending as much money as he or she feels necessary to combat his opponent late in the race if newly discovered campaign issues arise. That, Hergert asserts, amounts to an overwhelming burden on a nonabiding candidate's right to speak.

[13] Hergert's constitutional challenge is not unlike the situation in *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987) (*NSBA v. Douglas*), in which the respondent, Paul L. Douglas, challenged the constitutionality of the NPADA in an attorney disciplinary proceeding. In *NSBA v. Douglas*, this court adopted the " 'fraud and deceit' standing doctrine" established in *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966). See *State v. Monastero*, 228 Neb. 818, 830, 424 N.W.2d 837, 846 (1988). That doctrine "precludes a defendant's constitutional challenge to a particular statute, or statutory scheme, when the defendant has fraudulently circumvented or avoided that particular statute and . . . seeks to raise a constitutional question concerning the statute which the defendant had fraudulently circumvented or avoided" in a proceeding not intended to enforce the statute. *Id.* at 830-31, 424 N.W.2d at 846.

The *Dennis* Court stated in part: " 'When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.' " 384 U.S. at 866, quoting *Kay v. United States*, 303 U.S. 1, 58 S. Ct. 468, 82 L. Ed. 607 (1938). Relying on that language in *Dennis*, we held that the respondent lacked standing to raise a constitutional challenge to the NPADA. We stated:

> In *Dennis*, the prosecution was for the petitioners' fraud. It was not an action to enforce the statute claimed to be unconstitutional. The same is true with the case at bar. It is a case directed at the respondent's actions, not a case to enforce the statute claimed to be unconstitutional.

*NSBA v. Douglas*, 227 Neb. at 36, 416 N.W.2d at 536.

Those same principles apply in this matter, albeit an impeachment proceeding rather than an attorney disciplinary or criminal proceeding. As in *NSBA v. Douglas*, the question in this impeachment proceeding is not whether Hergert is technically guilty of the "crimes charged" in the articles of impeachment which arise out of the CFLA and/or the NPADA; rather, as we noted earlier in this opinion, it is Hergert's conduct or actions which are at issue. The holding in *NSBA v. Douglas* is equally applicable here:

> In the proceeding before us, relator is not trying in any way to charge respondent with any violation of the act, but has merely alleged that certain conduct of respondent has not measured up to the standard that our statutes have set for certain purposes. *Respondent, of course, is in a particular situation where he, as the Attorney General of Nebraska, chose to comply with the act by making filings under the act*. We hold that respondent has no standing to challenge the act's constitutionality in this proceeding and that we are judging his *conduct* in furnishing information to the public, as required by the act. *If respondent has chosen to mislead the public by his filings under the act, we are not concerned with any violation of the act, but with his conduct in improperly informing, or in misleading, the public*.

(Emphasis supplied.) (Emphasis in original.) 227 Neb. at 36, 416 N.W.2d at 536. In this case, Hergert chose to comply with the CFLA and the NPADA by making filings thereunder. We are not concerned with specific violations of these acts in this impeachment proceeding, but, rather, we are concerned only with his conduct in furnishing the NADC, as well as the public, with information required by these acts. Thus, in this case, as in *NSBA v. Douglas*, we will not reach the claims of the unconstitutionality of these statutes.

## VI. CONCLUSION

For the reasons fully explained above, we find Hergert guilty of the charges set forth in articles of impeachment III and V. We find that in the primary and general elections, Hergert intentionally manipulated and violated Nebraska's campaign finance laws in a scheme to prevent his opponents from receiving public

campaign funds. During the campaign and, significantly, after he took office, Hergert intentionally filed false reports of campaign spending in an attempt to cover up his conduct. Hergert's various explanations for his actions contradict one another and are not believable when the clear and convincing evidence before this court is considered.

Thus, we conclude that the Legislature has proved by clear and convincing evidence that, as alleged in article III, "False Reporting," after he was in office, Hergert knowingly furnished materially false information to the NADC on January 11, 2005, when he represented that he had incurred an expenditure to Jackson-Alvarez on December 14, 2004, rather than in early October 2004. We further conclude that as alleged in article V, "Obstruction of Government Operations," the false statement filed January 11, 2005, was intended to deflect the NADC's investigation away from the Jackson-Alvarez accrued expense and, thus, to impede the investigation of an actual criminal matter. The actual matter under investigation was the NADC's case No. 04-36, which focused on Hergert's violation concerning the forty-percent affidavit, and such violation could have subjected him to criminal charges. That affidavit was required to be filed for the general election for regent for the seventh district when Hergert reached 40 percent of his estimated maximum expenditures for this election. As a result of Hergert's violations, public funds were not disbursed to Hergert's opponent, who was entitled to receive such funds during the campaign. The triggering date for release of public funds was under investigation in case No. 04-36, and Hergert's January 11, 2005, filing covered up the true triggering date and diverted the investigation. Hergert's conduct on January 11 clearly violated Hergert's duties as a public officer to provide truthful information during the course of an investigation into his conduct.

We conclude that Hergert is guilty as charged in articles III and V. In view of our finding of guilt as to articles III and V, Hergert's motion to dismiss is overruled as to articles III and V, and, as to articles I, II, IV, and VI through X, the motion to dismiss is overruled as moot. Based on our finding of guilt, it is the judgment of this court that C. David Hergert is removed from

office and is disqualified from holding and enjoying any office of honor, profit, or trust in this State.

JUDGMENT OF GUILTY ON ARTICLES III AND V, AND ORDER OF REMOVAL AND DISQUALIFICATION FROM OFFICE.

STEPHAN, J., not participating.

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