THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

JULY 14, 2006 and FEBRUARY 1, 2007

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXII

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

2010

Copyright A. D. 2010

By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

TABLE OF CONTENTS
For this Volume

Members of the Appellate Courts v

Judicial Districts and District Judges vi

Judicial Districts and County Judges viii

Separate Juvenile Courts and Judges x

Workers' Compensation Court and Judges x

Attorneys Admitted xi

Table of Cases Reported xv

List of Cases Disposed of by
Filed Memorandum Opinion xxi

List of Cases Disposed of Without Opinion xxiii

List of Cases on Petition for Further Review xxvii

Justice Leslie Boslaugh Memorial xxxvii

Cases Reported 1

Headnotes Contained in this Volume 1037

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

John V. Hendry, Chief Justice[1]
Michael G. Heavican, Chief Justice[2]
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

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

[1]Until September 30, 2006
[2]As of October 2, 2006

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	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
		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	Richard W. Krepela	Madison
		Donna F. Taylor	Madison
		Ross A. Stoffer	Pierce
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
	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 271

Joseph E.W. Abler
Amber Linn Ackerson
Jerrad Rick Ahrens
William David Andres
Jennifer Lynn Andrews
Amy L. Arndt
Theodore Patrick Arndt
Daphne Hyun-Jin Aronson
David Stuart Atkinson
Lucas William Atkinson
Audrey Marie Bartholomew
Jeffrey Martin Bateman
Amol Batra
Donald Douglas Bend
Barbara Ann Biederman
Kimberly Peschka Bilder
Aaron Michael Bishop
Jerrold Robert Black
Jeffrey Aaron Bloom
Linsey Moran Bryant
Michael Edward Brzica
Colleen Marie Byelick
Mary Josephine Cannella
Bruce Michael Carden
Jon Randall Carpenter
Justin Forest Carter
Jason Matthew Caskey
Kerry Cooper Collins
Matthew James Connealy II
Sean M. Conway
Brian Alan Coon
Elizabeth Anne McCoy Crabill
Monte Omar Crockett
Allyson Vanstory Crossman
Jacqueline Marie De Wispelare
Jennifer Rebecca Deitloff
Luke Eliot DeLay
Taylor Christopher Dieckman
Robert Patrick Diederich
Douglas F. Dieker
Rebecca Lynn Dinan
Jennifer A. Doyle
Sarah Lindsay Duncan
Amy Lynn Eckhoff
Kevin James Edwards
Lindsay Katrina Edwards
Sara Jean Bieker English
Sarah Elizabeth Eurek
Bradley Aaron Ewalt
Jill Dorothy Fiddler
Loralea Lynn Frank
April Denise Franklin
Amanda Marie Gartner
Megan Lee Gerriets
Krista Goodenberger
Jason A. Grant
Jared Keith Grauer
Kimberly Suzanne Griffin
Nicholas Robert Grillot
Raul Felipe Guerra
Laura Jane Gunderson
Leilani Marie Harbeck
Jessica Shaw Harder

Erin Renee Harris
Staci Leigh Hartman
Mark Alan Hassebrook
R. Joel Hatch
Kathryn Anne Dittrick Heebner
Sarah Catherine Helvey
Nick Aaron Henderson
Justin Wendell High
Christopher Carl Hilkemann
Stacey Lynn Hines
Janice Holmes
Jennifer Elizabeth Hynek
Brandy Marie Ingles
Mark Frederick Jacobs
Jason Paul Janousek
Nicholas David Jantzen
William Benjamin Jones
Jennifer Danielle Kearney
Rebecca Sue Keim
Gerald Michael Keller, Jr.
Rustin James Kimmell
Benjamin David Kingston
Rita Jean Kitchens-Bohaboj
Luke James Klinker
Andrew Dale Kloeckner
Kris William Kobach
Leigh Michelle Koehn
Julie Marie Koubek
Matthias John Kraemer
Mark D. Kratina, Jr.
Jessica Anna Krieger
Joseph Edwin Kuehl
L. Tyler Laflin
Theodore Jeffers Lane
Amie Elizabeth Larson
Grant Davis Leach
Catherine Claire Lemoine
David Charles Levy
Alexis Linnea Lewis
Kevin James Loftus
Alice Ann Lugo
Caroline Stephenson Marciano
Angelica Wichman McClure
Katherine Marie McGuire
Tracy Leigh McKay
Amanda Ann McMahon
Joshua David McMahon
Brian Paul Meade
Ryan Bennett Meikle
Regina Lee Meradith
Andrea Dawn Miller
Nicole Ann Miller
David Hardin Milligan
Matthew Joseph Molettiere
Michael Thomas Mollner
Susan Marie Napolitano
Jerome Chinedu Okolo
Patrick Vincent Ortman
Amy Schupbach Ostermeyer
Matthew Robert Ottemann
Faith Ann Padgett
David Michael Pantos
Paul Arthur Payne
Denise Karst Pearce
Erin Cecelia Duggan Pemberton
Keith Tyler Peters
Michael Roy Peterson
Steven Gerald Piland
Sarah Suzanne Pillen
Kate Elizabeth Placzek
Justin Keith Poots
Mark Thomas Porto
Nic A. Prenger
Christine Marie Prill
Justin Adam Quinn

Christopher Joel Riffle
Timothy Joseph Riveria
Robert John Romeo
Christopher Todd Schicker
Alan Louis Schuller
Tina Marie Schuman
Jamian Jean Simmons
Shelldon Ray Skelcher
Ashley Elizabeth Sloup
Richard R. Smith
Edward Martin Spellman
Kevin K. Stephenson
Bart Michael Sturdy
Casey Lee Symington
Rachel L. Theilmann
Jennifer Ann Thompson
Jerod Lee Trouba
Patrick Raymond Turner
Ranae Brester Upton
John B. Vaterlaus
Heather Brooke Veik
Melissa Renee Vincent
Joni Marie Visek
Brandi Marie Volenec
Jennifer Denise Walkingstick
Mathew Thomas Watson
David Adam Weintraub
Joshua Willman Weir
Elise M.W. White
Joel Logsdon Wiegert
Jessica Suzanne Wieland
Andrew Ross Wilcox
Andrew Ryan Willis
Melanie Martha Neely
Willis
Alexander John Wolf
Holly Rae Wolf
Elias Theodore Xenos
Rebecca Ann Zawisky

TABLE OF CASES REPORTED

ABB/Alstom Power Int. CE Servs.; Worline v. 797
Aaron Ferer & Sons; Ferer v. 770
Aaron Ferer & Sons; State ex rel. Columbus Metal v. 758
Adoption of Jaden M., In re 789
Adoption of Kenten H., In re 846
Advanced Gaming Tech.; Stewart v. 471
American Fam. Mut. Ins. Co.; Pogge v. 554
Antonini, In re Application of 985
Application of Antonini, In re 985
Application of Budman, In re 829
Ash Grove Cement Co.; Didier v. 28

Barfield; State v. 502
Barnes; State v. 749
Beach; State ex rel. Counsel for Dis. v. 337
Blair; State v. 951
Blue Cross Blue Shield; Brodine v. 713
Bohaboj v. Rausch 394
Brodine v. Blue Cross Blue Shield 713
Bronsen v. Dawes County 320
Bruna; State v. 313
BryanLGH Med. Ctr. East; Foster v. 918
Budman, In re Application of 829
Bullock v. J.B.. 738

Caniglia; State v. 662
Castillo v. Young 240
Chadron State College; D'Quaix v. 859
Charest; State ex rel. Counsel for Dis. v. 755
City of Elkhorn v. City of Omaha 867
City of Lincoln v. Hershberger 839
City of Omaha; City of Elkhorn v. 867
Columbus Metal, State ex rel. v. Aaron Ferer & Sons 758
Constructors Bonding Co.; National Am. Ins. Co. v. 169
Counsel for Dis., State ex rel. v. Beach 337
Counsel for Dis., State ex rel. v. Charest 755
Counsel for Dis., State ex rel. v. Mills 56
Counsel for Dis., State ex rel. v. Petersen 975
Counsel for Dis., State ex rel. v. Riskowski 781
Counsel for Dis., State ex rel. v. Rogers 450
Counsel for Dis., State ex rel. v. Wickenkamp 889
County of Lancaster; State v. 376
Crouse v. Pioneer Irr. Dist. 276

Davlin; State v. 139
Dawes County; Bronsen v. 320
Deckard; State v. 410
Didier v. Ash Grove Cement Co. 28
D'Quaix v. Chadron State College 859

Eihusen v. Eihusen 462
Elkhorn, City of v. City of Omaha 867
Erickson, Sederstrom; Ferer v. 113
Erickson, Sederstrom; Ferer v. 470

Fedalina G., In re Interest of 314
Ferer v. Aaron Ferer & Sons 770
Ferer v. Erickson, Sederstrom 113
Ferer v. Erickson, Sederstrom 470
Fischer; State v. 963
Floyd; State v. 898
Foster v. BryanLGH Med. Ctr. East 918

Gale; State ex rel. Lemon v. 295
Gilbert & Martha Hitchcock Found. v. Kountze 251
Granville Cemetery Assn.; Sjuts v. 103
Gutierrez; State v. 995

Hallie Mgmt. Co. v. Perry 81
Hershberger; City of Lincoln v. 839
Hogan; State ex rel. NSBA v. 19
Huffman v. Peterson 62
Humbert; State v. 428

In re Adoption of Jaden M. 789
In re Adoption of Kenten H. 846
In re Application of Antonini 985
In re Application of Budman 829
In re Interest of Fedalina G. 314
In re Interest of Veronica H. 370
Iromuanya; State v. 178
Irving F. Jensen Co. v. State 162
Irwin Indus. Tool Co.; Riesen v. 41

J.B.; Bullock v. 738
Jaden M., In re Adoption of 789
Johanns; Schumacher v. 346
Johnson v. Johnson 263

Kanne v. Visa U.S.A. 489
Keen; State v. 123
Kenten H., In re Adoption of 846
King; State v. 638
Kountze; Gilbert & Martha Hitchcock Found. v. 251

Lancaster, County of; State v. 376
Lassek; State v. 523
Lemon, State ex rel. v. Gale 295
Liming v. Liming 534
Lincoln, City of v. Hershberger 839
Lovette v. Stonebridge Life Ins. Co. 1

Marksmeier v. McGregor Corp. 401
Marrs; State v. 573
Marshall; State v. 924
McGregor Corp.; Marksmeier v. 401
Midwest Fam. Mut. Ins. Co.; Young v. 385
Millatmal v. Millatmal 452
Mills; State ex rel. Counsel for Dis. v. 56
Moore; State v. 71
Myers v. Nebraska Invest. Council 669

NSBA, State ex rel. v. Hogan 19
National Am. Ins. Co. v. Constructors Bonding Co. 169
Nebraska Dept. of Health & Human Servs.; Wilson v. 131
Nebraska Invest. Council; Myers v. 669
Nebraska Liq. Cont. Comm.; Nebraska Liq. Distrib. v. 390
Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm. 390

Ohio Casualty Group; Peterson v. 700
Omaha, City of; City of Elkhorn v. 867

Pennfield Oil Co. v. Winstrom 219
Pepitone v. Winn 443
Perry; Hallie Mgmt. Co. v. 81
Petersen; State ex rel. Counsel for Dis. v. 975
Peterson; Huffman v. 62
Peterson v. Ohio Casualty Group 700
Pioneer Irr. Dist.; Crouse v. 276
Pogge v. American Fam. Mut. Ins. Co. 554

Rausch; Bohaboj v. 394
Reed v. State 8
Riesen v. Irwin Indus. Tool Co. 41
Riskowski; State ex rel. Counsel for Dis. v. 781
Robinson; State v. 582
Rodriguez; State v. 930
Rogers; State ex rel. Counsel for Dis. v. 450
Roseland v. Strategic Staff Mgmt. 434
Rozsnyai v. Svacek 567

Schumacher v. Johanns 346
Simms v. Vicorp Restaurants 744
Sims; State v. 811
Sjuts v. Granville Cemetery Assn. 103

Sommer; State v. 995
Stark; State v. 89
State ex rel. Columbus Metal v. Aaron Ferer & Sons 758
State ex rel. Counsel for Dis. v. Beach 337
State ex rel. Counsel for Dis. v. Charest 755
State ex rel. Counsel for Dis. v. Mills 56
State ex rel. Counsel for Dis. v. Petersen 975
State ex rel. Counsel for Dis. v. Riskowski 781
State ex rel. Counsel for Dis. v. Rogers 450
State ex rel. Counsel for Dis. v. Wickenkamp 889
State ex rel. Lemon v. Gale 295
State ex rel. NSBA v. Hogan 19
State; Irving F. Jensen Co. v. 162
State; Reed v. 8
State v. Barfield 502
State v. Barnes 749
State v. Blair 951
State v. Bruna 313
State v. Caniglia 662
State v. County of Lancaster 376
State v. Davlin 139
State v. Deckard 410
State v. Fischer 963
State v. Floyd 898
State v. Gutierrez 995
State v. Humbert 428
State v. Iromuanya 178
State v. Keen 123
State v. King 638
State v. Lassek 523
State v. Marrs 573
State v. Marshall 924
State v. Moore 71
State v. Robinson 582
State v. Rodriguez 930
State v. Sims 811
State v. Sommer 995
State v. Stark 89
State v. Tompkins 547
State v. Tompkins 865
State v. Vela 287
State v. Walker 725
State v. White 421
Stewart v. Advanced Gaming Tech. 471
Stonebridge Life Ins. Co.; Lovette v. 1
Strategic Staff Mgmt.; Roseland v. 434
Svacek; Rozsnyai v. 567

Tompkins; State v. 547
Tompkins; State v. 865

Vela; State v. 287
Veronica H., In re Interest of 370
Vicorp Restaurants; Simms v. 744
Visa U.S.A.; Kanne v. 489

Walker; State v. 725
Watson v. Watson 647
White; State v. 421
Wickenkamp; State ex rel. Counsel for Dis. v. 889
Wilson v. Nebraska Dept. of Health & Human Servs. 131
Winn; Pepitone v. 443
Winstrom; Pennfield Oil Co. v. 219
Worline v. ABB/Alstom Power Int. CE Servs. 797

Young; Castillo v. 240
Young v. Midwest Fam. Mut. Ins. Co. 385

LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-05-140: **Travelers Indem. Co. v. Paradise Park, Inc**. Affirmed. Stephan, J. Hendry, C.J., not participating.

No. S-05-434: **Meyer v. Koenig**. Affirmed. Stephan, J. Wright, J., participating on briefs.

No. S-05-838: **Rasch v. Remedy Intelligent Staffing**. Petition for further review affirmed. Miller-Lerman, J. Heavican, C.J., not participating.

No. S-05-1087: **State v. Golka**. Affirmed in part, and in part vacated and remanded with directions for resentencing. McCormack, J. Hendry, C.J., not participating.

No. S-05-1252: **State v. Kern**. Affirmed. Wright, J.

No. S-06-699: **State v. Moore**. Sentence vacated, and cause remanded for resentencing. McCormack, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-02-630: **State ex rel. Counsel for Dis. v. Achola**. Application for reinstatement granted, effective immediately.

No. S-05-098: **Frain v. Portsche**. After petition of appellant for further review sustained, letter filed January 5, 2007, received regarding death of appellant; letter treated as motion to dismiss. Motion to dismiss appeal sustained; appeal dismissed.

No. S-05-117: **Riley v. Fremont Cancer Ctr**. Stipulation allowed; appeal dismissed.

No. S-05-614: **Rust v. Leikhus**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-05-640: **Farrakhan v. City of Omaha**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-05-787: **Genoways v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-05-812: **O'Brien v. Department of Motor Vehicles**. Stipulation allowed. Reversed and remanded with directions.

No. S-05-836: **State v. Ryan**. Motion for summary affirmance overruled. Cause remanded to district court for entry of final order on motion for postconviction relief.

No. S-05-836: **State v. Ryan**. Motion to retain jurisdiction sustained. The district court's denial of postconviction relief is summarily affirmed. See rule 7A(1).

No. S-05-965: **Enriquez v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-05-1005: **Lamar Co. v. Kelley**. Motion sustained; appeal dismissed with prejudice; each party to pay own costs.

No. S-05-1059: **Brandon v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-1213: **Richards v. Meeske**. Stipulation allowed; appeal dismissed; each party to pay own costs.

Nos. S-05-1429 through S-05-1437: **In re Estate of Buffett**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-05-1467: **State v. Harris**. Appeal dismissed at the request of appellant.

No. S-06-217: **In re Interest of Jonathan W**. Appeal dismissed as moot. See, rule 7A(2); *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

No. S-06-256: **Rognirhar v. Kinlund**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-06-333: **State v. Garza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-459: **Dolezal v. Nebraska Game & Parks Comm**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-582: **In re Guardianship & Conservatorship of Larson**. Appeal dismissed. See rule 7A(2).

No. S-06-631: **Waite v. Adams**. Affirmed. See, rule 7A(1); *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006). The appellees are permitted 10 days to file motions for attorney fees and costs and supporting affidavits pursuant to rule 9F and Neb. Rev. Stat. § 25-824 (Reissue 1995).

No. S-06-644: **Pettit v. Committee for Reorg. of Sch. Dist**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1905 (Reissue 1995).

No. S-06-645: **Seifer v. Committee for Reorg. of Sch. Dist**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1905 (Reissue 1995).

No. S-06-793: **State v. Derry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-963: **State ex rel. Counsel for Dis. v. Gilner**. Judgment of suspension.

No. S-06-1026: **Henry v. Americans for Limited Government**. Stipulation to dismiss filed in response to November 15, 2006, order to show cause is allowed; appeal dismissed.

No. S-06-1126: **State ex rel. Counsel for Dis. v. Grabinski**. Thomas D. Grabinski is suspended from the practice of law in the State of Nebraska until further order of this court.

No. S-07-075: **State ex rel. Counsel for Dis. v. Smyrak**. Judgment of suspension.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-04-715: **Otte v. Neth**. Petition of appellant for further review sustained on November 22, 2006.

No. S-04-835: **Robbins v. Neth**, 15 Neb. App. 67 (2006). Petition of appellant for further review sustained on November 15, 2006.

No. A-04-893: **Peterson v. Peterson**, 14 Neb. App. 778 (2006). Petition of appellant for further review overruled on July 19, 2006.

No. A-04-1016: **Wilmot v. Snelling**. Petition of appellant for further review overruled on August 30, 2006.

No. A-04-1030: **State v. Henderson**. Petition of appellant for further review overruled on September 18, 2006, as untimely filed.

No. A-04-1077: **Anderson v. Christensen**. Petition of appellee for further review overruled on August 30, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellee Farnam Bank for further review overruled on July 6, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellee Rupp for further review overruled on July 6, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellees Franzen and Widick for further review overruled on July 6, 2006.

No. A-04-1191: **Frazier v. Eberspacher**. Petition of appellants for further review overruled on November 29, 2006.

No. A-04-1193: **Eran Indus. v. City of La Vista**. Petition of appellee for further review overruled on January 18, 2007.

No. A-04-1214: **Lenzen v. JG Shopping Ctr. Mgmt**. Petition of appellant for further review overruled on October 12, 2006.

No. A-04-1236: **Berens v. McNeil Company**. Petition of appellee McNeil Company for further review overruled on August 30, 2006.

No. A-04-1238: **Thomas v. Hollinger**. Petition of appellant for further review overruled on August 30, 2006.

No. A-04-1251: **Campagna v. Higday**, 14 Neb. App. 749 (2006). Petition of appellant for further review overruled on July 12, 2006.

No. A-05-035: **Underwood v. Underwood**. Petition of appellant for further review overruled on January 4, 2007.

No. A-05-064: **State on behalf of Snyder-Brandt v. Bartels**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-106: **Jepsen v. Greenfield Sales**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-126: **State v. Fair**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-130: **State ex rel. Wagner v. Kay**, 15 Neb. App. 85 (2006). Petition of appellant for further review overruled on January 4, 2007.

No. A-05-289: **Poppe v. City of Lincoln**, 15 Neb. App. 164 (2006). Petition of appellant for further review overruled on January 4, 2007.

No. A-05-365: **In re Estate of Schindler**. Petition of appellant for further review overruled on November 20, 2006.

No. A-05-374: **Conroy v. Columbia Ins. Co**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-463: **B & B Sales v. Union Ins. Co**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-496: **State v. Gray**. Petition of appellant for further review overruled on October 12, 2006.

No. A-05-504: **State v. Buggs**. Petition of appellant for further review overruled on December 13, 2006.

No. S-05-519: **Zink v. Neth**. Petition of appellant for further review sustained on August 30, 2006.

No. S-05-519: **Zink v. Neth**. Petition of appellant for further review dismissed on January 24, 2007, as having been improvidently granted.

No. A-05-669: **In re Estate of Anderson**. Petition of appellant for further review overruled on January 18, 2007.

No. A-05-692: **State v. Koch**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-707: **State v. Rose**. Petition of appellant for further review overruled on November 15, 2006.

No. A-05-881: **State v. Murphy**, 14 Neb. App. 804 (2006). Petition of appellant for further review overruled on July 19, 2006.

No. A-05-885: **Finnegan v. Leslie**. Petition of appellant for further review overruled on August 30, 2006.

No. S-05-947: **State v. Muse**, 15 Neb. App. 13 (2006). Petition of appellant for further review sustained on November 15, 2006.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Petition of appellee for further review overruled on July 6, 2006.

No. A-05-962: **State v. Benish**. Petition of appellant for further review overruled on September 27, 2006.

No. S-05-1033: **In re Interest of Jeffrey K.**, 14 Neb. App. 818 (2006). Petition of appellee for further review sustained on August 30, 2006.

No. A-05-1043: **State v. Hysell**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1096: **Pflepsen v. KC Concrete Placement**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1130: **Velehradsky v. Velehradsky**. Petition of appellant for further review overruled on September 13, 2006.

No. A-05-1131: **State v. Stetz**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1140: **State v. Miner**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-1153: **State v. Agee**. Petition of appellant for further review overruled on October 25, 2006.

No. A-05-1157: **State v. Miner**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-1195: **Hansen v. Vampola**. Petition of appellant for further review overruled on July 14, 2006, as untimely filed. See rule 2F(1).

No. A-05-1201: **In re Interest of Walter W.**, 14 Neb. App. 891 (2006). Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1220: **State v. Devitt**. Petition of appellant for further review overruled on September 13, 2006.

No. A-05-1233: **Arias v. Department of Corr. Servs**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1253: **State v. Stevens**. Petition of appellant for further review overruled on January 18, 2007.

No. A-05-1258: **Scheurich v. Drivers Mgmt., Inc**. Petition of appellee for further review overruled on August 30, 2006.

No. A-05-1269: **State v. Dupre**. Petition of appellant for further review overruled on November 15, 2006.

No. A-05-1296: **State v. Zmievski**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1322: **Lynch v. Sparks**. Petition of appellant for further review overruled on August 30, 2006.

Nos. A-05-1324, A-05-1325: **In re Interest of Chynne P. et al**. Petition of appellant for further review overruled on August 8, 2006.

No. A-05-1331: **State v. Cole**. Petition of appellant for further review overruled on September 20, 2006.

No. A-05-1337: **Conn v. Conn**, 15 Neb. App. 77 (2006). Petition of appellant for further review overruled on December 13, 2006.

No. A-05-1375: **State v. Pfeifer**. Petition of appellant for further review overruled on September 13, 2006.

Nos. A-05-1381, A-05-1382: **In re Interest of Vanessa R. & Mario R**. Petitions of appellant for further review overruled on August 30, 2006.

No. A-05-1388: **Backhaus v. Calvert**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1397: **In re Interest of Dennis W.**, 14 Neb. App. 827 (2006). Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1407: **In re Interest of Brandon G**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1408: **State v. Lohman**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-1414: **State v. Bussart**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1417: **State v. Brown**. Petition of appellee for further review overruled on November 15, 2006.

No. A-05-1418: **State v. Portsche**. Petition of appellant for further review overruled on October 12, 2006.

No. A-05-1454: **Kuhn v. H&H Chevrolet Co**. Petition of appellant for further review overruled on September 13, 2006.

No. A-05-1455: **State v. McClure**. Petition of appellant for further review overruled on July 12, 2006.

No. A-05-1477: **In re Interest of Maxwell T.**, 15 Neb. App. 47 (2006). Petition of appellant for further review overruled on January 18, 2007.

No. S-05-1525: **In re Interest of Michael U.**, 14 Neb. App. 918 (2006). Petition of appellant for further review sustained on September 13, 2006.

No. A-05-1535: **State v. Rose**. Petition of appellant for further review overruled on October 18, 2006.

No. A-05-1544: **State v. Prater**. Petition of appellee for further review overruled on August 30, 2006.

No. A-05-1559: **In re Adoption of Jessica D**. Petition of appellee for further review overruled on August 30, 2006.

No. A-05-1568: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on July 19, 2006. See rule 2F(3).

No. A-06-007: **State v. Grant**. Petition of appellant for further review overruled on September 20, 2006.

No. A-06-008: **State v. Zephier**. Petition of appellant for further review overruled on November 15, 2006.

No. S-06-015: **Liming v. Liming**. Petition of appellant for further review sustained on May 18, 2006.

No. A-06-029: **Sinsel v. Weinand**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-035: **State v. Segura**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-041: **State v. Perry**. Petition of appellant for further review overruled on October 25, 2006.

No. A-06-059: **State v. Wehr**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-074: **Banks v. Midwest Padding**. Petition of appellant for further review overruled on October 12, 2006.

No. A-06-080: **State v. Mendoza**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-131: **Nocita v. Nocita**. Petition of appellee for further review overruled on September 27, 2006.

No. A-06-154: **State v. Wilson**, 15 Neb. App. 212 (2006). Petition of appellant for further review overruled on January 18, 2007.

No. A-06-165: **State v. Banks**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-167: **Marriott v. SID No. 230**. Petition of appellant for further review overruled on July 6, 2006.

No. A-06-174: **State v. Snyder**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-179: **In re Interest of Ethan M.**, 15 Neb. App. 148 (2006). Petition of appellees and guardian ad litem for further review overruled on January 18, 2007.

Nos. A-06-180, A-06-181: **In re Interest of Chloe H. & Katrina H.**, 15 Neb. App. 148 (2006). Petitions of appellant for further review overruled on January 18, 2007.

No. A-06-184: **Arias v. Department of Corr. Servs**. Petition of appellant for further review overruled on September 27, 2006.

No. S-06-235: **In re Interest of Fedalina G**. Petition of appellant for further review sustained on July 19, 2006.

No. A-06-241: **Clayton v. Warford**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-250: **State v. Hauck**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-253: **Murray v. Department of Motor Vehicles**. Petition of appellant for further review overruled on October 12, 2006.

No. S-06-258: **Foster v. BryanLGH Med. Ctr. East**. Petition of appellant for further review sustained on July 6, 2006.

No. A-06-290: **Dunham v. State Patrol**. Petition of appellant for further review overruled on July 6, 2006.

Nos. A-06-295, A-06-296: **State v. Kenney**. Petitions of appellant for further review overruled on August 30, 2006.

No. A-06-307: **State v. Guajardo**. Petition of appellant for further review overruled on October 12, 2006.

No. A-06-315: **State v. Perez**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-316: **State v. Perez**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-331: **State v. Goldsworthy**. Petition of appellant for further review overruled on October 18, 2006.

Nos. A-06-343, A-06-344: **State v. Cisar**. Petitions of appellant for further review overruled on October 18, 2006.

No. A-06-366: **Keup v. Department of Corr. Servs**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-367: **State v. Wiemer**, 15 Neb. App. 260 (2006). Petition of appellant for further review overruled on January 18, 2007.

No. A-06-387: **Schlichtman v. Jacob**. Petition of appellant for further review overruled on October 18, 2006.

No. A-06-402: **In re Interest of Emma B**. Petition of appellant for further review overruled on July 12, 2006.

No. A-06-413: **In re Interest of Savannah S. et al**. Petition of appellant for further review overruled on November 29, 2006.

No. A-06-437: **State v. Warnsing**. Petition of appellant for further review overruled on November 1, 2006.

No. A-06-440: **In re Interest of Joshua A. et al**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-450: **State v. Smith**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-450: **State v. Smith**. Petition of appellant pro se for further review overruled on January 18, 2007.

No. A-06-452: **In re Interest of Thomas Z**. Petitions of appellant for further review overruled on October 18, 2006.

No. A-06-469: **Theis v. Neth**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-470: **Stroh v. Stroh**. Petition of appellant for further review overruled on October 18, 2006.

Nos. A-06-476, A-06-478: **State v. Cooper**. Petitions of appellant for further review overruled on October 12, 2006.

No. A-06-485: **Kaelin v. Neth**. Petition of appellant for further review overruled on January 4, 2007.

No. A-06-516: **State v. Humphrey**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-539: **State v. Weekly**. Petition of appellant for further review overruled on October 18, 2006.

No. A-06-559: **State v. Rodriguez**. Petition of appellant for further review overruled on January 24, 2007.

No. A-06-571: **Caton v. Clarke**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-602: **State ex rel. Tyler v. Department of Corrections**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-603: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-604: **Tyler v. Houston**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-609: **State on behalf of Luna v. Luna**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-616: **In re Interest of Amanda W**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-621: **Schlichenmaier v. Whitlock**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-653: **State v. Le**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-656: **In re Interest of Jason B. & Michael B**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-667: **State v. Castellanos**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-670: **Travelers Indemnity Co. v. Heim**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-671: **State v. Larsen**. Petition of appellant for further review overruled on November 29, 2006.

No. A-06-672: **State v. Larsen**. Petition of appellant for further review overruled on November 29, 2006.

No. A-06-691: **State v. Cramer**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-698: **State v. Tyler**. Petition of appellant for further review overruled on August 14, 2006, as premature. See rule 2F(1).

No. S-06-698: **State v. Tyler**. Petition of appellant for further review sustained on December 13, 2006.

No. A-06-715: **State v. Martin**. Petition of appellant for further review dismissed on November 13, 2006, as moot.

No. A-06-718: **In re Interest of Ciera C**. Petition of appellee State for further review overruled on January 24, 2007.

No. A-06-763: **Barrett v. Fabian**. Petition of appellant for further review overruled on November 1, 2006.

No. A-06-821: **State v. Anderson**. Petition of appellant for further review overruled on November 15, 2006.

No. S-06-889: **Williams v. Baird**. Petition of appellant for further review sustained on November 15, 2006.

No. A-06-901: **Onuachi v. Meylan Enters**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-903: **City of Blair v. Thompson**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-984: **First Resolution Investment v. Llanes**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-1003: **Kuhn v. Wells Fargo Bank**. Petition of appellant for further review overruled on January 4, 2007.

No. A-06-1007: **Martin v. Department of Corr. Servs**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-1101: **State v. Pfitzer**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-1153: **Steffens v. Steffens**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-1177: **Spotanski v. Willyard**. Petition of appellant for further review overruled on January 22, 2007, as untimely filed.

No. A-06-1261: **Davis v. Board of Parole**. Petition of appellant for further review dismissed on January 18, 2007, for lack of jurisdiction.

No. A-06-1262: **Davis v. Board of Parole**. Petition of appellant for further review dismissed on January 18, 2007, for lack of jurisdiction.

No. A-06-1263: **Davis v. Board of Parole**. Petition of appellant for further review dismissed on January 18, 2007, for lack of jurisdiction.

Nebraska Supreme Court

In Memoriam

Justice Leslie Boslaugh

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
December 4, 2006
2:00 p.m.

Proceedings before:

SUPREME COURT

Chief Justice Michael G. Heavican

Justice John F. Wright

Justice William M. Connolly

Justice John M. Gerrard

Justice Kenneth C. Stephan

Justice Michael McCormack

Justice Lindsey Miller-Lerman

Justice Leslie Boslaugh

Proceedings

CHIEF JUSTICE HEAVICAN: Good afternoon. The Nebraska Supreme Court is meeting in special ceremonial session on this 4th day of December, 2006, to honor the life and memory of Former Supreme Court Justice Leslie Boslaugh 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. Justice Kenneth Stephan is next to Justice Miller-Lerman, and next to Justice Stephan is Justice William Connolly. To my far right is Justice Michael McCormack. Next to Justice McCormack is Justice John Gerrard, and to my immediate right is Justice John Wright.

The Court further acknowledges the presence of Justice Boslaugh's wife, Betty; son, Paul and his wife Eileen Boslaugh, and their son Max and twin daughters. Justice Boslaugh's daughters and sons-in-law, Sarah Boslaugh and Daniel Peck and Marguerite Boslaugh and David Guadliana were unable to attend today.

The Court also acknowledges the presence of other members of the family and friends of former Supreme Court Justice Boslaugh.

Also present are former members of the Nebraska Supreme Court, members of the Nebraska Court of Appeals, and other members of the judiciary and members of the bar.

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

Mr. Chief Justice, good afternoon.

CHIEF JUSTICE HASTINGS: Good afternoon. If it please the Court, William Hastings, Chair of Special Supreme Court Committee, memorializing Judge Leslie Boslaugh.

The members of my committee are C. Thomas White, Chief Justice, Retired, of this Court; John G. Grant, Judge Retired of this Court; James Hewitt, Wesleyan University Professor and attorney; and D. Nick Caporale, Retired Judge of this Court. They will each be called upon to recall their remembrances of Judge Boslaugh.

Leslie Boslaugh was born in Hastings, Nebraska, on September 14, 1916, and died in Lincoln on February 16, 2006. He is survived by his wife, Elizabeth; daughters Marguerite and her husband David Guadliana, Sarah and her husband Daniel Peck; and Paul and wife Eileen, grandson Maxwell Joseph and twin granddaughters Rachael Leslie and Andrea Genevieve.

Judge Boslaugh graduated from the University of Nebraska College of Law, cum laude, was a member of Phi Kappa Psi Fraternity and a 33rd degree Scottish Rite Mason. He served during World War II in the United States Army Field Artillery in Germany. He practiced law in Hastings and later in Lincoln with the Attorney General's Office.

Judge Boslaugh was elected to this Court in 1961. He served until his retirement in 1994, having served on the Court for a total of 33 years, longer than any other judge except for Judges William Rose and Edward Carter. His services were distinct in that he was one of the last judges of this Court to have been elected by open ballot or popular ballot and the only judge to have succeeded his father on the bench.

At this time please permit me to present C. Thomas White, Chief Justice, Retired.

CHIEF JUSTICE HEAVICAN: Thank you.

CHIEF JUSTICE WHITE: May it please the Court, I first met Judge Leslie Boslaugh in 1966 or thereabouts when as a District Judge I was privileged to sit with the Supreme Court for a week, hearing, as I remember, a series of property tax appeals.

In that week I formed an impression of him, a giant of a man, a towering intellect, courtly, friendly and genuinely interested in your thoughts, your experiences and your opinions.

Over the succeeding years I grew to know him better, and my earlier judgments were confirmed.

In his approach to the law, Les understood the majesty of the common law, that that which is fixed should be followed, but he also believed, as did Holmes, that the law was based on experience and not logic. He recognized that the law was for the living and change was at times both desirable and necessary. His dedication to the law was one of respect, almost reverence. Lincoln wrote, "Let reverence for the law be taught by every American mother to the child that prattles in her lap. Let it be taught in schools, in seminaries and in colleges. Let it be written in primers, spelling books and in almanacs. Let it be preached from the pulpit, proclaimed in fine legislative halls and enforced in the courts of justice. And in short let it become the political religion of the nation."

Les's approach to the role as appellate judge was to compose an opinion, carefully crafted to decide this case and not another, and to leave for another day an issue not yet discussed, briefed or argued. His words on presentation of opinion that he deemed too long and inclusive was, "I apologize for the length of the opinion. I didn't have time to write a short one."

Judge Boslaugh's interests went far beyond his devotion to his law career, his interest in military history due to his World War II role as an artillery man. His colleague Chief Justice William Hastings, also a cannoneer, frequently discussed their experience. I was an avid listener, as only an office soldier could be fascinated. He lies buried among his fellow warriors.

Judge Boslaugh was proud of his family, and his love of them shone when he was in their presence.

His encyclopedic knowledge of American railroads was inspiring. I had a limited knowledge in my boyhood as a gandy dancer and he required of me to tell all the aspects to add to his warehouse of facts. A gandy dancer is somebody who works on railroad tracks.

Judge Boslaugh was again of the group with which I served, a man for all seasons. We will not see his — soon see his like again.

Robert Louis Stevenson's poem is of comfort.

"Under a wild and starry sky
Dig the grave and let me lie

Gladly did I live, and gladly die
And I lay me down with a will
And this the verse you grave for me
Here he lies where he longed to be
Home is the sailor home from the sea
and the hunter home from the hill."

I thank the Court for permitting me to speak.

CHIEF JUSTICE HEAVICAN: Thank you.

CHIEF JUSTICE HASTINGS: May I introduce John G. Grant, Retired Judge of this Court.

CHIEF JUSTICE HEAVICAN: Thank you.

JUSTICE GRANT: May it please the Court, I used to jump up and run up here but them days is gone.

I'm extremely pleased to be here, and I don't have much to add to what Tom and these other learned guys are going to say, but I had to tell you this one story. About the first day I was on the Court we were going, walking to lunch, and school let out. I turned around this way. I don't know where it is. And he knew I was a Catholic and he said, "My goodness, those Catholic kids are sure noisy," he said. So I knew I had a friend and from then on I was a great pal to him. He was just a dear, dear, friend and just not too solemn and yet wise as an owl, and I loved him and I want to extend my condolences, belated, to his family, but he's a great man and I hope everybody knows that. Thank you very much.

CHIEF JUSTICE HEAVICAN: Thank you, Judge Grant.

CHIEF JUSTICE HASTINGS: May I present at this time James Hewitt, Professor at Wesleyan University and a lawyer.

CHIEF JUSTICE HEAVICAN: You may indeed. Thank you. Mr. Hewitt.

MR. JAMES HEWITT: May it please the Court, I'm exceptionally happy to be here this afternoon to tell you a few things about Les Boslaugh, whom I revered and enjoyed for 50 years.

I graduated from law school in 1956. I had an Air Force ROTC commission and I was going to be called to active duty sometime after the first of 1957. I needed a job. I needed to do something and Lester Stiner and Leslie Boslaugh, lawyers in Hastings, practicing together, who were longtime friends of

our family, offered me the opportunity to be an associate in their office during this span of time before I was called up to active duty.

I enjoyed it very much. I learned a great deal from both of them. One of the things that I learned was in October of 1956 — I remember it very clearly — I came back to the office after lunch and neither Mr. Stiner nor Judge Boslaugh were there. I didn't know if they had a hearing that afternoon or if I had forgotten something that they were going to do.

I stayed in the office pretty much all afternoon doing meaningful work. I think I was probably filing advance sheets or something of that kind, but in any event I stayed in the office all afternoon, not knowing where they were, until late in the afternoon when they both returned to the office and advised me that on that particular day Don Larsen had pitched the first perfect game ever pitched in a World Series. I don't know what I learned from that except that partners in law firms and associates function on a significantly different level.

During the fall of 1956 the United States was engaged in a presidential campaign. Dwight Eisenhower, who was then president, was running against his challenger for the second time, Adlai Stevenson. Leslie Boslaugh was an official in the Adams County Republican Party and he worked very diligently to bring about the reelection of President Eisenhower.

In that particular fall, the Big 10 high school athletic conference held its championship football game at Hastings High School. They played at Hastings College but it was Hastings against McCook for the championship and Judge Boslaugh this time invited me to go to the game with him and we did. It was an afternoon game and we went out there. And we ran into Frank Morrison who subsequently became the Governor of Nebraska, who was a Democratic activist to the Nth degree, and Jerry Whelan who was Lieutenant Governor during the Exon administration and another Democratic activist.

These people had been fighting each other tooth and nail over the election of Dwight Eisenhower or Adlai Stevenson, and yet I stood and watched as they laughed and joked and had a wonderful time visiting with each other throughout the course of the afternoon. It taught me that it is quite, quite possible for

people to compete, for people to be against each other vigorously and still retain a wonderful respect and regard for each other and to enjoy each other's company.

After Judge Boslaugh came to this Court and I came back from the service, I frequently came to see him in his office. Things were different at the Court then. There weren't any bomb threats. There weren't any of the things that you walk through, the metal detectors. There was no glass wall in the clerk's office where you pass your papers through like you were buying something in a cheap liquor store. It was very different. I would come in and sit down and chat with the judge and he would tell me stories and we would have a good time and I learned another lesson. He had books piled all the way across his couch and I realized that it was possible to be a success even if you had a messy office.

I — when I was considering an important career change of my own from private practice to working in a corporate situation, I came to see the judge, talked to him at some length. I came several times. He asked me searching questions. He focused on a number of issues and made me decide the issue for myself. I learned the lesson then that a good friend can be invaluable in dealing with major challenges in your life.

In the 1970s I was elected by the lawyers of Nebraska to be the state delegate to the House of Delegates of the American Bar Association. After a while while I had served in that post I was invited to go to Minden, Nebraska, to a meeting of the 10th Judicial District Bar Association and to tell them what I thought the ABA was up to. Judge Boslaugh knew that I was going and he called me and asked if he could ride along and I said I would love to have him, and we had a great visit on the way out and on the way back.

This was shortly after a former member of this Court had had some difficulty in an automobile situation. It was not any of the judges who are here today. But in any event, it was a difficult situation and I was interested in trying to find out more than I knew about it. I used every bit of cross-examination skill that I had to try and elicit the information from Judge Boslaugh and he handled it very nicely and I did not learn a single thing. The thing I did learn, however, was that a good judge treats the

business of the Court as privileged and confidential no matter to whom he or she is talking.

I also learned from watching Judge Boslaugh in his intersection with the lawyers of the 10th Judicial District where he had lived and worked for a long time that it is quite possible for lawyers and judges to eat and meet and break bread and drink and enjoy each other without their respect for each other diminishing in any sense of the word.

During the 1970s when Jerry Whelan was the Lieutenant Governor in the Exon administration, he and Judge Boslaugh and I would frequently meet at the University Club for lunch. That was one of Judge Boslaugh's favorite haunts and we would have clam chowder and we would talk about what was going on in business and industry and in the law. And I learned that judges do not check their interest in community life, in contemporary life at the door when they reach the bench.

As you can see, I have learned a great deal from Judge Boslaugh over a long span of time, but the lessons he taught me were not confined to me. Over the years, both as a lawyer and as a judge, Leslie Boslaugh served as a shining example of what is good in a man and in a servant of the law.

We hear a lot these days about parties, about groups having a big tent. Leslie Boslaugh's tent was immense. He did not discriminate. All who wanted to learn were welcome to learn what he had to teach, and hundreds of Nebraska's lawyers and judges benefited from his example.

I can think of no finer epitaph. Thank you very much.

CHIEF JUSTICE HEAVICAN: Thank you, Mr. Hewitt.

CHIEF JUSTICE HASTINGS: May I present D. Nick Caporale, Retired Judge of this Court.

CHIEF JUSTICE HEAVICAN: Yes, you may. Judge Caporale.

JUSTICE CAPORALE: May it please the Court. Though there's not much new that can be said concerning the nature of Judge Boslaugh and his contributions to the juris prudence of this state, I am nonetheless grateful for the opportunity to say a few words about this talented and unusual man, a man whom I respected, admired and who by example taught me a great deal about appellate judging.

Here are a few of the things for which I remember him the most.

I remember him for his calming and leveling influence on the Court. I remember an occasion during my freshman period as a member of this body when I was arguing, rather passionately I think, my view of the law to Judge Boslaugh. He listened quietly for a time and then said, "Judge Caporale" — and as many here know, when judges call each other by title, idle chitchat has ended and serious business is at hand — and then he calmly said, "I'm not trying to convert you. I'm simply trying to explain my point of view." My response, of course, was, "But I am trying to convert you." I don't remember what the issue was. I do remember I did not succeed.

I remember him for his compassion and his politeness. Though he never shied away from a harsh result when the law required a harsh result, you could nonetheless sometimes discern that he was discomforted by having to do what had to be done.

He was unfailingly polite. He didn't ask many questions during oral argument because experience had taught him, as he once observed, that if you simply wait, the lawyers will tell you what you need to know.

When he did ask a question, it was a crucial one and it was nearly always at the end of the lawyer's presentation. And I know what some of you are thinking, but remember my observation was that he taught many lessons, not that they were all taken.

He had one of the most inquisitive minds I've ever encountered. He was well-read and well-versed about virtually everything. And if an occasion presented itself when he was not as well-versed as he would like to have been, you can rest assured that the next time the topic came up, he would be. This was true whether you were talking about the law or carpentry or food or finance and most especially railroads.

He had one of the most organized minds and disheveled offices I have ever seen. As has been alluded before, there were books and piles of paper on the desk, on the couch and on the chairs. When you came in he was always cordial and asked

you to sit. Fulfilling that requirement sometimes presented a challenge.

And I said that his office was disheveled, not disorganized, and that distinction I think is illustrated by an occasion when I needed to look to a rather antiquated version of the Code of Professional Conduct and happened to mention during our coffee meeting that morning that I was having difficulty locating it and Les said, "You know, I think I've got that." And so we went to his office, he selected a pile of papers on his desk and on his first archeological dig came within three or four sheets of where we needed to be. It was an amazing feat, worthy of Houdini.

I remember him, too, because he seldom said anything bad about anyone. About the harshest comment I remember is that occasionally he would observe that if you could buy so-and-so for what he was actually worth and sell him for what he thought he was worth, you would do very well indeed.

The exact opposite was true of Les Boslaugh. We were privileged to have him walk among us and I am uneasy by the fact that he no longer does so. Thank you.

CHIEF JUSTICE HEAVICAN: Thank you, Judge Caporale.

CHIEF JUSTICE HASTINGS: Les was my very good friend. We first became really acquainted when I was serving as a judge of the District Court for Lancaster County. We were both members of the Judicial Qualification Commission which meant frequently we would have lunch together, always at the University Club because they had linen tableclothes and napkins. He hated the paper variety.

He would never let me reimburse him so in defense of my own integrity, I finally joined the Nebraska Club which presented similar niceties and equally good food.

In addition to possessing skills as a judge, he had those as a plumber, carpentry, model train building. He was a real railroad enthusiast. He knew about every train in Nebraska by its number; that is, he would not say that was the westbound Denver train, but that's No. 8.

His son Paul works for the railroad and they shared their love of the rails which was a great joy to the judge.

Besides being a great legal scholar, his years of service on the Court permitted him to have outstanding institutional memory, which I'm sure you've all found has been invaluable in discussing and deciding cases.

He was a great judge and we all miss him. On behalf of my committee I thank you for the privilege we've had of being here today. Thank you.

CHIEF JUSTICE HEAVICAN: Thank you, Former Chief Justice William Hastings.

I take this final opportunity to note for those present that this entire proceeding has been memorialized by the court reporter who today is Sue Wurm, and we want to thank her. 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 Boslaugh. We will also forward a copy of the transcription to West Publishing for inclusion in its Northwest Reporter.

On behalf of the Nebraska Supreme Court, I extend its appreciation to Former Chief Justice William C. Hastings who chaired the Court's Memorial Committee, who, with the assistance of Janet Bancroft from the Court Administrator's Office is 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 Leslie Boslaugh to remain in the courtroom for a moment to greet each other on this occasion. I thank you all for attending. We are adjourned.

(Ceremonial session adjourned at 2:56 p.m.)

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

CYNTHIA A. LOVETTE AND RICHARD D. LOVETTE, APPELLANTS, v. STONEBRIDGE LIFE INSURANCE COMPANY, FORMERLY KNOWN AS J.C. PENNEY LIFE INSURANCE COMPANY, A STOCK COMPANY, APPELLEE.

716 N.W.2d 743

Filed July 14, 2006. No. S-05-389.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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.
4. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions when the contract was made.
5. ____: ____: ____. When the terms of an insurance contract are clear, the court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain meaning of the policy.
6. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
7. ____: ____. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Jeffrey F. Putnam, of Inserra & Kelley, for appellants.

Glen Th. Parks and Peter C. Wegman, of Rembolt Ludtke, L.L.P., for appellee.

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

STEPHAN, J.

Cynthia A. Lovette and Richard D. Lovette brought this action against Stonebridge Life Insurance Company (Stonebridge), formerly known as J.C. Penney Life Insurance Company, to recover as beneficiaries on an accidental death policy issued by Stonebridge to their son, Jason M. Lovette. Stonebridge refused payment, contending that an exclusion in the policy applied. The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of Stonebridge and denied the Lovettes' motion. The Lovettes appeal from that final order. We find no error and affirm the judgment of the district court.

FACTS

The case was submitted on stipulated facts. According to the stipulation, Cynthia and Richard are the parents and next of kin of Jason, who was born July 10, 1979. Jason purchased a life insurance policy from Stonebridge insuring his life for $100,000 against loss through accidental injuries. The certificate of insurance contained an exclusion which provided that "[n]o benefit shall be paid for Injury that . . . is caused by or results from the Covered Person's blood alcohol level being .10 percent weight by volume or higher."

Jason died on October 6, 2002, at approximately 3 a.m. in Wallace, Lincoln County, Nebraska, in a motor vehicle accident. The vehicle he was driving rolled over and pinned him underneath it. The certificate of death stated that the "IMMEDIATE CAUSE" of death was "Blunt Force Trauma," which was "DUE TO, OR AS A CONSEQUENCE OF [a] Motor Vehicle Accident." At the time of his death, Jason had a blood alcohol content of .27 grams per 100 milliliters of blood, which is equivalent to a blood alcohol level of .22 percent.

The accident occurred when Jason was backing his 1991 Honda Accord and attempted to make a moving 180-degree

turn. His vehicle entered the south ditch of Nebraska Highway 23. The right front corner of the vehicle struck the ditch, which caused the vehicle to flip onto its top. Jason was ejected through the open driver's-side window. The weather was clear, the asphalt road was level, and the pavement was dry. Investigating officers observed that Jason's face had been pressed into the mud by the weight of the vehicle. A V-shaped dent was visible on the driver's-side roof area that appeared to have been caused by Jason's body. An impact mark on the sunroof was consistent with an impact on the back of Jason's head. Investigating officers found several full, unopened bottles of beer lying in and around the vehicle. Investigating officers also detected a strong odor of alcoholic beverage on or about Jason.

A front seat passenger in Jason's vehicle told investigators that at the time of the accident, Jason had been rapidly accelerating backward, westbound, and was attempting to complete a 180-degree turn and continue westbound without stopping. The passenger told a bystander that the vehicle had been traveling approximately 50 to 55 miles per hour backward prior to the accident and told investigating officers that the vehicle was traveling approximately 30 to 35 miles per hour backward prior to the accident. No autopsy was performed.

The district court concluded that the "accident was caused at least in part by or resulted from [Jason's] blood alcohol level being over two times the legal limit." The court found that the policy exclusion thus applied, and the court granted summary judgment in favor of Stonebridge. The Lovettes filed this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The Lovettes assign that the district court erred in finding that the policy exclusion applied and erred in granting Stonebridge's motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine

issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006); *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (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).

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court. *Molina v. American Alternative Ins. Corp.*, 270 Neb. 218, 699 N.W.2d 415 (2005); *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004).

ANALYSIS

[4,5] The issue presented is whether the exclusion contained within the policy prohibits the Lovettes from recovering against Stonebridge. Familiar general principles guide our analysis of this issue. An insurance policy is to be construed as any other contract to give effect to the parties' intentions when the contract was made. *Boutilier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 681 N.W.2d 746 (2004). When the terms of an insurance contract are clear, the court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. *Id.* In such a case, a court shall seek to ascertain the intention of the parties from the plain meaning of the policy. *Id.*

The policy provides that "[n]o benefit shall be paid for Injury that . . . is caused by or results from the Covered Person's blood alcohol level being .10 percent weight by volume or higher." The Lovettes argue that this language is not satisfied by the mere fact that Jason was intoxicated at the time of the accident. Instead, they contend that the language of the exclusion unambiguously requires a "causal connection" between Jason's "blood alcohol weight," or his intoxication, and the injuries he suffered. Brief

for appellants at 6. They contend that such a connection is not present in this action because the uncontroverted evidence is that Jason's death was caused by "blunt force trauma" as a result of a motor vehicle accident. *Id.*

We agree that the plain language of the policy exclusion requires the insurer to show a causal connection between the decedent's blood alcohol level and the accident in which the fatal injuries were sustained. See *Bankers Life & Cas. Co. v. Jenkins*, 547 S.W.2d 237 (Tenn. 1977). However, the Lovettes view the connection too narrowly by focusing on the ultimate cause of death and disregarding the circumstances that led up to the motor vehicle accident that resulted in Jason's death. The unambiguous language of the policy does not require that the intoxication, or blood alcohol weight, be the sole cause of the death in order to trigger the exclusion. Rather, the language requires only that the intoxication be a cause of a fatal event. See, *Ober v. CUNA Mut. Soc.*, 645 So. 2d 231 (La. App. 1994); *Bankers Life & Cas. Co. v. Jenkins, supra*; *Richard v. American Home Assurance Company*, 318 So. 2d 613 (La. App. 1975). Thus, where death results from a vehicular accident, the insurer need not eliminate all other possible causes of the accident to invoke the policy exception, as long as it demonstrates that the insured's blood alcohol level is causally related to the accident.

[6] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). To meet this burden, Stonebridge was required to produce evidence from which a finder of fact could reasonably infer that Jason's blood alcohol level was a cause of his death. We note that in some reported cases where an insurer has successfully invoked a similar exclusion in circumstances where the insured was operating a motor vehicle at the time of death, the evidence includes expert testimony correlating blood alcohol level with impairment. *Ober v. CUNA Mut. Soc., supra*; *Bankers Life & Cas. Co. v. Jenkins, supra*; *Richard v. American Home Assurance Company, supra*. In at least one case, however, causation was established without

expert testimony. *Morgan v. Fortis Benefits Ins. Co.*, 107 P.3d 267 (Alaska 2005). The record in this case does not include expert opinion evidence that Jason's blood alcohol level resulted in impairment which was causally related to the fatal motor vehicle accident, and the parties have not briefed or argued whether an inference of causation can be drawn in the absence of such evidence.

Under a prior version of Nebraska's driving under the influence statute, this court held that a statutory presumption of intoxication arising from a specific blood alcohol level was in derogation of common law and therefore was applicable only to driving under the influence prosecutions. See *Hoffman v. State*, 160 Neb. 375, 70 N.W.2d 314 (1955). In *Raskey v. Hulewicz*, 185 Neb. 608, 616, 177 N.W.2d 744, 749-50 (1970), a personal injury case arising out of a motor vehicle accident, we first held that the trial court had properly excluded the results of a blood alcohol test because of insufficient foundation, and we then stated that the test results would have been inadmissible in any event because the "percentage of the alcohol content of the body fluids of a defendant in a civil matter is relevant, in the absence of a presumption, only when accompanied by expert opinion evidence of the effect thereof."

We do not regard this dictum in *Raskey* as establishing a bright-line rule that expert testimony is always necessary in a civil case to establish a causal relationship between a motorist's blood alcohol content and a motor vehicle accident which results in personal injury or death. In other circumstances where we have held that expert testimony is generally necessary to prove a fact, we have recognized exceptions. For example, although expert testimony is generally required to prove professional negligence, we have held that such testimony is not essential in circumstances where the recognition of the alleged negligence may be presumed to be within the knowledge of a layperson. *Boyd v. Chakraborty*, 250 Neb. 575, 583, 550 N.W.2d 44, 49 (1996) ("[i]n sum, this case involves the leaving of a foreign object, namely, a tube fragment, in a patient's body, which fragment should have been removed by an act understandable by the jury without technical evidence. . . . This is within the realm of knowledge of laypersons"); *Swierczek v.*

Lynch, 237 Neb. 469, 478, 466 N.W.2d 512, 518 (1991) ("[i]t is within the common knowledge and experience of a layperson to determine that an individual does not enter the hospital for extraction of her teeth and come out with an injury to nerves in her arms and hands, without some type of negligence occurring"). Similarly, we have stated that "where injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, use of expert testimony is not legally necessary to establish the cause and extent of such injuries." *Storjohn v. Fay*, 246 Neb. 454, 461, 519 N.W.2d 521, 527 (1994), citing *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974).

In most circumstances in civil cases, expert testimony will be necessary to establish a causal relationship between a motorist's blood alcohol level and a fatal accident. This, however, is an exceptional case. There is undisputed evidence that Jason, the insured, with a blood alcohol level of .22 percent, was operating a motor vehicle backward on a public highway at 3 a.m. at a speed of 30 to 55 miles per hour in an attempt to make a moving 180-degree turn and that he was ejected from the vehicle when it struck a ditch and flipped over, resulting in fatal injury. It is within the general knowledge of laypersons that a blood alcohol level of more than twice the legal limit impairs physical and mental faculties, and thus, a fact finder could infer, without expert testimony, that Jason's blood alcohol level was causally related to the manner in which his fatal accident occurred. By establishing these facts, Stonebridge met its prima facie burden of producing enough evidence to demonstrate that it would be entitled to judgment if the evidence were uncontroverted at trial. See, *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[7] The burden then shifted to the Lovettes to produce evidence showing the existence of a material issue of fact that would prevent judgment as a matter of law. See *id*. There is no evidence in the record suggesting an alternative cause for the accident or negating the inference of a causal relationship between the blood alcohol level and the fatal accidental injury. See *Morgan v. Fortis Benefits Ins. Co.*, 107 P.3d 267 (Alaska 2005).

Accordingly, the district court did not err in entering summary judgment in favor of Stonebridge and in denying the Lovettes' motion for summary judgment.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

BEVERLY A. REED, APPELLANT, V. STATE OF NEBRASKA DEPARTMENT OF LABOR AND FERNANDO LECUONA III, COMMISSIONER OF LABOR, APPELLEES.

717 N.W.2d 899

Filed July 14, 2006. No. S-05-1473.

1. **Administrative Law: Final Orders: Appeal and Error.** An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act.
2. **Administrative Law: Time: Appeal and Error.** Under Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999), when the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency.
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. **Administrative Law: Statutes: Appeal and Error.** Under *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), a court reviewing an agency's construction of a statute it administers confronts two questions: (1) whether Congress has directly spoken to the precise question at issue and (2) whether the agency's answer is based on a permissible construction of the statute.
5. **Administrative Law: Appeal and Error.** Under *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant the deference of *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); instead, they are entitled to respect to the extent they have the power to persuade.
6. **Statutes: Courts.** When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.

7. ____: ____. The courts will not apply an administrative construction that has been prohibited by subsequent legislative enactments of the same nature.
8. **Federal Acts: Employment Security: Statutes: Time: Waiver.** The Trade Adjustment Assistance Reform Act of 2002 and remaining regulations forbid using state laws or regulations to waive time limits or late filings for good cause.

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

Riko E. Bishop, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

John H. Albin, Thomas A. Ukinski, and W. Russell Barger for appellees.

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

CONNOLLY, J.

Goodyear Tire and Rubber Company (Goodyear) laid off appellant, Beverly A. Reed, early in 2004. Reed was eligible to apply for trade readjustment allowance (TRA) benefits under 19 U.S.C. § 2291 (2000 & Supp. II 2002) of the Trade Act of 1974 (Trade Act), a federal unemployment benefits program administered by the states to assist workers who were laid off because of foreign trade competition. Nebraska Workforce Development (Workforce Development) failed to notify Reed of her rights and eligibility under the Trade Act as an "oversight." Reed missed the deadline to apply for TRA benefits, as interpreted by both the state and the federal Departments of Labor, and Workforce Development denied her benefits application as untimely.

Reed appealed the denial of benefits, arguing that the plain language of the statute does not support the state Department of Labor's interpretation of the deadline and that even if it does, Workforce Development is equitably estopped from enforcing the deadline against her. We affirm the district court's order that Reed's application was properly denied as untimely because Congress, when adopting the new deadlines, rejected the interpretation which Reed advocates.

BACKGROUND

The facts are not disputed. Goodyear employed Reed from March 26, 1987, to January 31, 2004, when she was laid off. On

January 29, 2003, the U.S. Department of Labor certified that employees laid off from Goodyear on or after December 18, 2001, would be eligible to apply for benefits under the Trade Act.

The U.S. Secretary of Labor appoints individual state agencies to administer the TRA benefits program; in Nebraska, the Secretary of Labor designated Workforce Development as that state agency. Paul Elkins of Workforce Development conceded at the administrative hearing that Reed's separation from employment fell "within the certification parameters." Elkins also explained that the Trade Act affirmatively requires his office to send notification letters to those eligible for Trade Act benefits even when the employer does not provide a list of affected employees. Elkins conceded that Goodyear had notified Workforce Development of Reed's separation, but that Reed received no notice. Elkins described this as an oversight. He explained that his office copies and files every notification letter sent to eligible employees and confirmed that the Goodyear file lacked a copy of Reed's notification letter.

Reed also confirmed that Workforce Development never sent her information about her rights under the Trade Act. She explained that she had heard from other Goodyear employees that "we may be eligible for benefits," but that Goodyear's human resources employee told Reed during her initial meetings about unemployment benefits and that Workforce Development would contact her if she was eligible for other benefits. Reed stated that she did not question the lack of correspondence initially because she knew she had 1 year in which Goodyear could recall her. She also admitted she did not press Workforce Development about further benefits because she experienced a family crisis that occupied much of her time and because the unemployment benefits she received enabled her to cover expenses without worrying about her financial situation right away.

In September 2004, Reed's family crisis abated and finances became a concern. She had still not heard from Workforce Development about additional benefits, so she contacted Workforce Development on September 23. After meeting with a Workforce Development employee on October 1, the employee informed Reed that she would have been eligible for TRA benefits but that the deadline to apply had passed.

Reed filed a training approval request form, initiating the TRA benefits process. Nonetheless, Workforce Development denied Reed's application for training approval because she had not applied for benefits within the "8/16 week deadline." Elkins explained that under the Trade Act, applicants have 8 weeks after the certification date or 16 weeks after their separation date to apply for benefits. Elkins explained that the only remedy the office has when an employee is overlooked is a 45-day extension for extenuating circumstances, but that Reed first contacted his office in the fall of 2004, which exceeded even the extended deadline. Elkins informed Reed of the appeal process, and Reed initiated this appeal. Reed stated that had she been properly informed, she would have taken the steps to meet the deadlines.

ASSIGNMENTS OF ERROR

Reed assigns that the district court erred when interpreting the Trade Act and erred by concluding that equitable estoppel did not apply in this case.

STANDARD OF REVIEW

[1,2] An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act. *Lancaster Cty. Sch. Dist. No. 0001 v. State*, 260 Neb. 108, 615 N.W.2d 441 (2000). Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999) provides that "[w]hen the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency . . . ." Under such circumstances, the court may affirm, reverse, or modify the decision of the agency or remand the cause for further proceedings. § 84-917(6)(b).

[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*, 271 Neb. 43, 709 N.W.2d 325 (2006).

ANALYSIS

This case presents the question whether Workforce Development could deny Reed the opportunity to apply for TRA

benefits for missing the training application deadline when the agency failed to inform her of her eligibility. The answer is shrouded in a fog of federal statutes and regulations.

Workforce Development and the state Department of Labor argue that 19 U.S.C. § 2291(a)(5)(A) provides explicit deadlines for applying for TRA benefits and that by failing to comply with those deadlines, Reed is ineligible for TRA benefits.

The Trade Act provides in relevant part:

> ***(a) Trade readjustment allowance conditions***
>
> Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification . . . *who files an application for such allowance for any week of unemployment which begins more than 60 days after the date on which the petition that resulted in such certification was filed* under section 2271 of this title, if the following conditions are met:
>
> . . . .
>
> *(5)* Such worker—
>
> *(A)(i)* is enrolled in a training program approved by the Secretary under section 2296(a) of this title*, and*
>
> *(ii)* the enrollment required under clause (i) occurs no later than the latest of—
>
> > *(I)* the last day of the 16th week after the worker's most recent total separation from adversely affected employment which meets the requirements of paragraphs (1) and (2),
> >
> > *(II)* the last day of the 8th week after the week in which the Secretary issues a certification covering the worker,
> >
> > *(III)* 45 days after the later of the dates specified in subclause (I) or (II), if the Secretary determines there are extenuating circumstances that justify an extension in the enrollment period, *or*
> >
> > *(IV)* the last day of a period determined by the Secretary to be approved for enrollment after the termination of a waiver issued pursuant to subsection (c) of this section,
>
> *(B)* has, after the date on which the worker became totally separated, or partially separated, from the adversely affected

> employment, completed a training program approved by the Secretary under section 2296(a) of this title, *or*
>
> *(C)* has received a written statement under subsection (c)(1) of this section after the date described in subparagraph (B).

(Emphasis supplied.) 19 U.S.C. § 2291. Subsections 2291(a)(5)(A)(ii)(I) and (II) are commonly referred to as the "8/16 week deadline." The state Department of Labor argues that the petition certifying Goodyear employees as eligible for TRA benefits occurred before Reed's actual layoff, so Reed had until the last day of the 16th week after her layoff, May 22, 2004, to enroll in training or request a training waiver. Further, the state Department of Labor argues that even with the additional 45-day extension for extenuating circumstances, Reed missed the deadline because the 45-day extension would only extend the deadline to July 6, 2004, whereas Reed did not initiate contact with Workforce Development until September 23, 2004—124 days after the 16-week deadline.

[4] The state Department of Labor relies on the assistant secretary for the U.S. Department of Labor Training and Employment Guidance Letter No. 11-02, change 1, 69 Fed. Reg. 60903 (Oct. 13, 2004), as support. The letter provides:

> Section 114 of the 2002 amendments, which amended section 231(a)(5)(A) of the Trade Act, imposed a deadline by which a worker must be enrolled in approved training, or have a waiver of this requirement, in order to be eligible for TRA.
>
> This deadline is either the last day of the 8th week after the week of issuance of the certification of eligibility covering the worker or the last day of the 16th week after the worker's most recent total qualifying separation, whichever is later (commonly referred to as the 8/16 week deadline). The "8/16 week deadline" applies to eligibility for all TRA, both basic and additional TRA. *If a worker fails to meet the applicable 8/16 week deadline, then the worker is not eligible for any TRA (basic TRA or additional TRA, including TRA for remedial training) under the relevant certification.*

(Emphasis supplied.) The state Department of Labor argues that letter No. 11-02 is entitled to substantial deference under *Auer v.*

Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). See, also, *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under this test, a court reviewing an agency's construction of a statute it administers confronts two questions:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U. S. A. v. Natural Res. Def. Council, 467 U.S. at 842-43.

[5] Reed, however, urges that *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), controls. In *Christensen*, the U.S. Supreme Court determined that *Chevron*-style deference does not apply to an agency's opinion letter. The Court distinguished opinion letters from regulations because opinion letters are not typically forged through "formal adjudication or notice-and-comment rulemaking." *Christensen v. Harris County*, 529 U.S. at 587. The Court further stated:

> Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944), but only to the extent that those interpretations have the "power to persuade." . . .

(Citations omitted.) *Id.*

But we need not determine which level of deference to apply because Congress has "directly spoken to the precise question at

issue" by adopting the Trade Adjustment Assistance Reform Act of 2002 (2002 Trade Act). See *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. at 842. See, also, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). When Congress has resolved a policy dispute in enacting a statute, an agency or court can, and must, adopt Congress' resolution. *Chevron U. S. A. v. Natural Res. Def. Council, supra*. See, also, I Richard J. Pierce, Jr., Administrative Law Treatise § 3.3 (4th ed. 2002). When Congress has spoken, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. at 842-43.

Congressional Intent

Reed argues that when scrutinized, 19 U.S.C. § 2291 provides no deadline for securing training waivers. She points to the language of § 2291(a) as requiring that TRA applications be filed "no sooner than" 60 days after the certification petition is filed. Brief for appellant at 8. She argues that failure to specify a "no later than" deadline means that no such deadline exists. *Id*. Although inventive, Reed's argument loses its luster on further scrutiny.

Reed points us to federal regulations interpreting the Trade Act to bolster her claim. She argues that 20 C.F.R. § 617.10 (2005) provides the controlling time limit. It provides:

> (a) *Before and after certification*. An individual covered under a certification or a petition for certification may apply to a State agency for TRA. A determination shall be made at any time to the extent necessary to establish or protect an individual's entitlement to TRA or other [trade adjustment assistance], but no payment of TRA or other [trade adjustment assistance] may be made by a State agency until a certification is made and the State agency determines that the individual is covered thereunder.
>
> (b) *Timing of applications*. An initial application for TRA, and applications for TRA for weeks of unemployment beginning before the initial application for TRA is filed, may be filed within a *reasonable period of time* after publication of the determination certifying the appropriate group of workers under section 223 of the [Trade] Act.

> However, an application for TRA for a week of unemployment beginning after the initial application is filed shall be filed within the time limit applicable to claims for regular compensation under the applicable State law. For purposes of this paragraph (b), *a reasonable period of time means such period of time as the individual had good cause for not filing earlier, which shall include, but not be limited to, the individual's lack of knowledge of the certification or misinformation supplied the individual by the State agency.*

(Emphasis supplied.) Reed argues that this language provides a relaxed deadline for workers, like her, seeking retroactive benefits—benefits for periods of unemployment that occurred before an eligible worker files his or her initial TRA application. As enticing as 20 C.F.R. § 617.10 seems, we cannot apply its terms.

The federal Department of Labor adopted 20 C.F.R. § 617.10 on December 22, 1986, and last updated § 617.10 in 1994. The state Department of Labor argues that the 8/16 deadline enacted through the 2002 Trade Act superseded conflicting regulations like § 617.10. We agree. In addition to the 8/16 deadline, Congress added the following language through its 2002 amendments:

> ***(b)*** **Withholding of trade readjustment allowance pending beginning or resumption of participation in training program; period of applicability**
>
> . . . .
>
> *(2) The provisions of subsection (a)(5) of this section and paragraph (1) shall not apply with respect to any week of unemployment which begins—*
>
> *(A)* after the date that is 60 days after the date on which the petition that results in the certification that covers the worker is filed under section 2271 of this title, and
>
> *(B)* before the first week following the week in which such certification is made under subpart A of this part.

19 U.S.C. § 2291(b). In § 2291(b)(2), Congress excepted certain workers from the training requirements of § 2291(a)(5). But the enumerated exception in § 2291(b)(2) does not track with the retroactive/proactive distinction in 20 C.F.R. § 617.10. Instead, § 2291(b)(2) fails to mention the retroactive/proactive distinction recognized by the regulations.

[6] When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. *United States v. Johnson*, 529 U.S. 53, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000). The proper inference is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth. See *id*. We infer from the language of § 2291(b)(2) that Congress opted not to adopt the eligibility requirements as interpreted by the regulations. Further, legislative history for the 2002 Trade Act supports this reading.

A House of Representatives conference report describes the decisionmaking process of the Trade Act. The report notes that § 114 of the 2002 Trade Act, now codified at § 2291(a)(5), "establishes qualifying requirements that *must* be met in order for an individual worker within a certified group to receive Trade Adjustment Assistance." (Emphasis supplied.) H.R. Conf. Rep. No. 107-624, 107th Cong., 2d Sess. 123, *reprinted in* 2002 U.S. Code Cong. & Admin. News 653. Further, the report details the discrepancy between the approach preferred by the House of Representatives and that preferred by the Senate. The House favored "requirements and deadlines for workers to enroll in training," while the Senate maintained the eligibility requirements in "current law" but revised provisions for granting waivers. *Id*. Ultimately, the Senate yielded to the House, adopting the training enrollment deadline. The two houses considered and expressly rejected the eligibility approach embodied in the regulations.

[7] The courts will not apply an administrative construction that has been prohibited by subsequent legislative enactments of the same nature. See, *United States v. Gilmore*, 75 U.S. (8 Wall.) 330, 19 L. Ed. 396 (1869); 2 Am. Jur. 2d *Administrative Law* § 81 (2004). See, generally, *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998) (stating legislative act which is complete in itself and is repugnant to or in conflict with prior law repeals prior law by implication to extent of repugnancy or conflict.)

Because Congress considered the issue of exceptions to its training requirement and explicitly rejected the approach embraced by the regulations, we, too, must reject that approach and adhere strictly to the language of the statute. While the regulatory

approach seems more equitable, we are bound by Congress' words and intent. Thus, we reluctantly affirm the district court's conclusion that Workforce Development properly denied Reed's application as untimely.

EQUITABLE ESTOPPEL

We next consider Reed's equitable estoppel argument. Reed concedes that 20 C.F.R. § 617.50(d) (2005) bars using state law or regulations to circumvent TRA time limits, but argues that the "reasonable period of time" language in 20 C.F.R. § 617.10 allows equitable estoppel review. Section 617.50 provides:

> [N]o provision of State law or regulations on good cause for waiver of any time limit, or for late filing of any claim, shall apply to any time limitation referred to or specified in this part 617, *unless such State law or regulation is made applicable by a specific provision of this part 617*.

(Emphasis supplied.)

[8] Reed argues that the good cause exception in § 617.10 implies equitable principles and allows equitable estoppel analysis. But as previously discussed, the mandatory deadlines of the 2002 Trade Act effectively supersede 20 C.F.R. § 617.10. Similarly, we can find no other provision of § 617 that allows application of state law on this topic. Thus, the 2002 Trade Act and remaining regulations forbid state action on this point. See *Lowe v. Unemployment Compensation Bd.*, 877 A.2d 494 (Pa. Commw. 2005). We affirm the district court's conclusion that equitable estoppel does not apply.

CONCLUSION

Because Congress amended the Trade Act by adopting qualifying deadlines, we conclude that the statute does not allow for a good cause exception in either state or federal law. For these reasons, we reluctantly affirm the district court's conclusion that Workforce Development properly denied Reed's application as untimely.

AFFIRMED.

WRIGHT, J., participating on briefs.

State of Nebraska ex rel. Nebraska State Bar Association, relator, v. Kelly M. Hogan, respondent.

717 N.W.2d 470

Filed July 21, 2006. No. S-98-1228.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence.
3. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline cases, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
4. ____: ____. Under Neb. Ct. R. of Discipline 10(L) (rev. 2005), when no exceptions are filed to the referee's report, the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive.
5. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
6. ____. Violation of a disciplinary rule is a ground for discipline.
7. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
8. ____. The following may be considered as discipline for attorney misconduct: (1) disbarment, (2) suspension, (3) probation, (4) censure and reprimand, (5) temporary suspension, or (6) private reprimand.
9. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
10. ____. 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.
11. ____. The determination of appropriate discipline to be imposed on an attorney requires consideration of any aggravating and/or mitigating factors.
12. ____. The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.
13. **Disciplinary Proceedings: Attorney and Client.** In cases involving diagnosable behavioral issues, the suspension of an attorney is not designed as a punishment; rather, it is meant as a time period in which the attorney can seek treatment without posing a danger to his or her clients.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

K.C. Engdahl and Karisa D. Johnson, of Ballew, Schneider, Covalt, Gaines & Engdahl, P.C., L.L.O., for respondent.

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

PER CURIAM.

NATURE OF CASE

Relator, the Counsel for Discipline of the Nebraska State Bar Association, now known as the Counsel for Discipline of the Nebraska Supreme Court, initiated this attorney discipline proceeding against respondent Kelly M. Hogan. Formal charges were filed against respondent alleging ethical violations. A referee was appointed who heard evidence, made findings of fact, and recommended discipline. No exceptions were filed to the referee's report. We sustained relator's motion for judgment on the pleadings in part and adopted the referee's findings. We reserved the issue of the appropriate discipline, directed briefing, and conducted oral argument. We now order respondent suspended from the practice of law with no possibility of reinstatement prior to January 1, 2008, followed by a 2-year period of probation.

STATEMENT OF FACTS

The following facts are found in the referee's report: Respondent was admitted to the practice of law in the State of Nebraska on April 11, 1978. He was engaged in the private practice of law in Keith County, Nebraska, and he also served as the county attorney for Garden County, Nebraska.

In March 1992, respondent met D.F., who at the time had three minor children, one of whom was a daughter, A.H., born October 9, 1977. Respondent initially represented D.F. in a marriage dissolution proceeding. In late 1992, after his representation of D.F. had concluded, respondent entered into an intimate relationship with D.F. This relationship lasted until at least October 1998. During his relationship with D.F., respondent maintained a paternal relationship with D.F.'s children, including spending days and nights in D.F.'s home, offering the children advice, lending them money, discussing problems and acting as their confidante, helping them with homework, babysitting them when D.F. was away, taking them to their doctor appointments, preparing their

meals, taking them to extracurricular activities, and showing them affection by hugging and kissing them on the cheek.

Throughout respondent's relationship with D.F., he was suffering from a sexual compulsive disorder, which was evidenced in part by respondent's maintaining simultaneous intimate relationships with multiple women. In 1998, as a result of his disorder, respondent "peep[ed] through the window of D.F.'s home" to observe her youngest daughter. In May 1998, also as a result of respondent's sexual compulsive disorder, respondent masturbated and ejaculated on A.H.'s back as she sat at respondent's computer while respondent was helping her with college homework. A.H. was 20 years old at the time of this incident. As a result of respondent's behavior, D.F. filed a petition for and received a harassment protection order against respondent dated October 9, 1998, which order essentially restrained respondent from any contact with D.F. and members of her household. Respondent did not challenge D.F.'s petition seeking the protection order.

On November 12, 1998, as a result of the harassment protection order, the chairperson of the Committee on Inquiry of the Sixth Disciplinary District filed with this court an application for temporary suspension of respondent's law license. On November 16, respondent filed his consent to an order of temporary suspension, and on November 25, we suspended respondent from the practice of law until further order of the court.

From November 30 through December 4, 1998, respondent attended and completed a "Survivors I Workshop" at a facility in Arizona offering treatment for mental and addictive disorders. The workshop was designed for individuals with sexual compulsive disorders. From January 11 through 15, 1999, respondent attended and completed a "Sexual Compulsivity Workshop" at the Arizona facility.

In April 1999, respondent moved to Albuquerque, New Mexico, and thereafter, he began attending "Sexaholics Anonymous" meetings. Respondent later moved to Dallas, Texas, where he claimed he attended "Sex Addicts Anonymous" meetings. After a year in Dallas, respondent returned to Albuquerque, where he claimed he resumed his attendance at Sexaholics Anonymous meetings. Finding them "lacking," respondent claimed he formed with others a Sex Addicts Anonymous group, which he asserts he attended.

In 2003 and again in 2005, respondent was evaluated by Dr. Timothy S. Strongin, a psychologist in Albuquerque. Strongin did not provide any treatment for respondent. Instead, Strongin conducted an "occupational eval[uation]" relative to respondent's "fitness for duty." In performing his evaluation, Strongin did not engage in any independent investigation of the circumstances leading to respondent's suspension from the practice of law. Rather, he relied upon respondent's self-reporting of his condition and his suspension from the practice of law. Respondent did not advise Strongin of the specific allegations or incidents that led to his suspension. Respondent instead told Strongin that he had been intimately involved with a woman and her daughter in a small community and that respondent had experienced some political strife that "he felt contributed to the exaggeration of the significance of [respondent's] personal behavior, or even unfair treatment as a result of those connections." Further, respondent related to Strongin that his compulsions to enter into romantic relationships occurred in his "early adulthood." At the time of the 1998 incidents, respondent was approximately 48 years of age. Strongin's understanding regarding respondent's condition was as follows:

> I believe that there was a time in his life years before in which he had been indiscre[et] in choosing his adult sex partners, that he was sorry he had done that, and he felt that some — when he was anxious he felt some compulsion to enter into a romantic relationship, and that would [lead] to the self defeating behavior . . . .

Based upon his evaluations of respondent, Strongin concluded that respondent suffered from no mental illness or mental defect.

On May 15 and June 6 and 26, 2003, respondent filed applications with this court seeking reinstatement. We denied respondent's applications, in effect because he had failed to show a present fitness to practice law. On April 7, 2004, respondent filed his fourth application seeking reinstatement. On April 28, we denied the application and ordered relator to continue its investigation of respondent.

On February 25, 2005, relator filed formal charges containing a single count against respondent. The formal charges generally alleged that respondent's actions relative to D.F. and A.H. violated

Canon 1, DR 1-102(A)(1) (violating disciplinary rule) and (6) (engaging in conduct that adversely reflects on fitness to practice law), and Canon 9, DR 9-101 (avoiding appearance of impropriety), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent answered the formal charges on March 21, and a referee was appointed on March 30.

The referee hearing was held on November 17, 2005. A total of 23 exhibits were offered into evidence. Respondent testified in person. The testimony of Strongin and A.H. was introduced by deposition.

The referee filed her report on December 20, 2005. Based upon the evidence presented at the hearing, the referee found facts and concluded that respondent's actions constituted conduct that adversely reflected on respondent's fitness to practice law in contravention of DR 1-102(A)(1) and (6) and DR 9-101. The referee did not address whether respondent violated his oath of office as an attorney. The referee noted that respondent sought reinstatement to the practice of law and concluded that based upon her findings of fact, "the imposition of discipline [was] appropriate."

With regard to discipline, the referee recommended that respondent be suspended from the practice of law for a period of time, followed by a monitored probationary period of 2 years. The referee in effect recommended that respondent not be reinstated until he had "demonstrate[d] through verifiable means that treatment specific to his sexual compulsive disorder has resulted in a meaningful and sustained recovery."

As noted above, no objections were filed to the referee's report. On January 4, 2006, relator filed a motion for judgment on the pleadings. On January 25, this court granted the motion in part, adopting the referee's findings and setting for briefing and oral argument the issue of the appropriate discipline.

ASSIGNMENT OF ERROR

The only issue before the court is the appropriate discipline to be entered against respondent.

STANDARDS OF REVIEW

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

conclusion independent of the findings of the referee. *State ex rel. Counsel for Dis. v. Petersen*, 271 Neb. 262, 710 N.W.2d 646 (2006). When no exceptions are filed to the referee's report, the Nebraska Supreme Court may consider the referee's findings final and conclusive. See *id*. To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Horneber*, 270 Neb. 951, 708 N.W.2d 620 (2006).

ANALYSIS

Findings.

[3,4] 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, supra*; *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. *State ex rel. Counsel for Dis. v. Petersen, supra*. As previously noted, there were no exceptions filed to the referee's report in this case, and in an earlier order, this court adopted the findings of the referee. Given this record, we find clear and convincing evidence that respondent's conduct, set forth above, violated DR 1-102(A)(1) and (6) and DR 9-101. We further find that respondent's conduct violated his oath of office as an attorney. See § 7-104. 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.

Factors Affecting Discipline to Be Imposed.

[5-8] 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. Reilly*, 271 Neb. 465, 466-67, 712 N.W.2d 278, 279 (2006). Violation of a disciplinary rule is a ground for discipline. *State ex rel. Counsel for Dis. v. Petersen, supra*. 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 as discipline for attorney misconduct: (1) disbarment, (2) suspension, (3) probation, (4) censure and reprimand, (5) temporary suspension, or (6) private reprimand. See, also, rule 10(N).

[9-11] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004). To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Coe*, 271 Neb. 319, 710 N.W.2d 863 (2006). We have noted that the determination of appropriate discipline to be imposed on an attorney requires consideration of any aggravating and/or mitigating factors. See *State ex rel. Counsel for Dis. v. Hart, supra.*

Discipline to Be Imposed.

The evidence in the present case establishes that respondent engaged in highly inappropriate behavior, which at a minimum, violated the trust placed in him by D.F. and her children and adversely reflects on his fitness to practice law. With regard to respondent's actions, we agree with the referee's observation that

> [r]espondent's conduct in window peeping at D.F.'s youngest daughter is inexcusable and cannot be explained away as innocuous behavior. . . . Respondent's conduct in masturbating behind A.H. and ejaculating on her back while he was supposed to be helping her with a homework assignment is reprehensible. [R]espondent exploited his paternal relationship with A.H. and her younger sister. [Respondent's] conduct was exploitive, manipulative, and unjustifiable.

In her report, the referee noted that respondent was remorseful and ashamed regarding his conduct and that respondent

admitted his conduct violated the Code of Professional Responsibility.

Given the record in this case, the referee stated in her report that she "struggl[ed] mightily" when considering what recommendation to make regarding the appropriate discipline, in part because of the lack of current information with regard to respondent's treatment for his sexual compulsive disorder. In her report, the referee stated that Strongin's testimony concerning respondent's condition "as a whole is not particularly helpful in that it is based upon incomplete information and does not address the nature and extent of the sexual compulsions and other conduct (window peeping) that respondent engaged in and which resulted in respondent's temporary suspension." In reviewing the evidence adduced at the hearing, the referee stated that

> it is concerning . . . that there is very little evidence in the record relating to the respondent's sexual compulsive disorder. Keeping in mind that this is what resulted in the egregious behavior exhibited by respondent in 1998, one would expect evidence addressing the nature and extent of that disorder, the steps taken to address and treat that disorder including ongoing treatment to prevent a reoccurrence of such conduct, [and] corroboration of respondent's compliance with a treatment plan or relapse prevention plan by experts in the field of sexual disorders (particularly experts who are working or have worked with respondent on these issues) . . . . This evidence is lacking and the evidence that was adduced does not offer sufficient assurance that the public will be protected and the reputation of the bar promoted if respondent is allowed to return to the practice of law.
>
> . . . .
>
> The evidence which bears on the sexually compulsive behavior exhibited by respondent is simply too remote in time to be of help in determining whether respondent's sexual compulsions impede his fitness to practice law today.

We have reviewed the record, and we agree with the referee's assessment of the evidence. In particular, we find lacking a genuine acknowledgment of the conduct giving rise to these proceedings, a record of meaningful treatment, and an indication of

sustainable recovery. As a result, respondent has failed to demonstrate his present fitness to practice law.

[12,13] Our main concern in determining what impact respondent's sexual compulsive disorder should have on his discipline is the overall protection of the public. As we have noted, "the purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice." *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 568, 635 N.W.2d 427, 432-33 (2001). In this regard, in cases involving diagnosable behavioral issues, we have noted that the suspension of an attorney is not designed as a punishment; rather, it is meant as a time period in which the attorney can seek treatment without posing a danger to his or her clients. See *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

Upon due consideration of the record, we agree with the referee that a suspension for a period of time is necessary to adequately ensure there will be a demonstrated, meaningful, and sustained recovery before respondent is allowed to return to the practice of law and that reinstatement, if ordered, be followed by a period of probation on terms that we note below. Accordingly, we conclude that protection of the public demands respondent be suspended from the practice of law for an indefinite period, with no possibility of reinstatement prior to January 1, 2008. Compare, *State ex rel. Counsel for Dis. v. Petersen*, 271 Neb. 262, 710 N.W.2d 646 (2006), and *State ex rel. Counsel for Dis. v. Thompson, supra*. In the event respondent seeks reinstatement, respondent will have the burden of acknowledging the conduct giving rise to these proceedings and of showing by an independent and informed third party that treatment for respondent's sexual compulsive disorder has resulted in a meaningful and sustained recovery such that we can conclude he is fit to practice law.

In addition to requiring assurance regarding respondent's treatment and recovery, we are also concerned with the number of years that respondent has been away from the practice of law. For these reasons, we believe a period of probation following reinstatement is necessary. Accordingly, in the event respondent seeks reinstatement following his suspension, his reinstatement

will be conditioned upon the submission by respondent and approval by this court of a probation plan, to be in effect for a period of 2 years following reinstatement, whereby respondent's recovery program, his law practice and 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.

CONCLUSION

We find by clear and convincing evidence that respondent violated DR 1-102(A)(1) and (6), DR 9-101, and his oath of office as an attorney. It is the judgment of this court that respondent be suspended from the practice of law for an indefinite period with no possibility of reinstatement prior to January 1, 2008, and, if reinstated, respondent shall be subject to 2 years' probation as outlined above. Respondent shall 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), rule 10(P), and Neb. Ct. R. of Discipline 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

WRIGHT, J., participating on briefs.

CONNOLLY and MCCORMACK, JJ., not participating.

DARRYL DIDIER AND ELECTRIC COMPANY OF OMAHA, APPELLANTS, V. ASH GROVE CEMENT COMPANY, APPELLEE.

718 N.W.2d 484

Filed July 21, 2006. No. S-03-924.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
4. ____. Whether a duty is nondelegable is a question of law.
5. **Statutes.** Statutory interpretation presents a question of law.
6. **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.
7. **Negligence: Liability: Contractors and Subcontractors.** Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule pursuant to which the employer of an independent contractor may be vicariously liable to a third party. Those two exceptions are where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm.
8. **Negligence: Contractors and Subcontractors.** Nondelegable duties include, but are not limited to, (1) the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions.
9. **Federal Acts: Negligence.** Coverage of the Occupational Safety and Health Act does not extend to working conditions that are regulated by other federal agencies.
10. ____: ____. The preemption inquiry pursuant to 29 U.S.C. § 653(b)(1) (2000) is satisfied once it is determined that an agency has exercised its authority to prescribe a safety standard or regulation and that regulation covers the specific working conditions at issue.

Petition for further review from the Nebraska Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Cass County, RANDALL L. REHMEIER, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James R. Harris and Mark P. Grell, of Harris Law Offices, P.C., L.L.O., for appellant Darryl Didier.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Darryl Didier filed a negligence action in the district court for Cass County against Ash Grove Cement Company (Ash Grove), seeking damages for injuries he sustained after falling from the roof of a building located on Ash Grove's Louisville, Nebraska, premises. Electric Company of Omaha (ECO), Didier's employer, had been hired by Ash Grove to perform certain work at the Louisville site. The district court granted summary judgment in favor of Ash Grove. Didier appealed to the Nebraska Court of Appeals. In its opinion, the Court of Appeals reversed the grant of summary judgment and remanded the cause to the district court for further proceedings. *Didier v. Ash Grove Cement Co.*, No. A-03-924, 2005 WL 2276848 (Neb. App. Sept. 20, 2005) (not designated for permanent publication). Ash Grove sought further review. We granted Ash Grove's petition for further review. We reverse the decision of the Court of Appeals and remand the cause with directions to affirm the order of the district court granting summary judgment in favor of Ash Grove.

STATEMENT OF FACTS

On March 19, 1997, Didier fell from the roof of a building located on the site of Ash Grove's Louisville facility and sustained injuries. At the time of his accident, Didier was employed by ECO, an independent contractor retained by Ash Grove to relocate a cable tray. The cable tray was accessed from the flat roof of the building from which Didier fell. Didier fell off the flat roof while he was walking backward and carrying cable. The fall occurred during the first morning on the job after approximately 15 minutes of work. Didier was not wearing any "fall protection" equipment at the time of his accident. Didier fell nearly 20 feet to the ground, landing on a concrete surface and fracturing various bones throughout his body. After the accident, Didier underwent multiple surgeries and incurred significant medical and hospital expenses.

Didier filed a petition on March 5, 2001, asserting a negligence action against Ash Grove. ECO was joined as a "Third-Party Plaintiff" to protect its interests relative to Didier's workers' compensation claim. Didier alleged that a proximate cause of his fall was Ash Grove's negligence in (1) failing to provide

a reasonably safe place to work, (2) failing to have handrails or other safety devices on the roof, (3) failing to warn Didier of the dangers, (4) designing the building in such a manner as to not allow the work Didier was engaged in to be performed in a safe manner, (5) failing to have a safety net in place on the ground, and (6) failing to exercise reasonable care in supervising ECO with respect to the use of safety equipment. Didier alleged that Ash Grove was, at all times, acting as a general contractor and retained control over the work of Didier and ECO. In his petition, Didier also alleged that Ash Grove breached various duties as they related to the standard of care, including the duty to maintain the roof of the building from which he fell in a reasonably safe condition, and that thus, Ash Grove breached its nondelegable duty to provide a safe workplace for Didier. Didier alleged that Ash Grove had a plant, mine, and mill at its Louisville facility and that the U.S. Department of Labor had rules and regulations that were applicable to facilities such as Ash Grove. Didier sought a determination of ECO's rights and liabilities relative to his workers' compensation claim and sought judgment against Ash Grove for his past, present, and future medical expenses; his loss of wages and permanent loss of earning capacity; and his past, present, and future disability and pain and suffering.

Ash Grove moved for summary judgment on February 19, 2003, alleging that there was no genuine issue of material fact and that Ash Grove was entitled to judgment as a matter of law. At a hearing on Ash Grove's motion on July 8, the court received exhibits, including various depositions and affidavits, and heard arguments from the parties. On July 29, the court entered a lengthy opinion and order granting Ash Grove's motion for summary judgment. The court summarized the evidence, which we discuss below as relevant to our analysis, and concluded, inter alia, that there was no evidence to support the claim that Ash Grove retained control over the work contracted to be done by ECO; that there was no evidence to support a conclusion that the work to be performed by ECO constituted a "peculiar unreasonable risk" of harm such that Ash Grove had a nondelegable duty to protect Didier; and that as a matter of law, Ash Grove was subject to the regulation of the Mine Safety and Health Administration (MSHA) and there was no competent evidence

that Ash Grove had breached any relevant MSHA regulation which would have established a duty of Ash Grove. The court dismissed Didier's petition.

Didier appealed to the Court of Appeals and asserted that the district court erred in granting Ash Grove's motion for summary judgment. The Court of Appeals determined that the court had not erred in concluding that (1) there was no evidence to support a conclusion that Ash Grove retained control over the work done by ECO and (2) there was no evidence to support a conclusion that the work to be performed by ECO constituted a "peculiar unreasonable risk" of harm such that Ash Grove had a nondelegable duty to protect Didier. In its opinion, the Court of Appeals stated that the district court did not address the issue of whether Ash Grove breached a nondelegable duty to provide a safe workplace.

In further ruling on the appeal, the Court of Appeals determined that there was a question of fact precluding summary judgment and that the district court had erred in granting summary judgment on the issue of whether Ash Grove's plant fell under the jurisdiction of MSHA or under the jurisdiction of the Occupational Safety and Health Administration (OSHA). As noted, the district court had determined that Ash Grove fell under the jurisdiction of MSHA. In the Court of Appeals' opinion, it stated that the district court had erred when it had concluded that there was no genuine issue of material fact with regard to whether Ash Grove was a " 'cement plant' " and, as such, was considered a " 'milling' " operation exclusively under the jurisdiction of MSHA rather than of OSHA. *Didier v. Ash Grove Cement Co.*, No. A-03-924, 2005 WL 2276848 at *10 (Neb. App. Sept. 20, 2005) (not designated for permanent publication).

In its opinion, the Court of Appeals acknowledged that the record contained various references to Ash Groves' Louisville plant as a "cement plant" subject to MSHA jurisdiction, that the record showed that a MSHA inspector was conducting an inspection on the Ash Grove property at the time of Didier's accident, and that MSHA conducted an investigation of Didier's accident and issued a citation to ECO for failing to provide safety equipment or fall protection to Didier. MSHA did not cite Ash Grove. The Court of Appeals stated that the record contained

little information about what processes actually occurred at the Ash Grove location. In this regard, the Court of Appeals noted that Didier had presented testimony which it determined raised a question of fact as to whether the activities performed at the location were of the type that would subject Ash Grove to OSHA, rather than MSHA, jurisdiction. As noted, the district court had concluded that Ash Grove was under the jurisdiction of MSHA rather than OSHA, and the district court had therefore considered only whether Ash Grove had violated MSHA regulations without considering whether Ash Grove had violated OSHA regulations when the district court concluded that there was no evidence that Ash Grove had breached any statutory or regulatory duty. The Court of Appeals reversed the district court's grant of summary judgment in regard to the MSHA or OSHA issue and remanded the cause for further proceedings. The Court of Appeals affirmed the district court's grant of summary judgment in all other respects. Ash Grove petitioned for further review, which we granted.

ASSIGNMENTS OF ERROR

On further review, Ash Grove asserts that the Court of Appeals erred in (1) concluding that a genuine issue of material fact existed with respect to whether MSHA or OSHA had jurisdiction over Ash Grove's plant and whether Ash Grove had complied with the relevant regulations and (2) stating that the district court did not address whether Ash Grove breached any nondelegable duty to provide a safe workplace and in "reserving" the issue for further determination.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3-6] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005). Whether a duty is nondelegable is a question of law. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003). Statutory interpretation presents a question of law. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Home Builders Assn. v. City of Lincoln*, 271 Neb. 353, 711 N.W.2d 871 (2006).

ANALYSIS

Liability to Third Parties of One Who Employs an Independent Contractor for Acts or Omissions of Independent Contractor.

This case deals with Ash Grove's liability, if any, to Didier where Ash Grove employed an independent contractor, ECO. Therefore, before addressing Ash Grove's specific assignments of error on further review, we review the law relating to the liability of one who employs an independent contractor.

[7,8] Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule pursuant to which the employer of an independent contractor may be vicariously liable to a third party. Those two exceptions are where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm. See *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000). Regarding the second exception involving nondelegable duties, in *Parrish v. Omaha Public Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), we noted that nondelegable duties included (1) the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions. We do not read the list of nondelegable duties in *Parrish* as exhaustive, and we

therefore note that nondelegable duties include, but are not limited to, those three listed above.

As we read Didier's petition, the district court's order, the Court of Appeals' decision, and the record and argument in this case, we understand Didier to claim that Ash Grove was liable both because Ash Grove retained control over ECO's work and because Ash Grove had nondelegable duties. With respect to nondelegable duties, Didier asserted that Ash Grove's nondelegable duties included (1) the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, (2) duties imposed by rules and regulations of the U.S. Department of Labor, and (3) the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers. In granting summary judgment in favor of Ash Grove, the district court summarized the facts and, as we read the district court opinion, effectively concluded that Ash Grove either did not have or did not breach any of those duties.

The Court of Appeals affirmed the district court's determination that Ash Grove did not have a nondelegable duty arising from special risks. That issue was not raised on further review, and we therefore do not further discuss special risks herein. The nondelegable duty derived from duties imposed by rules or law and the nondelegable duty due to control of premises by the one who employs an independent contractor are implicated in Ash Grove's two assignments of error on further review. Those issues are discussed below.

Nondelegable Duty Imposed by Statute or Rule: Court of Appeals Erred in Determining That There Was a Genuine Issue of Material Fact as to the Legal Question of Whether Ash Grove Was Subject to Regulation and Rules Imposed by MSHA or by OSHA.

In its first assignment of error on further review, Ash Grove asserts that the Court of Appeals erred in finding that a genuine issue of material fact existed with respect to whether MSHA or OSHA had jurisdiction over Ash Grove's Louisville site and in failing to affirm the district court's finding that there was no competent evidence that Ash Grove breached any relevant MSHA rule or regulation. We conclude that because MSHA had

exercised jurisdiction, the Court of Appeals erred as a matter of law in concluding that there was a genuine issue of material fact as to whether MSHA or OSHA should have jurisdiction, and we further conclude that the district court did not err when it found that there was no evidence that Ash Grove had breached any relevant MSHA regulation.

The Court of Appeals' determination that a genuine issue of material fact existed as to whether MSHA or OSHA had jurisdiction was based on the testimony of Didier's expert, Frank Burg. Burg was a self-employed safety and health professional who had previously worked for OSHA. Burg testified that he understood Ash Grove's operations at the site to be a concrete processing operation and that as such, the plant was subject to OSHA jurisdiction rather than MSHA jurisdiction. The Court of Appeals noted that Burg's testimony was somewhat equivocal in that he stated, " 'Other people besides me decide these [jurisdictional questions] and they are deciding on bases that I don't always understand.' " *Didier v. Ash Grove Cement Co.*, No. A-03-924, 2005 WL 2276848 at *13 (Neb. App. Sept. 20, 2005) (not designated for permanent publication). The Court of Appeals acknowledged that the evidence showed MSHA had actually exercised jurisdiction over the plant and investigated Didier's accident. However, the Court of Appeals stated that in reviewing a grant of summary judgment, it was required to view the evidence in the light most favorable to Didier and concluded that at the summary judgment stage, Burg's testimony was sufficient to raise a question of fact as to whether Ash Grove's operations were subject to MSHA or to OSHA jurisdiction. This conclusion overlooks the federal authority which controls the outcome and is contrary to the analysis of the Court of Appeals.

[9,10] The Occupational Safety and Health Act of 1970, at 29 U.S.C. § 653(b)(1) (2000), provides: "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." The U.S. Supreme Court has noted that because of the language in § 653(b)(1), "coverage of the [Occupational Safety and Health] Act does not . . . extend to

working conditions that are regulated by other federal agencies." *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241, 122 S. Ct. 738, 151 L. Ed. 2d 659 (2002). The Court noted that the use of the word "exercise" in § 653(b)(1) made clear that actual exercise rather than "mere possession by another federal agency of unexercised authority to regulate certain working conditions" was required to displace OSHA's apparent jurisdiction and that "OSHA is only pre-empted if the working conditions at issue are the particular ones 'with respect to which' another federal agency has regulated." *Id.* Other federal appellate courts have stated that "the preemption inquiry is satisfied once we determine that an agency [such as MSHA] has exercised its authority to prescribe a safety standard or regulation and that regulation covers the specific working conditions at issue." *Pennsylvania Elec. v. Fed. Mine S. & H. Rev. Com'n*, 969 F.2d 1501, 1505 (3d Cir. 1992). See, also, *United Energy Services v. MSHA*, 35 F.3d 971 (4th Cir. 1994).

In the present case, there was undisputed evidence that MSHA had exercised its regulatory authority at Ash Grove's Louisville site and, in particular, that MSHA had exercised authority with respect to the specific accident at issue in this case. There was undisputed evidence that a MSHA investigator was onsite at the time of the accident, that MSHA actually investigated the accident and issued a citation to ECO, and that the citation to ECO identified the Ash Grove operation as a milling operation under the jurisdiction of MSHA. There was no evidence that OSHA, Ash Grove, or ECO disputed MSHA's authority to investigate the accident and to issue a citation.

The evidence as a whole showed without contradiction that MSHA exercised its statutory authority over the specific working conditions related to Didier's accident, and because of the provisions of 29 U.S.C. § 653(b)(1), MSHA's exercise of authority over the particular working conditions at issue in this case preempted OSHA authority over such conditions as a matter of law. Evidence regarding the processes that actually occur at the Louisville site and the comments by Burg which were noted by the Court of Appeals are not material to the resolution of this issue. The district court's conclusion that MSHA had jurisdiction was correct, and the Court of Appeals erred as a matter of law

when it concluded that there was a genuine issue of material fact regarding whether MSHA or OSHA had jurisdiction.

We further conclude, without regard to the discussion by the Court of Appeals, that the district court did not err when it determined that there was no competent evidence that Ash Grove breached any MSHA statutory or regulatory duty or corresponding standard of care. The district court noted that the evidence indicated that Ash Grove had complied with the specific MSHA regulations noted by the parties, and the district court further observed that although MSHA issued a citation to ECO after its investigation of Didier's accident, MSHA issued no citation to Ash Grove. Didier did not present evidence that Ash Grove violated any specific rules or regulations, and on appeal, Didier does not assert specific laws that Ash Grove violated as they bear on the standard of care but simply argues that OSHA rather than MSHA had jurisdiction.

In sum, we conclude that the Court of Appeals erred in reversing the grant of summary judgment in which the district court had concluded that MSHA had jurisdiction and further erred in failing to affirm the district court's grant of summary judgment in which it had determined that Ash Grove had not violated any nondelegable duty imposed by MSHA regulations.

Nondelegable Duty as Owner of Premises to Provide Safe Place to Work: Court of Appeals Erred in Stating That District Court Had Not Considered Whether Ash Grove Had Violated Nondelegable Duty as Owner in Control of Premises to Provide a Safe Place to Work.

In its second assignment of error on further review, Ash Grove claims that the Court of Appeals erred when it stated that the district court had not considered the issue of whether Ash Grove as the owner of the premises had breached a nondelegable duty to provide a safe workplace. We agree with Ash Grove that the Court of Appeals misread the district court's opinion and order. We determine that the district court did not fail to consider the issue of whether Ash Grove breached the nondelegable duty to provide a safe workplace and that the district court did not err when it ruled against Didier on this issue.

Ash Grove argues that the Court of Appeals' affirmance of the district court's explicit finding that Ash Grove did not retain

control of the work necessarily prevents a finding that Ash Grove had and breached a nondelegable duty to provide a safe workplace. As noted above, the duty derived from control of work is distinguishable from the nondelegable duty derived from ownership and control of workplace premises, and although both may or may not be present, these duties involve separate considerations. Thus, we do not agree with Ash Grove's analysis that the finding that Ash Grove did not retain control of the work is inconsistent with and prevents a finding that Ash Grove may have had a nondelegable duty arising from its ownership and control of the premises where the work occurred. Nevertheless, on the record in this case, we determine that, contrary to the opinion of the Court of Appeals, the district court did consider and effectively rejected Didier's claim that Ash Grove breached a nondelegable duty arising from its ownership and control of the premises and that the Court of Appeals erred when it stated that the district court had failed to consider this issue. We further determine that the district court did not err when it rejected Didier's claim that Ash Grove breached the nondelegable duty to provide a safe place to work.

As noted above, an employer of an independent contractor is generally not liable for physical harm caused to another by the acts or omissions of the contractor or his servants, but an employer of an independent contractor may be vicariously liable to a third party pursuant to two exceptions, where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm. See *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000). As noted above, nondelegable duties include, but are not limited to (1) the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions. See *Parrish v. Omaha Public Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

In its argument on further review, Ash Grove appears to misinterpret this court's opinion in *Parrish*. Although certain

nondelegable duties arise from the owner's possession and control of the premises, not all nondelegable duties are dependent on such possession and control. Ash Grove tends to confuse the employer's retaining control of the work, which gives rise to the first exception noted above, with the employer's retaining control of the premises, which gives rise to one of the nondelegable duties pursuant to the second exception encompassing various nondelegable duties.

We do, however, find merit to Ash Grove's assertion that the Court of Appeals erred when it stated that the district court did not address the issue of whether Ash Grove breached a nondelegable duty to provide a safe workplace arising from its ownership and control of the premises. In its opinion and order, the district court discussed at length the evidence submitted at the hearing on summary judgment. The district court noted specifically the uncontroverted admission by the safety director for ECO that there were no "site-specific or abnormal hazards on top of the flat concrete roof on which the work was to be performed." We read the district court's grant of summary judgment to include an implicit finding that Didier did not present sufficient evidence as a matter of law to show that Didier's accident was the result of Ash Grove's breach of a nondelegable duty arising from its possession and ownership of the premises, and we find no error in the district court's conclusion in this regard. We therefore agree with Ash Grove that the Court of Appeals erred when it stated that the district court did not consider this issue.

CONCLUSION

We conclude that because MSHA actually exercised jurisdiction, as a matter of law, MSHA preempted OSHA and the Court of Appeals erred in concluding that there was a genuine issue of material fact with regard to whether MSHA or OSHA had jurisdiction over the accident at issue. As a matter of law, MSHA had jurisdiction. The district court did not err in finding no genuine issue of material fact as to whether Ash Grove actually violated any duties derived from MSHA regulations. We further conclude that because the district court's opinion and order implicitly found in Ash Grove's favor on this issue, the Court of Appeals erred in stating that the district court did not consider the issue of whether Ash Grove breached a nondelegable duty to provide a

safe workplace arising from its ownership and control of the premises. We therefore reverse the decision of the Court of Appeals, and we remand the cause with directions to the Court of Appeals to affirm the district court's grant of summary judgment in all respects.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.
HENDRY, C.J., not participating.

GARY RIESEN, APPELLANT, V. IRWIN INDUSTRIAL TOOL COMPANY, FORMERLY KNOWN AS AMERICAN TOOL COMPANIES, INC., APPELLEE.

717 N.W.2d 907

Filed July 21, 2006. No. S-05-208.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
4. **Employer and Employee: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
5. **Actions: Workers' Compensation: Employer and Employee.** An action for retaliatory discharge is allowed when an employee has been discharged for filing a workers' compensation claim.
6. **Workers' Compensation: Employer and Employee: Proof.** The burden of proof for a prima facie case of retaliatory discharge for filing a workers' compensation claim is on the employee.
7. **Employer and Employee: Circumstantial Evidence.** Ordinarily, a prima facie case of retaliatory discharge must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as its motive.
8. **Termination of Employment: Workers' Compensation: Employer and Employee: Circumstantial Evidence.** Circumstantial evidence sufficient to establish a causal link between termination of an employee and the filing of a workers' compensation claim

includes: (1) knowledge of the compensation claim by those making the decision on termination, (2) expression of a negative attitude toward the employee's injured condition, (3) failure to adhere to established company policies, (4) discriminatory treatment in comparison to similarly situated employees, and (5) evidence that the stated reason for the discharge was false.

9. **Workers' Compensation: Employer and Employee: Time.** Proximity in time between a workers' compensation claim and the discharge of an employee is a typical beginning point for proof of a causal connection.
10. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
11. ____. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.
12. **Employer and Employee: Discrimination: Words and Phrases.** In employment law, a "pretext" has been described as a reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an inference that the employer is trying to conceal a discriminatory reason for its action.
13. **Workers' Compensation: Employer and Employee.** The filing of a workers' compensation claim does not insulate an employee from the requirement that he or she abide by all personnel rules. Such personnel policies must be applied in a neutral fashion, however.

Appeal from the District Court for Saline County: PAUL W. KORSLUND, Judge. Reversed and remanded for further proceedings.

Eric B. Brown, of Atwood, Holsten & Brown Law Firm, P.C., L.L.O., for appellant.

Bryan S. Hatch and Andrew W. Muller, of Stinson, Morrison & Hecker, L.L.P., for appellee.

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

HANNON, Judge, Retired.

I. NATURE OF CASE

Gary Riesen brought suit against his former employer, Irwin Industrial Tool Company (Irwin Industrial), alleging he was fired in retaliation for filing a workers' compensation claim. The trial court granted summary judgment for Irwin Industrial, and Riesen appealed.

In this opinion, we conclude that Riesen met his burden of establishing a prima facie case of retaliatory discharge for filing a workers' compensation claim. We also conclude that Riesen's evidence, viewed in a light most favorable to Riesen, created a

genuine issue of fact as to whether the reason offered by Irwin Industrial for the termination of Riesen's employment was a pretext for an impermissible termination. Thus, we reverse the trial court's order of summary judgment and remand the cause for further proceedings.

II. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (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. *Id.*

III. FACTS

On October 9, 2000, an employment agency placed Riesen with Irwin Industrial as a temporary employee. On December 1, Riesen submitted an application for employment with Irwin Industrial. The form instructed applicants to list "all present and past employment, beginning with [their] most recent." The application provided three spaces on which applicants were to list their previous employers. Applicants were instructed to "[u]se a separate sheet of paper if necessary." Riesen listed three previous employers. The form also specified that by signing the application, the applicants certified that their answers were "true and complete to the best of [their] knowledge" and that they understood that "false information given in [their] application [could] result in discharge." On December 11, Irwin Industrial hired Riesen for a full-time position on its second shift.

On May 8, 2001, Riesen injured his right shoulder while working at Irwin Industrial. He filed a claim for workers' compensation benefits. His treating physician instructed him to avoid using his right arm at work.

On July 11, 2001, Riesen received a positive performance appraisal from Irwin Industrial, which assessed him as a "[g]ood"

employee, and he was given a 10-percent pay increase. On July 31, Riesen requested to transfer from second shift to first shift. His request was approved on August 9. Before Riesen accepted the shift change, Judy Brahm, an employee relations representative, advised him that the requested shift change would result in a reduction in pay. He was also advised that although his transfer was approved, Irwin Industrial could not immediately accommodate him on the first shift within his medical restrictions and, thus, he would be out of work until an appropriate position became available. Riesen accepted the shift change under those conditions.

Approximately 2 months after his initial accident, Riesen took an insurance form regarding his off-work status to Robert Summers, the manager of Irwin Industrial's human resources department. This form was required by an insurance provider as a precondition for making payments on Riesen's bank loans while he was disabled. Summers refused to sign the insurance form because, according to him, "[Riesen] was not totally disabled. He had restrictions, but was not disabled." In a meeting with Riesen and his wife concerning this issue, Summers allegedly told Riesen that he would not sign the form, that he had no work available for Riesen because of Riesen's one-arm restriction, and that "it would be a lot easier on all of [them] if [Riesen would] just quit." Summers admitted that he refused to sign the insurance form, but he denied making the other statements.

On August 23, 2001, Riesen's treating physician released him to return to work without restrictions, and Riesen did so. On December 13, Riesen received another positive performance evaluation at work.

At some point between August 20, 2001, and January 7, 2002, Riesen met with Summers and a human resources administrator in Summers' office to discuss Riesen's physical restrictions. After this meeting, Riesen went to a nearby human resources office to discuss insurance. Riesen claims that Summers thought Riesen had left the area and that he overheard Summers tell the administrator in the hallway: "[H]e expects me to believe that he's injured" and "the little son of a bitch is faking and he only did this to get his raise." Riesen believed Summers was referring

to him because he had just met with Summers concerning his injury and had recently received a raise. Riesen claims that when Summers became aware Riesen was still nearby, Summers became quiet and retreated to his office. Summers denied making such statements.

The record indicates that between August 23, 2001, and January 2, 2002, Riesen missed work on three different days due to his work-related injury sustained on May 8, 2001. On January 7, 2002, Riesen underwent surgery on his shoulder as a result of the same work-related injury. Following surgery, Riesen missed work for over a month, during which time he received temporary total disability benefits. He missed work on several occasions between February 11 and April 24 due to his work-related injury.

On February 2, 2002, Riesen received a 4-percent pay increase. On February 28, Riesen received another positive employment evaluation from Irwin Industrial, in which he was rated as a "[g]ood" employee. On February 16, Riesen was given a 9-percent pay increase, which was approved by Summers.

On April 28, 2002, Riesen informed Brahm in the human resources department that his physician had said another surgery on his shoulder was necessary. Brahm responded by telling Riesen, "[L]et's get her fixed, do whatever you can to get it fixed."

During the morning of April 30, 2002, Summers received Riesen's answers to interrogatories and requests for production of documents in an action Riesen had filed against Irwin Industrial in Workers' Compensation Court. After reviewing Riesen's answers, Summers reviewed Riesen's personnel file, including his employment application. Summers discovered that the employment history Riesen provided in his answers to interrogatories differed from the employment history he had provided on his job application.

Later that morning, Summers called Riesen into his office. Riesen claims Summers stated: " 'You finally messed up . . . you lied on your work comp application.' " Summers denies making this statement. Summers then fired Riesen. Riesen was told his employment had been terminated because he had falsified his employment application.

Following the termination of his employment, Riesen again had surgery on his shoulder. He continued to receive workers' compensation benefits through August 4, 2002.

On June 19, 2003, Riesen filed an amended complaint against Irwin Industrial in the district court for Saline County, which complaint alleged that he had been fired in retaliation for filing a workers' compensation claim and pursuing his rights under the Nebraska Workers' Compensation Act. Irwin Industrial moved for summary judgment, and after a hearing was held, the trial court sustained the summary judgment motion and dismissed Riesen's complaint. The court reasoned that Riesen's evidence had failed to establish that Irwin Industrial was motivated by retaliation or that the company's justification for termination of Riesen's employment was pretextual. Riesen appealed.

IV. ASSIGNMENTS OF ERROR

Riesen asserts that the trial court erred in finding that he had failed to establish a prima facie case of retaliatory discharge and in sustaining Irwin Industrial's motion for summary judgment.

V. ANALYSIS

[3-5] The record indicates that Riesen was hired on an at-will basis. The general 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). Under the public policy exception to the at-will employment doctrine, however, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Id.* In *Jackson*, this court recognized that the Nebraska Workers' Compensation Act presents a clear mandate of public policy which warrants application of the public policy exception to the at-will employment doctrine. Thus, an action for retaliatory discharge is allowed when an employee has been discharged for filing a workers' compensation claim. *Id.*

In this appeal, we are asked to determine whether dismissal of Riesen's retaliatory discharge claim was improper because the evidence, viewed in the light most favorable to Riesen, disclosed

a genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts.

1. Applicability of Burden-Shifting Analysis

In cases involving claims of employment discrimination, albeit not involving workers' compensation claims, this court has recognized the burden-shifting analysis which originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See, e.g., *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002) (age discrimination); *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999) (gender discrimination); *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987) (discrimination against person with disability); *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985) (retaliatory discharge for filing claim with Nebraska Equal Opportunity Commission); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984) (gender discrimination). This court has noted that as clarified in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), " '*McDonnell Douglas Corp.* allocates the burden of production and the order for the presentation of the evidence; the ultimate burden of persuasion, however, rests on the plaintiff.' " *Billingsley*, 264 Neb. at 70, 645 N.W.2d at 803.

The following procedure is utilized under the three-tiered allocation of proof standard: First, the plaintiff has the burden of proving a prima facie case of discrimination. See *Goerke, supra*. Second, if the plaintiff succeeds in proving that prima facie case, the burden shifts to the defendant-employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection or discharge from employment. See *id*. This burden is a burden of production, not of persuasion. See *Lincoln County Sheriff's Office v. Horne*, 228 Neb. 473, 423 N.W.2d 412 (1988). The employer need only explain what has been done or produce evidence of a legitimate, nondiscriminatory reason for the decision. *Id*. It is sufficient if the employer's evidence raises a genuine issue of fact as to whether it discriminated against the employee. *Id*. " ' "If the defendant carries this burden of production, the

presumption raised by the prima facie case is rebutted" . . . and "drops from the case . . . .'" " (Citation omitted.) *Agnew*, 256 Neb. at 402, 590 N.W.2d at 694, quoting *St. Mary's Honor Center, supra*.

Third, assuming the employer establishes an articulated nondiscriminatory reason for disparate treatment of an employee, the employee maintains the burden of proving that the stated reason was pretextual and not the true reason for the employer's decision; i.e., that the disparate treatment would not have occurred but for the employer's discriminatory reasons. *Lincoln County Sheriff's Office, supra*.

Most jurisdictions apply the above-described analysis to workers' compensation retaliatory discharge cases. See, e.g., *Gonzalez v. City of Minneapolis*, 267 F. Supp. 2d 1004 (D. Minn. 2003) (applying Minnesota law); *Provo v. Continental Eagle Corp.*, 650 So. 2d 881 (Ala. 1994); *Ford v. Blue Cross and Blue Shield*, 216 Conn. 40, 578 A.2d 1054 (1990); *Rebarchek v. Farmers Co-op. Elevator*, 272 Kan. 546, 35 P.3d 892 (2001); *Buckner v. General Motors Corp.*, 760 P.2d 803 (Okla. 1988); *Hinton v. Designer Ensembles, Inc.*, 343 S.C. 236, 540 S.E.2d 94 (2000); *La Tier v. Compaq Computer Corp.*, 123 S.W.3d 557 (Tex. App. 2003); *Wentworth v. Fletcher Allen Health Care*, 171 Vt. 614, 765 A.2d 456 (2000); *Wilmot v. Kaiser Aluminum*, 118 Wash. 2d 46, 821 P.2d 18 (1991); *Cardwell v. American Linen Supply*, 843 P.2d 596 (Wyo. 1992). See, generally, 3 Natl. Employment Lawyers Assn., Employee Rights Litigation: Pleading and Practice § 11.06 (Janice Goodman ed., 2005) (describing allocation of burdens of production and proof, and providing additional and contra authority).

Like the trial court in the present case, we will apply the burden-shifting analysis this court has utilized in employment discrimination actions to this case involving retaliatory discharge for filing a workers' compensation claim. Our conclusion, however, differs from that of the trial court.

2. Allocation of Burdens

(a) Riesen's Prima Facie Case

[6] To establish a prima facie case of unlawful retaliation, an employee must show that he or she participated in a protected

activity, that the employer took an adverse employment action against him or her, and that a causal connection existed between the protected activity and the adverse employment action. *Fraternal Order of Police v. County of Douglas*, 270 Neb. 118, 699 N.W.2d 820 (2005). The burden of proof for a prima facie case of retaliatory discharge for filing a workers' compensation claim is on the employee. See 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 104.07[3] (2005). See, e.g., *Rebarchek, supra*; *Buckner, supra*.

In *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003), this court did not address what elements are necessary to establish a prima facie case for retaliatory discharge for filing a workers' compensation claim. In the present case, the trial court asserted that to demonstrate a prima facie case of retaliatory discharge for filing a workers' compensation claim, Riesen had to establish the following elements: (1) that he filed a workers' compensation claim, (2) that he was terminated from employment, and (3) that a causal link existed between the termination and the workers' compensation claim. The three elements utilized by the trial court fairly summarize the most common articulations of the prima facie case in such actions. See Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 Hastings L.J. 551 (1986). See, also, *Webner v. Titan Distribution, Inc.*, 267 F.3d 828 (8th Cir. 2001) (applying Iowa law); *Gonzalez v. City of Minneapolis*, 267 F. Supp. 2d 1004 (D. Minn. 2003) (applying Minnesota law); *Hinton v. Designer Ensembles, Inc.*, 343 S.C. 236, 540 S.E.2d 94 (2000). Those elements also parallel this court's established elements for unlawful retaliation actions in general. See *Fraternal Order of Police, supra*. We find that the trial court's articulation of the elements of a prima facie case applicable to this case was correct.

There is no dispute that Riesen satisfied the first two elements of a prima facie case. First, Riesen established that he filed a workers' compensation claim arising from an injury sustained on May 8, 2001, in the course and scope of his employment. That claim, in fact, was being litigated when he was fired. Second, Riesen established that Irwin Industrial fired him on April 30, 2002.

The trial court found that Riesen had failed to establish a prima facie case of workers' compensation retaliatory discharge because he had not met the third element—a causal nexus. The court stated that "Riesen's evidence fail[ed] to establish that Irwin [Industrial] was motivated by retaliation . . . ."

[7,8] "Ordinarily the prima facie case must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as its motive." 6 Larson & Larson, *supra* at 104-65. Accord, *Rebarchek v. Farmers Co-op. Elevator*, 272 Kan. 546, 35 P.3d 892 (2001); *Wilmot v. Kaiser Aluminum*, 118 Wash. 2d 46, 821 P.2d 18 (1991). One court has opined that

> [c]ircumstantial evidence sufficient to establish a causal link between termination and filing a compensation claim includes: (1) knowledge of the compensation claim by those making the decision on termination; (2) expression of a negative attitude toward the employee's injured condition; (3) failure to adhere to established company policies; (4) discriminatory treatment in comparison to similarly situated employees; and (5) evidence that the stated reason for the discharge was false.

Continental Coffee Products v. Cazarez, 937 S.W.2d 444, 451 (Tex. 1996).

Riesen injured his right shoulder at work on May 8, 2001. No dispute exists between the parties that Riesen had a valid workers' compensation claim as a result of that injury. Not only had he pursued his right to benefits, he had received substantial benefits and was seeking unknown future benefits. Riesen was fired on April 30, 2002, the same day on which Summers received Riesen's answers to interrogatories in the workers' compensation action.

In its brief, Irwin Industrial emphasizes that almost 1 year had elapsed between the date of Riesen's compensable injury and his termination of employment. Irwin Industrial argues that "[o]ne year is too long a time period to generate any inference of retaliatory intent based on temporal proximity." Replacement brief for appellee at 11. This argument ignores the fact that Riesen's claim was still pending. As such, the nature and extent of the injuries he claimed to have received had not yet been determined.

The record before us includes Riesen's answers to interrogatories, which Summers received on April 30, 2002, just prior to Riesen's dismissal. These answers show that Riesen and Irwin Industrial were in some sort of dispute over his right to recovery. They indicate that both parties were anticipating further litigation. In these answers, Riesen claimed that he had not reached maximum medical improvement and that he was reserving his right to claim benefits for vocational rehabilitation, further medical expenses, and temporary and permanent disability. This situation is clearly distinguishable from one in which a discharged employee had filed a workers' compensation claim that had been settled and satisfied without serious dispute.

[9] "Proximity in time between the claim and discharge is a typical beginning point for proof of a causal connection." *Rebarchek v. Farmers Co-op. Elevator*, 272 Kan. 546, 555, 35 P.3d 892, 899 (2001). A plaintiff supports an assertion of retaliatory motive by demonstrating proximity in time between the workers' compensation claim and the firing, along with evidence of satisfactory work performance and supervisory evaluations. See 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 104.07[3] (2005). In the present case, Riesen had received several positive work performance reviews and pay increases from his employer. He was fired just 2 days after he notified Irwin Industrial's human resource department that after nearly 12 months of medical treatment and accompanying workers' compensation benefits, he needed more surgery on his shoulder. The temporal proximity of 2 days between Riesen's notice that he needed additional surgery and the termination of his employment, coupled with evidence of his satisfactory work performance, created a causal nexus sufficient to satisfy the third prima facie element.

In cases involving retaliatory discharge for filing a worker's compensation claim, a "claimant's 'prima facie case is not an onerous burden under the McDonnell Douglas burden-shifting scheme.' " See *Rebarchek*, 272 Kan. at 557, 35 P.3d at 901, quoting *Robinson v. Wilson Concrete Co.*, 913 F. Supp. 1476 (D. Kan. 1996). We conclude that Riesen met his burden of establishing a prima facie case of retaliatory discharge for filing a workers' compensation claim.

(b) Irwin Industrial's Justification for Discharge

Irwin Industrial asserted that it had terminated Riesen's employment because he had misrepresented his past employment on his employment application. Thus, Irwin Industrial met its burden of production.

(c) Pretext

[10,11] Once Irwin Industrial successfully rebutted Riesen's prima facie case, Riesen was required to present evidence showing that the company's proffered explanation for firing Riesen was merely pretextual. The trial court found that Riesen's evidence had failed to establish that the company's justification was a pretext for a retaliatory motive. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted. *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000). Therefore, we must address whether Riesen presented sufficient evidence to create a genuine issue of fact for the jury. In other words, could Riesen's evidence, when viewed in the light most favorable to him (the nonmoving party), create an inference in reasonable minds that Irwin Industrial had retaliatory motives for firing Riesen?

[12] Riesen asserts that Summers seized upon the first opportunity to terminate Riesen's employment for what would appear to be a valid, nonretaliatory reason, but Riesen claims that Irwin Industrial's explanation was a pretext for retaliatory discharge. In employment law, a "pretext" has been described as " 'a reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an inference that the employer is trying to conceal a discriminatory reason for his action. . . .' " *Ryther v. KARE 11*, 108 F.3d 832, 837 n.4 (8th Cir. 1997).

In addition to the temporal proximity between Riesen's firing and his protected activity under the workers' compensation scheme, Riesen asserts other evidence to demonstrate a causal nexus and to show that Irwin Industrial's proffered reason was pretextual. For example, Summers had been the head of the

human resources department for approximately 6 years, but when deposed, he could not recall ever taking any other disciplinary action for a discrepancy between an employee's answers to interrogatories and that employee's personnel file. Although Summers stated it was the company's practice to terminate the employment of employees who misrepresent any information on their application, he had never before terminated the employment of an employee for that reason.

In *Reedy v. White Consol. Industries, Inc.*, 890 F. Supp. 1417 (N.D. Iowa 1995), a former employee claimed his employer fired him for seeking workers' compensation benefits. The employer said it fired the employee for misrepresentations on his job application and health forms. The federal district court found that a jury question existed as to the actual reason for the termination of employment. The court noted that the employee's evidence showed the employer had taken "no action to discipline him for any misrepresentations in his application and health forms until he actually appeared likely to run up medical bills and seek workers compensation benefits." See *id*. at 1434. Regarding this evidence, the court explained: "One implication of [such evidence] is that [the employer] decided to ignore those misrepresentations until health problems for which it might be required to pay manifested themselves." *Id*. The court continued:

> [A]nother implication of [the employer's] delay in terminating [the employee] until he actually appeared likely to require workers compensation benefits is that it was not until that time that [the employer] had any notice of [the employee's] misrepresentations of his health condition, and therefore no reason to invoke those misrepresentations as grounds for his discharge, and that [the employer] merely followed up on the warnings in both the application form and the health form which notified [the employee] that misrepresentations, or even omissions of fact, were grounds for dismissal. . . . [T]he real reason [for the discharge], [the employee's] misrepresentations or need for workers compensation benefits, is a fact question for the jury.

Id. at 1434 n.8.

In the case at bar, the employment application completed by Riesen instructed applicants to list "all present and past

employment" and to "[u]se a separate sheet of paper if necessary," but the application left room to list only three previous employers. Riesen listed only three previous employers on his application (although Riesen suggests that a separate page might have been lost from his personnel file). The record before us includes copies of other employees' job applications. Most of those applications include a listing of only three prior employers, with no addition of a separate page. Such evidence, Riesen claims, supports an inference that "Irwin [Industrial] itself does not consider the inclusion of all employers essential and material and thus, jumped at the first pretextual low-grade reason to terminate [him]." Brief for appellant at 22.

[13] "[T]he filing of a workers' compensation claim does not insulate the employee from the requirement that he or she abide by all personnel rules . . . . Such . . . personnel polic[ies] must be applied in a neutral fashion, however." 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 104.07[4] at 104-67 (2005). In *Rebarchek v. Farmers Co-op. Elevator*, 272 Kan. 546, 35 P.3d 892 (2001), the defendant-employer claimed that it fired the plaintiff because of poor job performance. The Kansas Supreme Court found that the plaintiff had "presented evidence that other . . . employees with somewhat similar performance deficiencies were not terminated." *Id.* at 558, 35 P.3d at 901. The court concluded that "[a]lthough [the plaintiff's] admittedly poor job performance supports [the employer's] position, we agree . . . that [the plaintiff] is entitled to test his case before a jury by virtue of his coming forward with evidence that raises genuine issues concerning [the employer's] motivation." *Id.*

Several statements allegedly made by Summers also tend to support an inference that Irwin Industrial's proffered reason for Riesen's firing was pretextual. Riesen claims that following a meeting between Summers and Riesen regarding Riesen's physical restrictions, he heard Summers exclaim, "[T]he little son of a bitch is faking and he only did this to get his raise." Approximately 2 months after his initial accident, Summers allegedly told Riesen that he would not sign an insurance form regarding Riesen's off-work status, that he had no work available for Riesen because of his one-arm restriction, and that "it would be a lot easier on all of [them] if [Riesen would] just quit."

Summers' statements, along with other evidence, could create an inference that Summers refused to sign the form in good conscience, but they could also tend to create an inference that he was upset with Riesen over Riesen's compensable injury.

Riesen further points to Summers' statement on April 30, 2002, as evidence of pretext. Riesen claims that on the date of the termination of his employment, Summers called him into Summers' office and told him, " 'You *finally* messed up . . . you lied on your *work comp* application.' " (Emphasis supplied.) Riesen asserts that, viewed in a light most favorable to him, the phrases "you finally messed up" and "work comp application" (as opposed to "employment application") create an inference that Summers was biding his time until he found a reason to terminate Riesen's employment and that the termination was actually in retaliation for Riesen's workers' compensation claim.

We need not decide whether the evidence offered by Riesen would be sufficient for him to prevail at trial. However, we conclude that Riesen's evidence, viewed in a light most favorable to him, created a genuine issue of fact as to whether the reason offered by Irwin Industrial for the termination of Riesen's employment was a pretext for an impermissible termination. Thus, the trial court erred in granting summary judgment for Irwin Industrial.

VI. CONCLUSION

We conclude that Riesen established a prima facie case of retaliatory discharge for filing a workers' compensation claim. We also conclude that Riesen's evidence, viewed in a light most favorable to Riesen, created a genuine issue of fact as to whether the reasons offered by Irwin Industrial for the termination of Riesen's employment were a pretext for an impermissible termination. Accordingly, we reverse the trial court's order granting summary judgment for Irwin Industrial and remand the cause to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Stuart B. Mills, respondent.

736 N.W.2d 712

Filed July 28, 2006. No. S-02-1085.

1. **Rules of the Supreme Court.** The Nebraska Supreme Court has the inherent power to define and regulate the practice of law in this state.
2. **Disciplinary Proceedings.** A suspended lawyer seeking reinstatement is required to affirmatively show that he or she has fully complied with the order of suspension and in the future will not engage in practices offensive to the legal profession.
3. **Disciplinary Proceedings: Proof.** The burden is upon a suspended lawyer to show his or her present fitness to again exercise the privileges and functions of an attorney in view of his or her previous conduct, the discipline imposed, and any reformation of character wrought thereby, or otherwise, as shown by his or her more recent conduct.
4. ____: ____. Whether or not a suspended lawyer has made a showing sufficient for reinstatement is dependent upon the record before the Nebraska Supreme Court and the suspended lawyer's prior conduct as reflected in the records of the court.
5. **Disciplinary Proceedings.** The character of the respondent in a disciplinary proceeding and the question of his or her reformation as to the previous unethical conduct are of great importance in determining whether or not a reinstatement should be granted.

Original action. Application for reinstatement granted.

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

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

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

Per Curiam.

INTRODUCTION

Stuart B. Mills asks this court to reinstate him to the practice of law following a 2-year suspension. The Counsel for Discipline resists the application for reinstatement because, subsequent to this court's suspension order, Mills pleaded guilty in federal court to a felony charge based upon the same conduct for which he was disciplined.

FACTS

Mills was admitted to the practice of law in the State of Nebraska on January 22, 1973. On December 5, 2003, this court suspended Mills from the practice of law for 2 years as a result of his engaging in conduct which violated the Code of Professional

Responsibility. Among other things, Mills notarized certain renunciations and deeds without witnessing the signatures of those signing the documents, and he filed a federal estate tax return form with the Internal Revenue Service based upon information which Mills knew to be false. The specific facts relating to those disciplinary proceedings are set forth in *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003).

The parties have entered into a stipulation for the purpose of establishing the factual record with respect to Mills' application for reinstatement. In June 2004, in the U.S. District Court for the District of Nebraska, Mills was charged with a felony in violation of 26 U.S.C. § 7212(a) (2000) relating to his conduct during the course of his representation of Cheryl Borgelt as personal representative of David Borgelt's estate in Cuming County, Nebraska.

Mills was charged by information in the U.S. District Court as follows:

> On or about the 30th day of June, 1999, in the District of Nebraska, the defendant, did corruptly obstruct and impede or endeavor to obstruct or impede the due administration of the Internal Revenue laws by filing altered renunciations with the Cuming County Court in an effort to evade and impede the collection of an estate tax.
>
> In violation of Title 26, United States Code, Sections 7212(a).

Mills entered a guilty plea to the federal charge and was sentenced on August 31, 2004, to 2 years' probation; fined $3,000; and required to perform 250 hours of community service. He has completed all the requirements of his sentence. On January 12, 2006, the U.S. District Court ordered that Mills be discharged from probation supervision and terminated the proceedings in that case.

On September 28, 2004, the Counsel for Discipline submitted a complaint to the Committee on Inquiry of the Third Disciplinary District (Committee) and requested the Committee to conduct an inquiry to determine whether reasonable grounds for discipline existed as a result of Mills' federal felony conviction. It was the Counsel for Discipline's position that the conviction, "in and of itself," was a new basis on which discipline could be grounded.

The complaint alleged that Mills' felony conviction constituted a violation of Canon 1, DR 1-102(A), of the Code of Professional Responsibility, which, in relevant part, prohibited a lawyer from violating a disciplinary rule; engaging in illegal conduct involving moral turpitude; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; engaging in conduct that is prejudicial to the administration of justice; and engaging in any other conduct that adversely reflects on his or her fitness to practice law. The Counsel for Discipline recommended formal charges against Mills be filed with this court. Mills' attorney submitted a response letter to the Committee in which he noted that the felony conviction arose from the same conduct for which Mills had been suspended by this court and that no new or different facts had arisen.

On October 18, 2004, the Committee determined that no public interest would be served by the filing of formal charges. The Committee determined that a private reprimand of Mills was appropriate.

The Counsel for Discipline appealed the Committee's determination to the Disciplinary Review Board (Board). The Counsel for Discipline stated that its practice had been "to consider [a] felony conviction as a separate and distinct violation of the Code of Professional Responsibility." The Counsel for Discipline again recommended the filing of formal charges against Mills.

Mills' attorney sent a letter to the Board in which it was expressed that Mills accepted the Committee's recommendation of a private reprimand. The letter also emphasized that all parties involved in the matter were fully aware that a federal grand jury investigation was pending during the course of the 2002-03 disciplinary proceedings against Mills and that the Nebraska Supreme Court, during oral argument, had raised the issue of a possible felony prosecution against Mills.

The Board concluded that the public interest had been served by the 2-year suspension of Mills, and it affirmed the determination of the Committee to issue a private reprimand of Mills. A private reprimand was issued on December 3, 2004. No further appeal was pursued by the Counsel for Discipline or by Mills.

On January 23, 2006, Mills requested this court to reinstate him to the practice of law in Nebraska, and the Counsel for

Discipline filed a resistance to such reinstatement. In its resistance, the Counsel for Discipline described Mills' felony conviction. The Counsel for Discipline stated that the private reprimand related to the conviction had been "an insufficient sanction" and that "Formal Charges should have been filed" against Mills. The Counsel for Discipline opposed the reinstatement because "subsequent to the entry of the two-year suspension herein, [Mills] was convicted of a felony involving moral turpitude."

The chairperson of the Committee filed a statement regarding Mills' reinstatement application, stating that he knew of no reason why Mills should not be reinstated to the practice of law and that the Committee recommended such reinstatement. The chairperson of the Board also filed a response to Mills' reinstatement motion. Therein, she stated that she was unaware of any information which would indicate that Mills should not be reinstated.

STANDARD OF REVIEW

[1] The Nebraska Supreme Court has the inherent power to define and regulate the practice of law in this state. *State ex rel. Nebraska State Bar Assn. v. Butterfield*, 172 Neb. 645, 111 N.W.2d 543 (1961).

ANALYSIS

The question is whether Mills' subsequent felony conviction, which was based on the same conduct for which he was suspended, prevents his reinstatement to the practice of law in this state. Upon his suspension, Mills was directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001) and to pay the costs and expenses of the action in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001). See *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003). There is no dispute that Mills has completed all the requirements set forth in the order of suspension, has paid all costs assessed against him, and has complied with rule 16. The chairpersons of the Committee and the Board have filed statements in support of Mills' reinstatement application.

[2-5] A suspended lawyer seeking reinstatement is required to affirmatively show that he or she has fully complied with the order of suspension and in the future will not engage in practices

offensive to the legal profession. See *Butterfield, supra*. The burden is upon the suspended lawyer to show his or her present fitness to again exercise the privileges and functions of an attorney in view of his or her previous conduct, the discipline imposed, and any reformation of character wrought thereby, or otherwise, as shown by his or her more recent conduct. *Id*. Whether or not such a showing is sufficient is dependent upon the record before us and the suspended lawyer's prior conduct as reflected in the records of this court. *Id*. The character of the respondent in a disciplinary proceeding and the question of his or her reformation as to the previous unethical conduct are of great importance in determining whether or not a reinstatement should be granted. *Id*. If a sufficient showing is made, the suspended lawyer "will be reinstated and allowed to engage in the practice of law." See, e.g., *State ex rel. Nebraska State Bar Assn. v. Erickson*, 204 Neb. 692, 704, 285 N.W.2d 105, 111 (1979).

In the present case, the record shows and the parties have stipulated that Mills has fully complied with the terms of his suspension. No evidence suggests that he has engaged in the practice of law or that he has engaged in any improper conduct since being suspended by this court. The Counsel for Discipline acknowledges that Mills is not currently under disciplinary investigation and that there are no pending disciplinary complaints against Mills.

Mills has shown that he will not in the future engage in conduct offensive to the practice of law. When suspending Mills in 2003, this court found as follows:

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

Mills, 267 Neb. at 71, 671 N.W.2d at 776.

In the present proceeding, Mills has sworn by affidavit that he agrees to abide by the rules of this court. The record also contains numerous letters in support of Mills' application for

reinstatement written by attorneys, county officials, businesspersons, community leaders, and former clients. These letters attest to Mills' good reputation, experience, community involvement, willingness to provide pro bono legal services, remorse for the improper conduct that precipitated his suspension, and adherence to this court's suspension order.

Despite not having appealed the private reprimand of Mills issued on December 3, 2004, the Counsel for Discipline now alleges that the private reprimand was an insufficient sanction for Mills' subsequent felony conviction. The sole reason offered by the Counsel for Discipline against reinstatement is that after he was suspended, Mills received a federal felony conviction for his conduct relating to the Borgelt estate.

The problem with the Counsel for Discipline's argument is that this court has already sanctioned Mills for the conduct which is at issue. He was suspended from the practice of law. Furthermore, after Mills pleaded guilty to the federal charge and was sentenced as described above, the Committee determined that a private reprimand of Mills would be appropriate. The Committee's determination was affirmed by the Board, and no further appeal was taken by the Counsel for Discipline. Mills was thus privately reprimanded in December 2004.

Mills has fully complied with the order of suspension issued by this court, and he has successfully completed the requirements of his sentence in the federal case. He has affirmatively shown that he will not in the future engage in conduct offensive to the practice of law. The chairpersons of the Committee and the Board have filed statements in support of his reinstatement. We conclude that Mills should be reinstated to the practice of law.

CONCLUSION

For the reasons stated herein, we order that Mills be reinstated to the practice of law in the State of Nebraska, effective immediately.

APPLICATION FOR REINSTATEMENT GRANTED.

WRIGHT, J., participating on briefs.

GERRARD and MCCORMACK, JJ., not participating.

MICHAEL D. HUFFMAN, APPELLEE, V. GREG E. PETERSON AND LYNDA J. PETERSON, APPELLANTS.

718 N.W.2d 522

Filed July 28, 2006. No. S-04-941.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Boundaries: Ejectment: Quiet Title.** Boundary disputes are properly brought as an action in ejectment or pursuant to Neb. Rev. Stat. § 34-301 (Reissue 2004). But when parties pursue a boundary dispute as a quiet title action without objection, the mode of procedure is no longer in question.
4. **Boundaries: Parties.** The common grantor rule provides that where conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter.
5. **Equity: Boundaries: Parties: Intent.** The common grantor doctrine is an equitable rule that is designed to ascertain the intention of the parties with respect to the location of premises described by lot number in a conveyance which is executed by a grantor who conveys only part of an area of land owned by him.
6. **Property: Boundaries: Title: Parties.** In applying the common grantor rule, the focus is on unity of title. If title to the property is actually held by the same party, the name in which such party conveys the property is irrelevant.
7. **Equity.** Equity looks through form to substance. Thus, a court of equity goes to the root of the matter and is not deterred by form.
8. **Trial: Witnesses: Testimony.** The credibility of witness testimony and weight to be given the testimony are questions for the trier of fact.
9. **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 Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

John D. Rouse and Gregory C. Damman for appellants.

Andrew D. Strotman and Trent R. Sidders, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

GERRARD, J.

NATURE OF CASE

Ben Justus James III conveyed adjoining residential lots to Greg E. Peterson (Peterson) and Lynda J. Peterson, as well as Michael D. Huffman. A dispute between the Petersons and Huffman arose after a survey conducted on the property revealed that Huffman's driveway encroached on the lot owned by the Petersons. Huffman filed an action to quiet title to the property in his favor, and in response, the Petersons filed an action seeking to eject Huffman from the property. Applying the common grantor doctrine, the district court determined that the boundary of Huffman's lot encompassed Huffman's driveway and quieted title to the disputed property in his favor. The Petersons challenge the court's application of the common grantor doctrine. For the following reasons, we conclude that the common grantor rule was applied correctly, and we affirm the court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In October 1987, Pioneer Partners, a partnership established by Robert Kerrey and James, acquired the property composing Pioneer Estates in Lancaster County, Nebraska. In 1989, Kerrey assigned his right, title, and interest in Pioneer Partners and conveyed his interest in Pioneer Estates to James.

In 1990, James had the main road, known as Westbrook Circle, built on the property, along with a driveway to his house, located at 3001 Westbrook Circle, also known as Lot 10, Block 2, Pioneer Estates (Lot 10). In 1992, James conveyed a life estate in the adjacent property to his father, who lived on the adjacent property, located to the east of Lot 10 at 3000 Westbrook Circle, Lot 9, Block 2, Pioneer Estates (Lot 9), until 1995, when James sold Lot 9 to the Petersons, the appellants in this action. At that time, James' father conveyed his life estate to the Petersons, and James, individually and as partner of Pioneer Partners, conveyed his remainder interest in the property to the Petersons. Thus, the remainder merged into the life estate, leaving the Petersons with title in fee simple. See *Watson v. Dalton*, 146 Neb. 78, 18 N.W.2d 658 (1945).

James lived next to the Petersons on Lot 10 until June 1999, when he sold Lot 10 to the appellee, Huffman. James never had a survey performed on Lots 9 and 10. Similarly, the Petersons and Huffman did not have surveys of the lots performed prior to their purchases in 1995 and 1999, respectively.

In August 1999, Huffman had his property surveyed in order to obtain financing. In May 2000, Huffman used the survey to obtain a building permit for a new detached garage and noticed an indication on the document that his driveway was encroaching on the Petersons' property, Lot 9. Huffman then told Peterson and James about his discovery. Prior to Huffman's discovery, Huffman, Peterson, and James had all assumed that Huffman's driveway was located entirely on Lot 10.

In October 2001, Huffman and Peterson met to discuss potential options for remedying the encroachment. Huffman offered to purchase the encroaching land or arrange for an easement, but Peterson indicated that the encroaching driveway should be moved from his property. In November 2002, Huffman filed an action against the Petersons, requesting the court to quiet title in the disputed property pursuant to the common grantor theory. Under that theory, Huffman alleged that at the time of the parties' respective conveyances, Huffman and the Petersons, along with James, intended a metal post and a tree located between the properties to mark the boundary between Lots 9 and 10. The Petersons filed an answer and cross-petition, asserting an ejectment action.

Following a bench trial, the district court ordered title to the disputed property quieted in Huffman's favor. The court found that the parties acquired their adjacent properties from a common grantor with an "understanding that the boundary between the lots was marked by a north-south line running through a metal T-post and a cottonwood tree east of the driveway leading to [Huffman's] residence." Pursuant to the common grantor doctrine, the court found such line to be the boundary between the two properties.

ASSIGNMENTS OF ERROR

The Petersons assign that the district court erred in (1) finding that the Petersons and Huffman acquired their properties from a

common grantor; (2) assuming the parties acquired their properties from a common grantor, finding that the common grantor conveyed the subject lots to Huffman and the Petersons with reference to " 'a boundary line then marked on the ground' "; (3) finding a small tree and movable metal post to be monuments for purposes of the common grantor rule; and (4) failing to eject Huffman from their property.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

ANALYSIS

[3] We first note that boundary disputes are not to be determined in a quiet title action. Rather, boundary disputes are properly brought as an action in ejectment or pursuant to Neb. Rev. Stat. § 34-301 (Reissue 2004). *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998). But when parties pursue a boundary dispute as a quiet title action without objection, the mode of procedure is no longer in question. *Id.*

[4,5] The common grantor rule provides that where conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter. See *Phillippe v. Horns*, 188 Neb. 304, 196 N.W.2d 382 (1972). This equitable rule is designed to ascertain the intention of the parties with respect to the location of premises described by lot number in a conveyance which is executed by a grantor who conveys only part of an area of land

owned by him. *Kraus v. Mueller*, 12 Wis. 2d 430, 107 N.W.2d 467 (1961).

The Petersons argue that the facts of this case and the testimony given at trial do not support the district court's application of the common grantor rule. Specifically, the Petersons challenge the court's findings (1) that Lots 9 and 10 were conveyed by a common grantor and (2) that the parties acquired the lots with the understanding that the boundary between their properties was marked by a line east of Huffman's driveway, running through a metal T-post and a cottonwood tree. In that regard, the Petersons question the evidence of both the understanding of the parties and the sufficiency of the markers. We address each argument in turn.

Lot 9 and Lot 10 Were Conveyed by Common Grantor.

The Petersons first assign that the district court erred in applying the common grantor rule because Lots 9 and 10 were not conveyed by a common grantor. While Lot 10 was conveyed to Huffman by one grantor—James—the Petersons assert that Lot 9 was conveyed to the Petersons by three separate grantors—James, James' father, and Pioneer Partners. Thus, according to the Petersons, the common grantor doctrine does not apply because the grantor of Lot 9 was not the same as the grantor of Lot 10.

Huffman argues that Lot 9 was conveyed to the Petersons by James, just as Lot 10 was conveyed to Huffman by James. Huffman asserts that James developed the properties at issue and constructed Huffman's driveway prior to conveying a life estate interest in Lot 9 to James' father and that, thus, the common grantor rule is not precluded by the interest later acquired by James' father. In addition, Huffman argues that because James was the sole partner in Pioneer Partners at the time of the conveyance of Lot 9, the partnership was not a separate entity or grantor in the conveyance.

James and Kerrey originally acquired title to the property at issue in the name of their partnership, Pioneer Partners, and later, James became the sole partner in Pioneer Partners and acquired sole ownership of the property at issue through an assignment and quitclaim deed from Kerrey. Thus, James acquired Lots 9 and 10 in the same transaction. Subsequently, James conveyed

Lot 9 to the Petersons, naming as grantor himself, individually, and as partner of Pioneer Partners. Several years later, James conveyed Lot 10 to Huffman, naming only himself, individually, as grantor.

[6,7] Based on these facts, the Petersons argue that the lots were not conveyed by the same grantor. However, in applying the common grantor rule, the focus is on unity of title. If title to the property is actually held by the same party, the name in which such party conveys the property is irrelevant. In other words, James acquired ownership of the two parcels at issue in the same transaction, in the same name. Equity looks through form to substance. Thus, a court of equity goes to the root of the matter and is not deterred by form. See *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999). Even though James ultimately drafted the conveyance documents using different language—one in his name alone, and one in his name along with the name of his partnership—the lots were owned by him in the same capacity. Thus, the language of the deed documents does not prevent proper application of the common grantor rule.

Furthermore, Lots 9 and 10 were originally owned by James in their entirety, giving him the power to determine the location of the boundary between the properties. The fact that James conveyed a life estate interest in Lot 9 to his father prior to conveying complete ownership of Lot 9 to the Petersons does not change the fact that James was the common grantor of the two parcels because James owned both parcels before conveying any interest at all.

For example, the common grantor rule could have applied had James conveyed a fee simple title in Lot 9 to his father, making his father the original grantee under the common grantor rule; similarly, the common grantor rule would have applied if James had not conveyed any interest in Lot 9 to his father, making the Petersons the original grantees under the rule. It would make little sense to refuse to apply the doctrine to facts presenting an initial conveyed interest that lies between those situations. All that matters for purposes of determining whether a common grantor is present is whether that grantor held title to both disputed parcels, such that the grantor had the power to establish the boundary between the two parcels.

Here, James held title to Lot 9 in fee simple before conveying a life estate to his father, but retained a remainder interest. James conveyed that remainder interest directly to the Petersons and also sold the life estate on his father's behalf. The Petersons' unified title to Lot 9 came from both James and James' father, but part of that title—the remainder interest—was conveyed directly from James. On the whole, the purchase was effectively negotiated and completed as a conveyance from James to the Petersons.

Most important, the nature of the Petersons' purchase was such that James was in a position to establish the boundaries of the property, and the Petersons were in the position of relying on James' description of the boundary. The fact that James' father first held part of the title to Lot 9 does not change the fact that the Petersons were the original grantees of the remainder of the title, and the first to obtain a unified title subsequent to James. The intent of the common grantor doctrine is to give effect to the original grantor's representation of the boundary to property. Based on this evidence, the district court did not err in concluding that James was a common grantor with respect to his conveyance to the Petersons. The Petersons' first assignment of error is without merit.

Huffman Proved Parties' Understanding of Boundary Line.

The Petersons next argue that Huffman failed to prove that the parties purchased their lots with the understanding that the boundary between the properties was marked by a metal T-post and a cottonwood tree to the east of Huffman's driveway and that such markers were sufficient to establish the boundary. The Petersons argue that without evidence of this shared understanding, the common grantor doctrine does not apply.

The metal post identified by Huffman as a marker of the boundary between Lots 9 and 10 was placed in the ground by James before the Petersons and Huffman acquired their respective lots. James testified that the post was meant to stabilize one of several telephone poles that had been placed as a barrier along the east side of the driveway in an effort to keep traffic from going beyond the roadway and onto the property then occupied by James' father. Peterson testified that the post was in

place at the time he purchased Lot 9 in 1995 and remained in place when Huffman purchased Lot 10 in 1999.

Huffman testified that prior to his purchase of Lot 10, James accompanied him on a walk around the perimeter of the lot to show Huffman the boundary lines. Huffman stated that he and James started at the northeast corner of Lot 10 where the metal post was located and that James represented the post to be the "original northeast property stake."

The cottonwood tree alleged to be a boundary marker between Lots 9 and 10 was planted by James in 1991 or 1992 on the east side of the Lot 10 driveway before the Petersons and Huffman acquired their lots. Huffman testified that during his walk with James around the perimeter of Lot 10, James stated that the tree was planted on the property line and that Peterson "knows about it, it's no big deal." Huffman also explained that prior to discovering the encroachment, Peterson asked his permission to landscape around the tree.

Peterson, however, testified that another post was located at the fence line to the south of Lots 9 and 10. Peterson stated that the post was located in the southwest corner of his property when he purchased it and described the post as a "wood lath painted pink [with] a pink flag." As shown on a map of Lots 9 and 10 entered into evidence at trial, this post is in line with the platted boundary between the lots. Huffman testified that during his walk with James around Lot 10, James indicated that the southeast boundary marker was near a common gate into a city park but, due to the heavy growth in the area, told Huffman of the boundary, "it's around here."

Huffman's testimony regarding James' representations that the boundary between Lots 9 and 10 was marked by the post and tree was disputed at trial. James testified that the post was installed for the sole purpose of preventing the telephone poles from rolling and not to mark a boundary. James stated that he never represented that the post marked the boundary between the lots. When asked how long the post remained in place, James explained that he tried to pull the post out of the ground when he removed the telephone poles but was unable to remove the post. Further, James testified that while walking the perimeter of Lot 10 with Huffman, he only referred to survey stakes as boundary

markers. Peterson testified that he purchased Lot 9 based on the legal plat and that James told both Huffman and him that the post had nothing to do with the boundary.

[8,9] Although Peterson and James contradicted Huffman's testimony regarding James' representations of the boundary between Lots 9 and 10, the credibility of witness testimony and weight to be given the testimony are questions for the trier of fact. See *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005). In this case, the court saw and heard the testimony of Huffman, Peterson, and James and, based on its judgment, gave greater weight to Huffman's testimony. 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. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). The common grantor rule would be of little use if it could be defeated simply by the assertion of contrary accounts, without any regard for whether those accounts are credible or persuasive to the fact finder.

We also note the testimony of Peterson and James that until the encroachment was discovered, both assumed that the entire driveway was located on Lot 10. Further, although there was no direct testimony that James pointed out the tree and post at the time of the conveyance of Lot 9 to the Petersons, the subsequent conduct of the Petersons in occupying Lot 9 from 1995 until 2000 and observing a boundary along the east of the driveway supports an inference that they purchased Lot 9 with the understanding that the west boundary of the premises ran through the tree and post. See *Kraus v. Mueller*, 12 Wis. 2d 430, 107 N.W.2d 467 (1961). Although the tree and post may not have been placed with the intent that they serve as boundary markers, according to Huffman's testimony, James used them in that capacity when conveying the property. We find nothing in the law to preclude fixed, visible landmarks from being used to define a boundary line, even if that was not their original purpose.

The evidence establishes that the landmarks Huffman testified had been identified by James as boundary markers were apparent upon visual examination of the property when Lots 9 and 10 were conveyed to the Petersons and Huffman. The parties were

under the impression that the boundary between Lots 9 and 10 ran east of Huffman's driveway, as evidenced by their subsequent conduct on the properties and mutual surprise after discovering that the plat specifications indicated otherwise. This evidence, giving weight to the district court's evaluation of the credibility of the witnesses, is sufficient to prove that the common grantor doctrine is applicable. Thus, we conclude that the district court properly applied the common grantor doctrine, quieting title to the disputed property in Huffman. We find the Petersons' second and third assignments of error to be without merit.

The Petersons also assign that the district court erred in failing to eject Huffman from their property. Having concluded that the court correctly quieted title in the disputed property in favor of Huffman, we naturally conclude that the court did not err in dismissing the Petersons' ejectment action and reject the Petersons' final assignment of error.

CONCLUSION

The district court correctly applied the common grantor rule, quieting title in favor of Huffman. Therefore, we affirm the judgment of the district court.

AFFIRMED.

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

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. CAREY DEAN MOORE, APPELLANT AND CROSS-APPELLEE.

718 N.W.2d 537

Filed July 28, 2006. No. S-04-1081.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.

4. **Criminal Law: Judgments: Sentences.** The judgment in a criminal case is the sentence.
5. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.
6. ____: ____. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
7. **Postconviction: Constitutional Law: Sentences.** An issue of constitutional dimension involving a sentence does not constitute grounds for postconviction relief unless it also constitutes grounds for finding the sentence void or voidable.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Alan E. Peterson, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

PER CURIAM.

NATURE OF CASE

Appellant, Carey Dean Moore, was convicted of two counts of first degree murder and sentenced to death in 1980. Since his original convictions and sentences, the state and federal courts have considered numerous cases brought by Moore, including direct appeals and collateral proceedings, one of which resulted in a remand for resentencing where Moore was again sentenced to death. On August 31, 2004, the district court for Douglas County denied Moore's second petition for postconviction relief since his resentencing, and thereafter, Moore filed this appeal.

Moore's petition for postconviction relief relies on the 8th and 14th Amendments to the U.S. Constitution and art. I, §§ 3, 9, and 15, of the Nebraska Constitution. Moore makes two challenges relative to the use of electrocution to enforce a sentence of death. First, Moore claims that "under any protocol, the use of electrocution [as the statutorily mandated method of execution] violates" his rights. Second, Moore claims that the electrocution procedure to be used pursuant to a new protocol which "provides for an uninterrupted application of 2,450 volts of electricity for

15 seconds" violates his rights. The district court denied an evidentiary hearing and postconviction relief on the basis that this court had recently rejected Eighth Amendment challenges to the use of the electric chair.

Moore appeals the denial of postconviction relief. The State cross-appeals and asserts that the district court reached the right result for the wrong reason. We agree with the State's analysis that Moore's claims are either procedurally barred or not authorized in a postconviction action. Therefore, albeit for reasons different than those stated by the district court, we affirm the district court's denial of postconviction relief.

STATEMENT OF FACTS

In our opinion in the appeal of Moore's previous state postconviction action after resentencing and prior to the present case, the procedural background of this case was set forth as follows:

> In a 4-day span during August 1979, Moore robbed and murdered two Omaha taxi drivers. Moore was convicted of two counts of first degree murder, based on a felony murder theory, and was sentenced to death by a three-judge panel in 1980. We affirmed the convictions and sentence in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864 (*Moore I*). The facts of the underlying crimes are more fully set out in that opinion.
>
> Moore filed his first state postconviction action in 1982, alleging, inter alia, that his trial counsel was ineffective and that Nebraska's death penalty procedures were unconstitutional. On appeal, we rejected these arguments. *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984) (*Moore II*).
>
> Moore then filed a federal habeas corpus action and was granted a writ of habeas corpus based upon his constitutional challenge to Nebraska's death penalty procedures. The U.S. Court of Appeals for the Eighth Circuit affirmed the order of resentencing, and this order was reaffirmed by the Eighth Circuit on denial of rehearing. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *rehearing denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992).

> On remand, this court determined that it would decline to itself resentence Moore, but would instead remand the cause to the state district court for resentencing. *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993) (*Moore III*). Moore was again sentenced to death, and on direct appeal from his resentencing, he again alleged, inter alia, that [some aspects of] Nebraska's death penalty statutes and procedures were unconstitutional. We rejected those arguments. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *cert. denied* 520 U.S. 1176, 117 S. Ct. 1448, 137 L. Ed. 2d 554 (1997) (*Moore IV*).
>
> On March 3, 1997, this court set an execution date of May 9 for Moore. Moore filed the [first] state action for postconviction relief [after resentencing] on April 30. On May 5, this court stayed Moore's execution in light of *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996), *rev'd* 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998). On the same date, the district court denied Moore's motion for postconviction relief, without an evidentiary hearing. This appeal followed, and because this is a capital case, the appeal was placed on our docket. See Neb. Rev. Stat. § 24-1106 (Reissue 1995).

State v. Moore, 256 Neb. 553, 554-55, 591 N.W.2d 86, 88-89 (1999) (*Moore V*).

As will be discussed below, we note that although Moore had unsuccessfully challenged the "use of an 'electric chair' " as the statutory method of execution in a motion filed in district court on April 8, 1994, in connection with his resentencing, he did not raise the denial of his challenge to the use of the electric chair in the appeal thereof, which appeal resulted in our opinion *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996) (*Moore IV*). In *Moore V*, Moore's first postconviction case following resentencing, we concluded that all of Moore's claims for postconviction relief were either procedurally barred or without merit, and we affirmed the district court's denial of that petition for postconviction relief.

On October 5, 1999, Moore filed a petition for writ of habeas corpus in the federal district court for the district of Nebraska. See *Moore v. Kinney*, 119 F. Supp. 2d 1022 (D. Neb. 2000). The

federal district court denied Moore's petition in its entirety and dismissed the petition with prejudice. *Id*. Among the claims Moore made in the petition for writ of habeas corpus was a claim that " 'Nebraska's death penalty by electrocution violates the Eighth and Fourteenth Amendments.' " 119 F. Supp. 2d at 1038. The district court rejected the claim based on the U.S. magistrate judge's recommendation that the claim was barred because the claim was "available to [Moore] and could have been raised during either the state direct appeal or postconviction proceedings" and the claim was therefore "subject to procedural default." *Id*. at 1039-40. The magistrate noted that Moore did "not even attempt to demonstrate either cause or prejudice sufficient to excuse this default." *Id*. at 1040. The denial of Moore's petition for writ of habeas corpus was affirmed by the Court of Appeals for the Eighth Circuit. *Moore v. Kinney*, 320 F.3d 767 (8th Cir. 2003).

On July 26, 2004, Moore filed his second petition for postconviction relief following resentencing in the district court for Douglas County. The denial of this petition for postconviction relief gives rise to the current appeal. In this postconviction petition, Moore alleges that "the imposition of death by electric chair violates his rights under the Nebraska and United States Constitutions' prohibitions against cruel and unusual punishment and right not to be deprived [of] his life without due process." Moore relies on the 8th and 14th Amendments to the U.S. Constitution and Neb. Const. art. I, §§ 3, 9, and 15, and Neb. Rev. Stat. § 29-2532 (Reissue 1995). In his petition, Moore notes the adoption of a new protocol for implementation of electrocution which he alleges provides for "an uninterrupted application of 2,450 volts of electricity for 15 seconds." Moore makes a global challenge to electrocution, which is the statutorily mandated method of execution in Nebraska, wherein he claims that "under any protocol, the use of electrocution violates" his rights. Moore makes the more specific claim that the new protocol providing for a specific electrocution procedure violates his rights. Moore requested, inter alia, an evidentiary hearing and an order declaring electrocution unconstitutional.

On August 31, 2004, the district court entered an order denying Moore's motion for postconviction relief without an evidentiary

hearing. The court stated, "The Nebraska Supreme Court in *State v. Bjorklund*, 258 Neb. 452 (2000) and in *State v. Ryan*, 248 Neb. 405 (1995) ruled that death by electrocution is not cruel and unusual punishment. Therefore, the Court finds that the defendant's pending motion for post-conviction relief should be overruled and denied." Moore appeals. The State cross-appeals.

ASSIGNMENTS OF ERROR

Moore claims, restated, that the district court erred in denying his petition for postconviction relief without an evidentiary hearing. In the State's cross-appeal, it claims, restated, that the district court reached the right result for the wrong reasons and that, inter alia, the district court erred in reaching the merits of Moore's claims and in failing to find that Moore was procedurally barred from raising the claims raised in this postconviction petition.

STANDARDS OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[2] 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. *Id*.

ANALYSIS

Moore filed this appeal challenging the denial of postconviction relief. The State filed a cross-appeal challenging the reasoning of the district court. We find merit to the arguments of the State on cross-appeal, the substance of which precludes Moore's success on appeal, and we therefore affirm the order of the district court.

Nebraska Postconviction Statute.

Postconviction relief in Nebraska is authorized by statute. Neb. Rev. Stat. § 29-3001 (Reissue 1995) provides, in part, as follows:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the

> judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion [for postconviction relief].

Under the postconviction statute, "[t]he court need not entertain a second or successive motions for similar relief on behalf of the same prisoner." *Id.*

[3,4] We have stated that in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). We have stated that "[t]he judgment in a criminal case is the sentence." *State v. Reeves*, 258 Neb. 511, 524, 604 N.W.2d 151, 161 (2000). We have also stated that "[a] finding of guilty is a conviction, but it is not a judgment or final order, and there can be no appeal until a sentence has been imposed." *State v. Hess*, 261 Neb. 368, 375, 622 N.W.2d 891, 899 (2001).

In this postconviction case, Moore does not challenge his underlying conviction. Instead, Moore makes two claims relative to the State's carrying out his sentence of death. First, he claims that electrocution as the statutorily mandated method of execution in Nebraska is unconstitutional. Second, he claims that the electrocution procedure recited in the new protocol summarized above is unconstitutional. We consider these claims separately.

Moore's Claim That Electrocution as the Statutorily Mandated Method of Execution Is Unconstitutional Is Procedurally Barred.

The State argues on cross-appeal that Moore's claim in this second postconviction petition following resentencing asserting that electrocution as the statutorily mandated method of execution is unconstitutional is procedurally barred. We agree.

[5,6] With respect to procedural default, we have stated that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal. *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003). We have further stated that an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at

the time the movant filed the prior motion. *Id.*; *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *State v. Ortiz, supra*. See, also, § 29-3001.

As his first claim in his petition for postconviction relief, Moore makes a global challenge to electrocution as the statutorily mandated method of execution in Nebraska. As noted in our "Statement of Facts," Moore previously challenged the "use of an 'electric chair' " to enforce capital punishment in Nebraska in a motion filed on April 8, 1994, in his resentencing case, which became known on appeal as *Moore IV*. However, after the district court overruled Moore's "motion re[garding] constitutionality of death penalty" on May 17, 1994, Moore chose not to appeal the denial of this constitutional challenge.

It is clear on the explicit record in this case that the use of electrocution as an issue relative to a sentence of death was known to Moore and that he could have litigated this issue on direct appeal from the resentencing. See *State v. Ortiz, supra*. The current postconviction motion cannot be used to secure review of this issue which we conclude, as did the federal district court, is procedurally barred. See *Moore v. Kinney*, 119 F. Supp. 2d 1022 (D. Neb. 2000). The district court did not err in denying relief without a hearing.

Moore's Claim That the Electrocution Procedure in the New Protocol Is Unconstitutional Cannot Be Reached in This Postconviction Case.

Moore alleges in this postconviction case that the electrocution procedure recited in the new protocol is unconstitutional. Moore's electrocution procedure challenge is based on purported violations of the 8th and 14th Amendments to the U.S. Constitution and article I, §§ 3, 9, and 15, of the Nebraska Constitution. Moore does not allege that use of the new protocol violates his civil rights under 42 U.S.C. § 1983 (2000). In making his electrocution procedure claim, Moore does not challenge either his underlying conviction or the judgment of a sentence of death. We conclude that in making his electrocution procedure claim, Moore has not alleged facts which if established would

render the judgment void or voidable as required to succeed under the Nebraska Postconviction Act, and, therefore, we conclude, albeit for reasons different than those stated by the district court, that the district court did not err in denying postconviction relief.

As noted, to succeed under the Nebraska Postconviction Act, a defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). The judgment in a criminal case for present purposes is the sentence. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

We have reviewed Moore's postconviction petition, and we determine that Moore's petition as it pertains to the electrocution procedure issue does not seek to set aside Moore's sentence of death and that, thus, he does not claim that the judgment is void or voidable. In making this determination, we are guided by the Nebraska postconviction statute and the analysis of the U.S. Supreme Court in *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004).

In *Nelson*, a state prisoner sentenced to death filed a civil rights action under § 1983 alleging that Alabama's proposed use of a "cut-down" procedure, not mandated by state law, to access his veins during the lethal-injection procedure constituted cruel and unusual punishment. The dismissal of the prisoner's action by the federal district court was affirmed by the Court of Appeals for the 11th Circuit. The U.S. Supreme Court reversed. Although *Nelson* states that it leaves unresolved the question as to whether a global challenge to a statutorily mandated method of execution "would call into question the death sentence itself," 541 U.S. at 645, the Court concluded that § 1983 was the appropriate vehicle for the prisoner to challenge the particular lethal-injection procedure. The U.S. Supreme Court stated that the prisoner's suit challenging "a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself [because by altering the lethal-injection procedure] the State can go forward with the sentence." 541 U.S. at 644.

Recently, on June 12, 2006, in *Hill v. McDonough*, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006), the U.S. Supreme Court reaffirmed the principles in *Nelson*. *Hill* was a § 1983 challenge to a three-drug lethal-injection procedure proposed in Florida. The Court in *Hill* observed that under Florida law, implementation of lethal injection was left to Florida's department of corrections. We view Neb. Rev. Stat. §§ 29-2532 to 29-2536 (Reissue 1995), which identifies the warden of the Nebraska Penal and Correctional Complex as the executioner, as similar to the Florida law dealing with implementation. The *Hill* court also noted that a prior habeas corpus petition filed by the prisoner did not preclude this § 1983 action and that the injunction sought by him enjoining the specific procedure would not foreclose the State of Florida from implementing lethal injection by another procedure and, thus, it could not be said that the prisoner's suit sought to establish " 'unlawfulness [that] would render a conviction or sentence invalid.' " 547 U.S. at 583, quoting *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

[7] Similar to *Hill*, in the instant case, it cannot be said that Moore's constitutional challenge to the electrocution procedure under the new protocol would render his sentence of death invalid. Unlike the cases in *Nelson* and *Hill* which were permitted to proceed, however, Moore has not filed this case as a § 1983 action but instead has filed for relief under Nebraska's postconviction statute. As such, Moore has not alleged facts which if proved would render his sentence of death void, and we conclude that in an action under Nebraska's postconviction statute, an issue of constitutional dimension involving a sentence does not constitute grounds for postconviction relief unless it also constitutes grounds for finding the sentence void or voidable. See *State v. Cole*, 207 Neb. 318, 298 N.W.2d 776 (1980). Moore's electrocution procedure challenge would not constitute grounds for setting aside his sentence of death and would not "render the judgment void or voidable." § 29-3001. Therefore, as to his challenge to the electrocution procedure, Moore has not alleged grounds for relief under the Nebraska Postconviction Act. The district court did not err in denying relief without a hearing.

CONCLUSION

We conclude that Moore, having previously raised the issue, is procedurally barred in this second postconviction action following resentencing from again raising a claim that electrocution as the statutorily mandated method of execution is unconstitutional. We also conclude that Moore's challenge to the electrocution procedure under the new protocol cannot be reached in a postconviction action under the Nebraska Postconviction Act. We find no merit to Moore's assignments of error, and we find merit to certain arguments in the State's cross-appeal. For reasons different than those stated by the district court, we affirm the district court's denial of postconviction relief.

AFFIRMED.

WRIGHT, J., not participating.

HALLIE MANAGEMENT CO., A NEBRASKA CORPORATION, APPELLANT, V. GAIL PERRY, AN INDIVIDUAL, AND BAYLOR, EVNEN, CURTISS, GRIMIT & WITT, LLP, A NEBRASKA LIMITED LIABILITY PARTNERSHIP, APPELLEES.

718 N.W.2d 531

Filed July 28, 2006. No. S-04-1436.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the 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 court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. ____: ____: ____. Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.
5. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.
6. **Pretrial Procedure: Final Orders: Attorney and Client: Appeal and Error.** An interlocutory discovery order compelling the production of documents for which a claim of attorney-client privilege is asserted can be adequately reviewed on appeal from a final judgment and, thus, is not appealable under the collateral order doctrine.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Appeal dismissed.

Clay M. Rogers and Edward F. Pohren, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellant.

Michael J. Mooney and Gregory D. Marchant, of Gross & Welch, P.C., L.L.O., for appellees.

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

GERRARD, J.

NATURE OF CASE

Hallie Management Co. (Hallie) filed a legal malpractice action against Gail Perry and Baylor, Evnen, Curtiss, Grimit & Witt, LLP (Baylor), alleging that Perry and Baylor (hereinafter collectively appellees) failed to exercise due care in advising Hallie regarding the implementation of a motorized scooter policy at a Lincoln retirement community managed by Hallie. Hallie claimed that the actions of the appellees subjected Hallie to a housing discrimination lawsuit filed by the U.S. Department of Housing and Urban Development (HUD). The appellees sought discovery of documents related to the HUD lawsuit, and Hallie filed a motion for a protective order claiming the documents were protected by the attorney-client privilege and work product doctrine. The district court overruled Hallie's motion and ordered the documents to be made available to Perry and Baylor. Hallie appeals the order. We conclude that we are without jurisdiction to consider the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The appellant, Hallie, manages Savannah Pines, an independent retirement community in Lincoln. After developing a written motorized scooter policy addendum (the Scooter Policy) to the Savannah Pines rental agreement, Hallie retained the services of Perry, an attorney with Baylor, to evaluate the Scooter Policy and advise Hallie as to whether the Scooter Policy complied with the law. On September 4, 2001, Perry sent a letter to Hallie, advising that proprietors must provide reasonable accommodation to disabled residents but that a policy permitting unlimited

scooter use would pose a greater liability risk than a policy limiting the residents' use of scooters.

In response to the Scooter Policy, several residents of Savannah Pines filed housing discrimination complaints with HUD. Subsequently, Perry sent Hallie another letter, advising Hallie to implement an amendment to the Scooter Policy, allowing scooters to be parked in the residence center rather than in the extended dining room. In November 2001, HUD filed a complaint (the HUD Complaint) against Hallie in federal district court. Perry represented Hallie in connection with the housing discrimination complaints until withdrawing in May 2002. In April 2003, Hallie agreed to a consent order, requiring payment of civil penalties, fines, and damages.

In August 2003, Hallie filed a complaint against the appellees, alleging legal malpractice in their evaluation of and advice regarding the Scooter Policy, which resulted in the charges filed by HUD, the expense of defending those charges, and the resulting penalties and fines required by the consent order, totaling $160,000.

In their answer, the appellees asserted, in part, that Hallie's Scooter Policy was not in violation of law and that Hallie had similarly denied any violation in its answer to the HUD Complaint. Further, the appellees asserted that Hallie agreed to the consent order to economically resolve the claim, avoid litigation costs, and establish a reputation as a facility accessible to disabled persons—not as a result of admitting guilt.

During discovery, the appellees issued a subpoena to the attorney who represented Hallie in the lawsuit filed by HUD, seeking to obtain documents pertaining to that representation. Hallie moved for a protective order, claiming that some of the documents were shielded by the attorney-client privilege and the work product doctrine. The parties entered into a stipulation in which Hallie agreed to release documents subject to the subpoena, with the exception of documents identified on a "Privilege Log" attached to the stipulation.

Subsequently, the appellees filed a motion to compel, asking the court to order Hallie to produce several documents identified on the Privilege Log. In response, Hallie filed another motion for protective order.

At a hearing on the motions, the parties agreed that the documents at issue were protected by the attorney-client privilege and work product doctrine. However, the appellees asserted that the protections of the attorney-client privilege and work product doctrine had been waived by Hallie.

At the request of the appellees, the court conducted an in camera review of the documents and sustained the appellees' motion to compel and overruled Hallie's motion for protective order, finding that the documents at issue were protected by the attorney-client privilege and work product doctrine but that Hallie had waived such protections. See *State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001). Accordingly, the court ordered Hallie to produce the documents for inspection and photocopying by the appellees.

Hallie filed the present appeal, challenging the court's order compelling disclosure of the privileged documents.

ASSIGNMENTS OF ERROR

Hallie assigns, restated, that the district court erred in determining that the elements set forth in *Roeder, supra*, were satisfied and that Hallie waived the protections of the attorney-client privilege and work product doctrine. Hallie also argues that "[c]ompelling disclosure of attorney-client communications will have a chilling effect on the client's willingness to give open and full disclosure of facts to its attorney for fear they may be disclosed in future unconsidered litigation." Brief for appellant at 14.

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

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Allied Mut. Ins. Co. v. City*

of Lincoln, 269 Neb. 631, 694 N.W.2d 832 (2005). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Id*.

Although Hallie concedes that the order on appeal here is not a final order, see *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989), Hallie argues that this court nonetheless has jurisdiction to hear the appeal pursuant to the collateral order doctrine adopted in *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). In contrast, the appellees argue that due to the absence of a final order, Hallie must wait to appeal the order until after final judgment or, alternatively, seek a peremptory writ of mandamus.

[4] Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Id*. However, in *Cohen v. Beneficial Loan Corp*., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), the U.S. Supreme Court announced a rule providing for appellate review of interlocutory orders that fall within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." In *Richardson, supra*, this court adopted the exception, allowing an appeal of an order granting a motion to disqualify counsel.

> "[I]f the appeal from an order of disqualification 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. at 831, 560 N.W.2d at 435, citing *Maddocks v. Ricker; Casson*, 403 Mass. 592, 531 N.E.2d 583 (1988). See, also, *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004); *Trainum v. Sutherland Assocs*., 263 Neb. 778, 642 N.W.2d 816 (2002).

[5] The U.S. Supreme Court has set forth three elements that must be met for an order to fall within the collateral order

doctrine: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978). The Court has emphasized the modest scope of the collateral order doctrine, stating that

> the "narrow" exception should stay that way and never be allowed to swallow the general rule . . . that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994).

[6] Here, the failure to meet the third condition of the collateral order doctrine, that the order be effectively unreviewable upon final judgment, forecloses Hallie's appeal. We join the majority of courts to have considered the question in holding that an interlocutory discovery order compelling the production of documents for which a claim of attorney-client privilege is asserted can be adequately reviewed on appeal from a final judgment and, thus, is not appealable under the collateral order doctrine. See, e.g., *Boughton v. Cotter Corp.*, 10 F.3d 746 (10th Cir. 1993); *Texaco Inc. v. Louisiana Land and Exploration Co.*, 995 F.2d 43 (5th Cir. 1993); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159 (2d Cir. 1992); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642 (Fed. Cir. 1991); *Abrams v. Cades, Schutte, Fleming & Wright*, 88 Haw. 319, 966 P.2d 631 (1998); *Melia v. Hartford Fire Ins. Co.*, 202 Conn. 252, 520 A.2d 605 (1987). Cf. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997) (concluding that appellant in postjudgment appeal had waived issue of attorney disqualification by not appealing pursuant to collateral order rule, but reaching issue of discovery order compelling production of allegedly privileged documents).

We recognize that delayed appellate review of these orders does not entirely eliminate the breach of confidentiality that results from an erroneous order to disclose privileged information. However, the U.S. Supreme Court has stated that the jurisdiction

of appellate courts should not depend on a party's ability to characterize the right asserted as one that would be "irretrievably lost" if review were confined to final judgments only. See *Digital Equipment Corp., supra*.

> A fully litigated case can no more be untried than the law's proverbial bell can be unrung, and almost every pretrial or trial order might be called "effectively unreviewable" in the sense that relief from error can never extend to rewriting history. Thus, erroneous evidentiary rulings, grants or denials of attorney disqualification . . . and restrictions on the rights of intervening parties . . . may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . and other errors, real enough, will not seem serious enough to warrant reversal at all, when reviewed after a long trial on the merits . . . . In still other cases, . . . an erroneous district court decision will, as a practical matter, sound the "death knell" for many plaintiffs' claims that might have gone forward if prompt error correction had been an option. But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third [requirement of the collateral order doctrine].

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994).

Thus, we must balance the potential harm of delaying appeal from orders compelling the production of documents over claims of privilege to final judgment, against the harm caused by the delay certain to result if interlocutory review of such orders is permitted. This third condition of the collateral order doctrine simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement. *Id.*

In most cases, as in this case, a court's decision to compel production of potentially privileged documents can be effectively reviewed on appeal from a final judgment, at which time, the appellate court, if it determines that production of the documents was erroneously compelled, may reverse the judgment and order

a new trial, prohibiting any use of the documents and any evidence obtained as a result of their disclosure. See *Boughton v. Cotter Corp.*, 10 F.3d 746 (10th Cir. 1993). Alternatively, if every order compelling the production of documents over claims of privilege were appealable, the litigation process would be significantly delayed, decreasing judicial efficiency and increasing costs of litigation. See, *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989); *Abrams v. Cades, Schutte, Fleming & Wright*, 88 Haw. 319, 966 P.2d 631 (1998).

Thus, any harm resulting from the occasional erroneous discovery order that might have been corrected, if interlocutory appeals had been available, is outweighed by the delay and disruption that would occur in the litigation process if we were to allow appeals from every discovery order claimed to implicate privilege. Furthermore, allowing interlocutory appeals from orders compelling the disclosure of privileged documents would interfere with the trial court's duty to oversee the discovery process. See *Abrams, supra*. Cf. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997) (describing discovery process with respect to allegedly privileged materials). We do not intend to minimize the harm that may be occasioned by an erroneous attorney-client privilege ruling. However, when the harm of delaying the correction of an occasional erroneous discovery order is balanced against the institutional harm that would be produced by allowing wholesale interlocutory appeals from this type of a disputed discovery order, we determine that the remedies available after appeal from a final judgment are sufficient to preclude application of the collateral order doctrine.

CONCLUSION

For the foregoing reasons, we conclude that the district court's order compelling Hallie to produce the documents requested by the appellees is not reviewable under the collateral order doctrine, and accordingly, we dismiss the appeal.

APPEAL DISMISSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DENNIS F. STARK, APPELLANT.

718 N.W.2d 509

Filed July 28, 2006. No. S-05-070.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Trial: Appeal and Error.** Conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed.
3. **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.
4. ____: ____. 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. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
6. **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.
7. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.
8. **Aiding and Abetting: Indictments and Informations: Notice.** An information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified.
9. **Jury Instructions: Appeal and Error.** A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial.
10. **Criminal Law: Constitutional Law: Trial: Witnesses.** The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution.
11. **Constitutional Law: Trial: Witnesses.** The functional purpose of the Confrontation Clause is to ensure the integrity of the factfinding process through the provision of an opportunity for effective cross-examination.
12. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from

engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.

13. **Trial: Testimony.** The right of cross-examination is not unlimited.
14. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
15. **Trial: Jurors.** Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jurors.
16. **Trial: Proof: Appeal and Error.** A defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.
17. **Trial: Juries: Appeal and Error.** When there is some incorrect conduct by a trial court which, on review of the record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant, the error is harmless.
18. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. 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.

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

Gregory A. Pivovar, and, on brief, Michael F. Maloney for appellant.

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

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

NATURE OF CASE

Dennis F. Stark was convicted of first degree murder and use of a deadly weapon to commit a felony, and he was sentenced to a term of life imprisonment and 15 to 20 years' imprisonment, to be served consecutively. After obtaining a new direct appeal through a postconviction action, Stark appeals his convictions and sentences.

FACTUAL AND PROCEDURAL BACKGROUND

On August 27, 2002, Victoria Fortune's body was discovered near U.S. Highway 75 in Washington County, Nebraska. An

autopsy revealed that she died as a result of blunt force trauma to the head. On August 28, Donald Ficenec, an officer with the Omaha Police Department and detective in the homicide unit, became involved in the investigation of Fortune's murder. Ficenec obtained information from Fortune's friends regarding her close friendship with Eric Bylund and involvement with the defendant, Stark. Upon visiting Bylund's home, Ficenec interviewed, among others, Bylund's roommate, Scott McNeill. Ficenec spoke to McNeill several more times after August 28, and on September 4, McNeill contacted Ficenec and confessed to his involvement in the Fortune murder. Based on the information provided by McNeill, he and Stark were arrested for Fortune's murder. In October 2002, Stark was charged with first degree murder and use of a deadly weapon to commit a felony. In exchange for McNeill's testimony against Stark at trial, McNeill was to be charged with second degree murder.

McNeill moved to Omaha, Nebraska, on August 5, 2002, and moved into Bylund's house, across the street from Stark. McNeill met Stark through Bylund and another of Bylund's roommates and began working for Stark shortly after moving to Omaha. McNeill helped Stark with his power-washing business and helped him build a retaining wall at his house. McNeill also met Fortune through his roommates, with whom she was good friends.

Stark met Fortune through Bylund toward the end of 2001 and began a sexual relationship with her in February or March of the following year. At trial, Stark testified that when he ended the relationship in June 2002, Fortune continued to contact him and informed his wife of the affair.

During the trial, McNeill and Stark presented conflicting accounts of the events leading to Fortune's murder.

McNeill's Testimony.

McNeill testified that sometime in the late hours of August 24 or early hours of August 25, 2002, he went over to Stark's house. He and Stark drank beer, smoked marijuana, and played pool. The two men then left the house in Stark's vehicle to get more beer and stopped at Fortune's house.

McNeill stated that once they arrived at Fortune's house, he and Stark drove around the block and down an alley. Stark

parked the vehicle and went to the door to knock. When nobody answered the door, Stark went around to the steps at the side of the house. Stark climbed the steps, while McNeill stood below. Stark and McNeill returned to the vehicle and drove to a gas station around the corner where Stark used the telephone to call Fortune's house. The two men drove back around to Fortune's house; McNeill got out and stood by the vehicle, while Stark went up to the house to look in a window. When Stark returned, the two men got in the vehicle and drove away.

McNeill testified that he and Stark returned to Stark's house for another game of pool, more beer, and more marijuana. McNeill went upstairs and "shot a bag [of heroin] up." When McNeill came back downstairs, Stark indicated that Fortune had called and was coming over to the house. Fortune arrived, and the three of them drank beer and smoked marijuana outside on the patio. The group then moved inside to the basement, where they played pool and continued drinking and smoking marijuana. McNeill testified that he and Stark ended up in the laundry room, where Stark said that he wanted to kill Fortune, and picked up a hammer from a toolbox sitting behind him and handed it to McNeill. McNeill placed the hammer in the back of his pants, and the two men left the laundry room. McNeill testified that Stark nodded toward Fortune, at which point McNeill pulled out the hammer and hit Fortune in the head. McNeill testified that the hammer left his hands but could not recall if he threw the hammer or dropped it. Fortune was on her hands and knees, gripping her head, when Stark came over and hit her with the hammer in the same spot. Fortune fell to the floor, and Stark hit her two more times. McNeill testified that Fortune began making noises, took a deep breath, and stopped moving.

McNeill explained that Stark wrapped the hammer in a T-shirt and retrieved two pairs of gloves from the laundry room. McNeill picked up Fortune and carried her to the garage; Stark tied a bag over her head to contain the blood. The men placed the body on a tarpaulin in the back of Stark's vehicle. Stark gave McNeill the keys to Fortune's car and instructed McNeill to meet him at a carwash. The men left Fortune's car parked at the carwash and drove for approximately 30 minutes before dumping Fortune's body on the side of the road.

McNeill and Stark returned to Stark's house, stopping on the way at a carwash to wash the exterior and part of the interior of the vehicle. Back at Stark's home, McNeill and Stark used buckets of "Oxi-Clean" to clean up the blood in the basement and placed the rags used to clean, and other bloodstained items, in a trash bag along with their clothing and the bath towels they used after showering. The men took the trash bag outside to Stark's backyard and buried it, covered it with cement, and placed Stark's doghouse on top of it. After cleaning up the basement, McNeill and Stark smoked marijuana. Stark then received a call from his wife in Harlan, Iowa, asking him to bring something to her. Stark left for Harlan, and McNeill went home.

Stark's Testimony.

Stark testified that he was working on his retaining wall on August 24, 2002, from 10 a.m. until 2:30 or 3 p.m. He then went inside, took his clothes off at the bottom of the stairs in the basement to avoid tracking dirt through the house, and went upstairs to clean up. Stark left his house at 3 or 3:15 p.m. in his flatbed pickup, to power wash in Valley, Nebraska.

Stark testified that he power washed until 1:30 a.m. on the morning of August 25, 2002. When he returned to his house after work, Stark testified that his vehicle was backed up to his garage door. Stark went inside to let his dogs out and sat down in the backyard with a beer and smoked marijuana. McNeill came from the south side of Stark's house to the backyard and joined Stark for a beer and some marijuana.

Stark testified that McNeill wanted to play pool, so the two men proceeded to the basement. Stark explained that when he went downstairs, he saw a blue tarpaulin at the bottom of the stairs containing what appeared to be a body. When Stark inquired about it, McNeill stated that "he fucked up" and that "this is [Fortune]." Stark responded that they had to get rid of the body, worrying that the police would suspect him, since he had had an affair with Fortune and the murder took place at his house.

Stark testified that he helped McNeill carry Fortune's body to the garage and load it into the vehicle. The two men drove out toward Fort Calhoun, Nebraska, where they dumped Fortune's body on the side of the road. Stark stopped at a carwash to clean

the vehicle, went home, and fell asleep on the couch after showering. Stark testified that McNeill cleaned the basement.

Other Testimony.

At trial, the State presented the testimony of Alexander Sturgeon, who lives across the street from Fortune's house. Sturgeon testified that between 2:40 and 3 a.m. on August 25, 2002, he heard an idling truck outside and looked outside to find a vehicle matching the description of Stark's. He testified that the vehicle went around the block a few times. It then parked, and two men got out. Sturgeon was able to describe the individuals. He testified that the men "snooped" around Fortune's house before getting back in the vehicle and driving through the alley. Then, the driver got out of the vehicle and climbed the stairs at the side of the house, while the passenger stayed down below. At this point, Sturgeon called the 911 emergency dispatch service and testified that "[i]t just didn't look right." Sometime later, Sturgeon observed police officers and crime scene tape around Fortune's house and immediately told the officers what he saw on the morning of August 25.

Following the jury trial, Stark was found guilty of both first degree murder and use of a deadly weapon to commit a felony and, subsequently, received sentences of life imprisonment and 15 to 20 years' imprisonment, to be served consecutively. After Stark's trial counsel failed to file an appeal, Stark filed a motion for postconviction relief asking the court to reinstate his right to file an appeal. The district court sustained the motion, and accordingly, Stark filed the present 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).

ASSIGNMENTS OF ERROR

Stark assigns that the district court erred in (1) refusing to instruct the jury on his theory that he was only an accessory to a felony, (2) overruling his objection to the prosecutor's statements during closing argument that Stark argues were unsupported by the evidence, (3) preventing questioning of McNeill regarding McNeill's fear of the death penalty and McNeill's

motion to suppress his statement to the police, and (4) testifying from the bench that the death penalty was not an issue in the case and instructing the jury not to consider information regarding the death penalty. Stark also argues that his trial counsel was ineffective in failing to object to testimony given by police officers Ficenec and Larry Cahill.

STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[2] Conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed. *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999).

[3-5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

ANALYSIS

District Court Did Not Err in Denying Stark's Proposed Jury Instruction.

During the jury instruction conference with the court, Stark proposed a jury instruction on the crime of accessory to a felony. The instruction described the elements of the crime of accessory to a felony and instructed that if the jury finds that the State established each element beyond a reasonable doubt, the jury is dutybound to find the defendant guilty of the crime of accessory to a felony, and vice versa. The court denied the request,

concluding that a defendant must "be charged with the crime in order to be instructed on the elements of that crime."

Stark assigns that the district court erred in failing to instruct the jury on his defense theory, accessory to a felony, thereby prejudicing Stark by withdrawing an essential issue from the jury and preventing trial counsel from informing the jury of the distinctions between the crimes of aiding and abetting and accessory to a felony. In contrast, the State asserts that the instruction was properly rejected because Stark was not charged with the crime of accessory to a felony, nor was the crime a lesser-included offense of first degree murder.

[6] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). Without addressing the first two elements, this court can dispose of Stark's first assignment of error based on the lack of prejudice resulting from the court's refusal to give the instruction.

[7,8] In this case, Stark was charged with first degree murder and use of a deadly weapon to commit a felony. The jury was instructed on the elements of each offense and the lesser-included offenses of second degree murder and manslaughter. The jury was also properly instructed on the concept of aiding and abetting—that is, that a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender. See *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004). Given the provisions of Neb. Rev. Stat. § 28-206 (Reissue 1995), an information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified. *Contreras, supra*.

As the defendant, Stark's goal was to rebut evidence presented by the State attempting to establish that he committed, or aided in the commission of, the crime of murder. Stark argues that his theory of defense was inhibited by the court's refusal to instruct

the jury as to the crime of accessory to a felony because he was prevented from drawing distinctions for the jury between aiding and abetting and the crime of accessory. However, the court's failure to instruct the jury as requested did not inhibit Stark's right or ability to defend himself against the crimes charged.

As defined in Neb. Rev. Stat. § 28-204 (Cum. Supp. 2004), the crime of accessory to a felony involves action taken by an individual with the intent to "interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment of another for an offense." As defined, the crime is based upon action taken after the crime is committed. Thus, any attempt by Stark to show evidence establishing his role as an accessory to Fortune's murder would not have assisted him in arguing that he did not aid and abet in the commission of the murder. In other words, even if Stark presented evidence at trial establishing that he was an accessory to the murder, such proof would not have precluded a finding of guilt in aiding and abetting the commission of the crime. Thus, the court's refusal to instruct the jury on the crime of accessory to a felony did not prejudice Stark's defense.

[9] In addition, instructing the jury on the elements of accessory to a felony—a crime of which Stark was not accused—would have tended to confuse and distract the jury in this case. A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial. *Id*. Accordingly, the court did not err in refusing Stark's proposed instruction, and the first assignment of error is without merit.

Stark's Defense Was Not Prejudiced as Result of State's References During Closing Argument to Sturgeon's 911 Call.

While discussing Sturgeon's testimony during closing argument, the State argued, in part:

> [Sturgeon] saw people matching the defendant's description that he gave you and McNeill's description that was very specific. And it's not a guess of time. We're not estimating.

> It's not guessing time when . . . Sturgeon saw this because he called 911 and they record calls at 911. So we know that . . . Sturgeon made a call to 911 at 2:59 a.m., Saturday, August 25th.

Stark objected on the basis that neither the 911 call, nor any evidence concerning the exact time at which the 911 call was made, was offered into evidence. The court sustained the objection to the extent that no evidence was presented regarding the exact time of the 911 call. However, the court otherwise overruled the objection, explaining that Sturgeon did testify to calling 911 and also testified about the time of his observations.

Stark argues that the State referred to evidence that was not presented during trial and, therefore, not properly before the jury and that the State used such information to bolster the credibility of Sturgeon's testimony. Thus, Stark claims that the court erred in overruling his objection.

The State argues that because Stark failed to make a motion for a mistrial after the State's allegedly prejudicial remarks during closing, he did not properly preserve the issue for appeal. Alternatively, the State argues that even if Stark had preserved the issue for appeal, the statements at issue did not prejudice his rights and, therefore, did not warrant a mistrial.

In this case, the court properly sustained Stark's objection as to the State's references to evidence of the official record of Sturgeon's 911 call because such a record was not presented at trial. However, Sturgeon did testify about the approximate time and duration of his observations on August 25, 2002, stating that he saw Stark's vehicle "[p]robably around 2:40, three o'clock [a.m.], somewhere around there" and that the two men were in the area for no more than 45 minutes. Furthermore, Sturgeon testified that during that time, he called 911 to report the suspicious activity.

After the objection was sustained, the State argued:

> Sturgeon came in and he told you that the time that he called 911, it was Saturday night about 2:59 a.m. — excuse me, Sunday morning about 2:59 a.m., and he called 911 and he reported to 911 at that time on Sunday morning that he saw [Stark's vehicle] and he saw the activities that he reported to the police. Keep that in mind.

Stark failed to object following this second reference to the time of Sturgeon's 911 call during the State's closing argument. Furthermore, although the prosecutor was incorrect in arguing that Sturgeon testified that he called 911 at 2:59 a.m., that argument did not suggest that there was independent verification of Sturgeon's testimony. Although technically inaccurate, the State's reference to 2:59 a.m. as the recorded time of the 911 call was within the time period to which Sturgeon testified that he made his observations and called 911 and, thus, cannot be said to have effected a substantial miscarriage of justice. Finally, we cannot say that Stark was prejudiced when Stark did nothing during Sturgeon's testimony to challenge his credibility. Simply put, Stark did not dispute Sturgeon's testimony. Therefore, Stark's second assignment of error is without merit.

Stark's Right to Confront Witnesses Through Cross-Examination Was Not Violated by Court's Actions in Limiting Inquiry Regarding McNeill's Fear of Death Penalty and Attempt to Suppress His Statements to Police.

Stark assigns that the district court erred in sustaining the State's relevancy objections, preventing testimony by McNeill regarding his fear of receiving the death penalty and McNeill's motion to suppress his own statement to police. Stark asserts that such testimony was relevant to reveal McNeill's motivation in cooperating with the State in its case against Stark and McNeill's credibility in testifying against Stark. As a result of the court's ruling, Stark argues that he was deprived of his right to confront witnesses against him.

The State argues that Stark failed to preserve the issue for appeal because he failed to make known to the trial judge the substance of the evidence he was attempting to offer through the cross-examination of McNeill. The State argues that Stark's right to confront McNeill was not violated because he was not prohibited from all inquiry into McNeill's concerns about the death penalty. The State asserts that the court properly limited questioning of McNeill regarding his own prosecution, thereby excluding irrelevant testimony and guarding against jury confusion. Finally, the State argues that any error committed by the court in limiting the cross-examination of McNeill resulted in harmless error.

[10-12] The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution. *State v. Johnson*, 255 Neb. 865, 587 N.W.2d 546 (1998). The functional purpose of the Confrontation Clause is to ensure the integrity of the fact-finding process through the provision of an opportunity for effective cross-examination. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination. *Johnson, supra*; *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996).

[13,14] The right of cross-examination, however, is not unlimited. *State v. Dixon*, 240 Neb. 454, 482 N.W.2d 573 (1992). The U.S. Supreme Court, in *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), has held:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, *confusion of the issues*, the witness' safety, or *interrogation* that is repetitive or *only marginally relevant*.

(Emphasis supplied.) This court has also recognized the well-established rule in this jurisdiction that "'"'the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion.'"'" *Dixon*, 240 Neb. at 463, 482 N.W.2d at 579.

In this case, Stark was not prohibited from cross-examination of McNeill to show bias. Rather, Stark was permitted to question McNeill about the reduction of his charges to second degree murder and his concern with getting the death penalty without objection. Such evidence was sufficient to support an argument that McNeill had a motive to confess and testify against Stark,

thereby questioning McNeill's credibility. Furthermore, because Stark was permitted to elicit such testimony from McNeill, it cannot be said that the jury would have received a significantly different impression of McNeill's credibility had Stark been permitted to pursue the cross-examination prevented by the court in this case.

McNeill's filing of motions to suppress his confession in the proceedings pending against him was not probative with respect to McNeill's credibility and motive to testify falsely against Stark. Information regarding McNeill's attempt to suppress statements he made to police in proceedings against him was irrelevant and could have caused jury confusion.

Given the lack of probative value of the excluded testimony and the scope of cross-examination that was permitted, we conclude that the court did not abuse its discretion. Stark's third assignment of error is without merit.

Statements Made by Court to Jury During Closing Arguments Did Not Result in Prejudice to Stark's Defense.

Discussing McNeill's credibility during closing argument, Stark argued, "[McNeill] had a huge motivation to sit up here and tell you the story he told you up here because he got a deal for it. He got second-degree murder. They took . . . death off the table." Following these comments, the State objected and asked the court to remind the jury that "in neither case at any time was the death penalty ever an issue in this case." The court indicated that such a statement was accurate, and after a conversation with counsel at the bench, the court stated to the jury, "You're instructed not to consider any information regarding the death penalty. It was not an issue in either case."

Stark asserts that the court erred in making these statements to the jury because not only were they inaccurate, but they served to bolster McNeill's credibility, indicating that McNeill was not motivated to lie during his testimony due to his fear of the death penalty.

The State asserts that both parties, as well as the court, informed jurors that the death penalty was not at issue in the case during voir dire, without any objection by Stark, and that therefore, similar statements made by the court during closing were not prejudicial. In addition, the State argues that Stark's

statements regarding the State's separate prosecution of McNeill—"[t]hey took . . . death off the table"—were not supported by evidence presented at trial. In other words, the State asserts that Stark failed to present any evidence that the State had filed an information charging McNeill with first degree murder, providing notice of aggravating circumstances to support punishment by death.

[15-17] Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jurors. However, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). When there is some incorrect conduct by a trial court which, on review of the record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant, the error is harmless. See *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004).

Even if the court erred in making the statements complained of, the comments were not prejudicial. Stark's attack of McNeill's credibility during closing argument was adequately supported by referencing McNeill's testimony, through which it was apparent that McNeill received a reduced charge for his testimony at trial, regardless of whether the death penalty was applicable, and that McNeill had lied to officers prior to making his confession. Thus, Stark's fourth assignment of error is without merit.

Defense Counsel's Failure to Object to Specific Testimony Given by Ficenec and Cahill Did Not Result in Prejudice to Stark's Defense.

Finally, Stark asserts that he received ineffective assistance of counsel at trial due to his attorney's failure to object to certain testimony given by Ficenec and Cahill, who participated in the search of Stark's residence and the excavation of the backyard. Specifically, Stark argues that his trial counsel was ineffective in failing to object to Ficenec's testimony regarding his attempt to subject McNeill to a polygraph examination; Ficenec's testimony about a conversation he had had with McNeill prior to his confession, during which Ficenec stated that he believed that

Stark killed Fortune and that McNeill helped dispose of the body; and the testimony of Ficenec and Cahill that they used information provided by McNeill to obtain warrants to arrest Stark and search his home.

[18] Stark brings his claim of ineffective assistance of counsel on direct appeal. However, such a claim need not be dismissed merely because it is made on direct appeal. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005). The determining factor is whether the record is sufficient to adequately review the question. *Id*. 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. *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006). We determine that given the nature of these issues, in the absence of testimony as to counsel's strategy for not raising certain objections at trial, the record is not sufficient to evaluate the effectiveness of trial counsel. Thus, we do not consider Stark's ineffective assistance of counsel arguments in this appeal.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT and MILLER-LERMAN, JJ., participating on briefs.

CALVIN L. SJUTS, INDIVIDUALLY AND AS TRUSTEE OF THE CALVIN L. SJUTS TRUST, AND BARBARA F. SJUTS, INDIVIDUALLY AND AS TRUSTEE OF THE BARBARA F. SJUTS TRUST, APPELLANTS, V. GRANVILLE CEMETERY ASSOCIATION ET AL., APPELLEES.

719 N.W.2d 236

Filed July 28, 2006. No. S-05-124.

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. **Statutes.** The interpretation of a statute presents a question of law.

3. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Easements: Adverse Possession.** The use and enjoyment that will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession that will give title to real estate.
5. **Easements: Proof.** A party claiming a prescriptive easement must show that his or her use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
6. **Easements: Words and Phrases.** In the area of prescriptive easements, the term "exclusive" does not mean that the easement must be used by one person only. Rather, it means that the use does not depend upon a similar right in others and that it must be exclusive as against the community or public at large.
7. **Easements: Proof.** The law treats a claim of prescriptive right with disfavor, and, accordingly, such a claim requires that all the elements of such adverse use be clearly, convincingly, and satisfactorily established.
8. **Easements.** In an action for a prescriptive easement, the record must show that there is no legal impediment to the claim of a prescriptive right.
9. **Property.** A cemetery, by its inherent nature, is not subject to the laws of ordinary property.
10. ____. Cemetery property in general has a public nature.
11. ____. Under Nebraska's cemetery association laws, there is a public nature to certain of the statutory authority given cemetery associations with regard to cemetery property.
12. **Property: Easements.** In the context of a claim of a prescriptive easement against cemetery property owned by a cemetery association that has not been abandoned, the cemetery property is similar in nature to public property, and consistent with Neb. Rev. Stat. § 39-1404 (Reissue 2004), such property is not subject to a prescriptive easement claim.

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

James G. Egley, of Moyer, Moyer, Egley, Fullner & Montag, for appellants.

Brian F. Beckner for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellants, Calvin L. Sjuts, individually and as the trustee of the Calvin L. Sjuts Trust, and Barbara F. Sjuts, individually and as the trustee of the Barbara F. Sjuts Trust, brought this quiet title action in the district court for Platte County against appellees,

Granville Cemetery Association and all persons having or claiming some right, title, or interest in the property involved in the action (collectively Granville), seeking a prescriptive easement to operate a center-pivot irrigation system over a portion of a 123-year-old cemetery owned by Granville in Platte County, Nebraska. The cemetery property contains at least 17 graves, all of which are marked by stone monuments. Appellants and Granville filed cross-motions for summary judgment. Following an evidentiary hearing, the district court determined that pursuant to the state statutes governing cemetery associations, Granville held certain quasi-public authority with respect to the cemetery property and that as such, the cemetery property possessed a public nature that protected it from appellants' claim of a prescriptive easement. The district court sustained Granville's motion for summary judgment, overruled appellants' motion for summary judgment, and dismissed appellants' quiet title action. Appellants filed an appeal. We affirm.

STATEMENT OF FACTS

There is essentially no dispute with regard to the material facts. In accordance with the state statutes then in effect, Granville was incorporated as a cemetery association on February 15, 1881. The current version of those laws is now codified at Neb. Rev. Stat. §§ 12-501 to 12-529 (Reissue 1997 & Cum. Supp. 2004). A board of trustees was selected, and the incorporation document was filed with the Platte County clerk on May 5, 1881. In March 1883, Granville acquired 1 acre of property located in Platte County. The deed conveying the property to Granville was recorded. Granville used the property as a cemetery. Seventeen stone grave markers presently mark burial sites within the cemetery property. The most recent stone marker is dated August 16, 1896. There is evidence in the record that as many as 20 other graves may exist in the cemetery, given the existence of various unmarked depressions in the ground. At least one Civil War veteran, F. (Francis) H. Baker, who served from January 11, 1864, to June 24, 1865, is buried in the cemetery.

There is no evidence that Granville was ever dissolved or that the cemetery property was legally abandoned. At some point in time, however, Granville's board of trustees became inactive, and

Granville's board was not reactivated until February 11, 2004. The record reflects that Granville is presently operated on a nonprofit basis.

In 1974, appellants took title to 160 acres, or a quarter section, in Platte County, initially individually, and later as trustees for their own individual trusts. The deeds conveying the quarter section to appellants purported to include the acre containing Granville's cemetery property. Appellants admit in their brief, however, that regardless of the language in the deeds, Granville "holds title to one square acre in the [quarter section]." Brief for appellants at 4. Appellants paid property taxes upon the entire quarter section until 2001, at which time, the cemetery property was taken off the tax rolls.

In 1976, appellants installed and began to operate a center-pivot irrigation system on the quarter section, and they have continued to operate the irrigation system annually, on a seasonal basis, since it was installed. When in operation, the irrigation system crosses a portion of the cemetery property. The two wheels that carry the last tower of the pivot system travel in a regular path across portions of the cemetery property, and the record shows that these wheels have left well-worn tracks as a result of crossing the cemetery grounds. Although appellants assert that the wheels of the pivot system do not cross any graves, they acknowledge that "irrigation pipe and sprinklers pass over the gravesites." Brief for appellants at 5.

On November 13, 2003, appellants filed their quiet title complaint, seeking a prescriptive easement across the cemetery property to operate their center-pivot irrigation system. Granville filed an answer, which in summary denied that appellants were entitled to the easement. Following discovery, the parties filed cross-motions for summary judgment. The cross-motions for summary judgment came on for an evidentiary hearing on August 13, 2004. Numerous witnesses testified by deposition and affidavit, including Mary Schott, a descendent of several persons buried in the cemetery.

On December 30, 2004, the district court filed its memorandum order, sustaining Granville's motion for summary judgment, overruling appellants' motion for summary judgment, and dismissing appellants' complaint. In its order, the district court

noted that it had reviewed the statutes governing cemetery associations. The court determined that under those statutes, cemetery associations possessed several characteristics with regard to cemetery property ownership that were similar to characteristics possessed by public entities. Those characteristics included the cemetery association's authority to condemn property, restrictions on the alienation of cemetery property, and the tax-exempt status of cemetery property. The district court noted that pursuant to Neb. Rev. Stat. § 39-1404 (Reissue 2004), adverse possession actions, such as an action for a prescriptive easement, cannot be maintained against governmental properties. Given the public nature of certain characteristics possessed by cemetery associations with regard to cemetery property, the district court reasoned that property owned by cemetery associations was in the nature of public property and, thus, was not subject to prescription. As a result, the court concluded that appellants were not entitled to a prescriptive easement against Granville's cemetery property to operate their irrigation system. Appellants filed their appeal.

ASSIGNMENT OF ERROR

On appeal, appellants assign three errors that can be restated as one. Appellants claim, restated, that the district court erred in sustaining Granville's motion for summary judgment, denying appellants' motion for summary judgment, and dismissing appellants' quiet title complaint.

STANDARDS OF REVIEW

[1-3] 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. *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006). The interpretation of a statute presents a question of law. See *State ex rel. Musil v. Woodman*, 271 Neb. 692, 716 N.W.2d 32 (2006). When an appeal calls for statutory interpretation, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

ANALYSIS

The issue presented in this case is whether appellants can obtain a prescriptive easement for the purpose of operating irrigation equipment over property that is held by a cemetery association and that has been and continues to be used for human burial purposes. Critical to our analysis in this case is the fact that this cemetery has not lost its character as a burial place throughout its existence.

On appeal, appellants challenge the district court's decision granting Granville's motion for summary judgment, denying appellants' motion for summary judgment, and dismissing appellants' quiet title action seeking the prescriptive easement. As noted above, the district court reasoned, in part, that given the provisions of the statutes governing cemetery associations, cemetery property was of a "public nature" and that thus, the property was afforded protection from a claim of prescriptive rights pursuant to § 39-1404, which provides:

> No privilege, franchise, right, title, right of user, or other interest in or to any street, avenue, road, thoroughfare, alley or public grounds in any county, city, municipality, town, or village of this state, or in the space or region under, through or above such street, avenue, road, thoroughfare, alley, or public grounds, shall ever arise or be created, secured, acquired, extended, enlarged or amplified by user, occupation, acquiescence, implication, or estoppel.

Upon due consideration, we conclude under the facts of this case that given the statutes governing cemetery associations as well as other statutes, and given certain principles regarding property law and the law of cemetery property, the district court did not err. We affirm the district court's decision.

[4-8] Appellants claim a prescriptive easement over the cemetery association's property. In considering appellants' claim of a prescriptive easement, we refer initially to certain principles of ordinary property law. We have noted that the use and enjoyment that will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession that will give title to real estate. See *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002) (citing *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001)). A

party claiming a prescriptive easement must show that his or her use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. *Id.*; *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985). With regard to the element of exclusivity, however, we have recognized that in the area of prescriptive easements, "[t]he term 'exclusive' does not mean that the easement must be used by one person only." *Scoville v. Fisher*, 181 Neb. 496, 503, 149 N.W.2d 339, 344 (1967). Rather, it means that "the use does not depend upon a similar right in others and that it must be exclusive as against the community or public at large." *Id.* We have noted that the law treats a claim of prescriptive right with disfavor and that accordingly, such a claim requires all the elements of such adverse use be clearly, convincingly, and satisfactorily established. *Lake Arrowhead, Inc. v. Jolliffe, supra*. Further, as the instant case demonstrates, the record must show that there is no legal impediment to the claim of a prescriptive right. See, e.g., § 39-1404; *Topping v. Cohn*, 71 Neb. 559, 99 N.W. 372 (1904) (stating that title by adverse possession cannot be acquired against state or general government property).

Cemetery associations are created and governed pursuant to the provisions of chapter 12, article 5, of the Nebraska Revised Statutes, and thus, we review the statutory provisions relevant to the resolution of this case. Section 12-501 provides, inter alia, as follows:

> Every cemetery hereafter established, other than those owned, operated and maintained by towns, villages and cities, by churches, and by fraternal and benevolent societies, shall be owned, conducted and managed by cemetery associations organized and incorporated as hereinafter provided. . . . It shall be lawful for any number of persons, not less than five, who are residents of the county in which they desire to form themselves into an association, to form themselves into a cemetery association, and to elect any number of their members, not less than three, to serve as trustees, and one member as clerk, who shall continue in office during the pleasure of the society . . . .

Pursuant to § 12-506, cemetery associations "have the power to purchase or take by gift, devise, or by exercising the power

of eminent domain . . . . The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724." With regard to property held by cemetery associations, the cemetery association statutes provide that such property is not subject to taxation and is generally exempt from execution, attachment, or partition. See, § 12-506 (describing cemetery association property as "exempt from taxation, execution, or from any appropriation of public purchasers"); § 12-517 (generally exempting burial lots sold by cemetery association from "taxation, execution, attachment, or any other claim, lien or process whatever"); § 12-520 (providing that "[l]ands appropriated and set apart as burial grounds, either for public or private use, and so recorded in the county clerk's office of the county where such lands are situated, shall not be subject to sale on execution on any judgment to be hereafter recovered, to taxation, nor to compulsory partition").

The cemetery association statutes also restrict a cemetery association's ability to alienate property. If a cemetery association has sold a lot for burial purposes, and the purchase price of a cemetery lot has not been fully paid in 3 years, a cemetery association may "sell the unused portion of [the] lot," but only after giving 60 days' notice of its intention to sell the lot and filing proof of such notice with the register of deeds. See § 12-505.

Further, in the event a cemetery association determines that cemetery association property should cease to be used as a cemetery, due to abandonment or other reasons, the cemetery association must generally comply with the provisions of §§ 12-521 to 12-529, which require, inter alia, that the cemetery association file an action in the district court of the county where the property is located and obtain a court order to discontinue the cemetery association and to sell the unused portions of the cemetery property.

[9] These statutes deal specifically with cemetery property owned by cemetery associations, and the fact that it is property that continues to be used as a cemetery over which appellants seek a prescriptive easement to operate an irrigation system is relevant to our analysis. Compare *Cleveland Cemetery Assn v Cuyahoga Co Comrs*, 7 Ohio Law Abs. 589 (Ohio App. 1929) (granting cemetery association's request to enjoin county's

attempt to acquire easement through cemetery property, stating "such proposed easement would in some degree destroy the use of the cemetery association, or at least materially interfere with the use by the association and the lot owners"). It has been widely recognized that "a cemetery, by its inherent nature, is not subject to the laws of ordinary property." See *State ex rel. Stephan v. Lane*, 228 Kan. 379, 386, 614 P.2d 987, 993 (1980). See, also, *Abrams v. Lakewood Park Cemetery*, 355 Mo. 313, 325, 196 S.W.2d 278, 284 (1946) (stating that "[i]ndubitably, the usual and ordinary rules of real property law are modified once land is devoted to cemetery purposes"); *Smallwood v. Midfield Oil Co.*, 89 S.W.2d 1086, 1090 (Tex. Civ. App. 1935) (stating "[i]n reverence of the dead, the law segregates and removes from the realm of commerce property dedicated as a cemetery, and it is no longer a subject-matter of conveyance . . . as other property so as to interfere with the use and possession to which it has been devoted").

[10] Moreover, the cases have observed that cemetery property in general has a public nature. " '[A] cemetery is as public a place as a courthouse, or a market. It may not be frequented as much, but visits to it are necessary and as certain. . . . We may keep away from the courthouse, and avoid the market, but the place of the dead none may shun.' " *State ex rel. Stephan v. Lane*, 228 Kan. at 386, 614 P.2d at 993 (quoting *Cemetery Association v. Meninger*, 14 Kan. 312 (1875)). See, also, *Trustees of First Presbyterian Church v. Alling*, 54 N.J. Super. 141, 145, 148 A.2d 510, 513 (1959) (stating "[a] burying ground or cemetery is affected with a public interest and is a trust").

In view of the foregoing, we agree with the reasoning of the district court that for purposes of evaluating appellants' action seeking a prescriptive easement, cemetery property is quasi-public in nature and that as a result, appellants are not entitled to a prescriptive easement against Granville's cemetery property to operate an irrigation system. But see *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64, 60 N.W. 358 (1894) (stating that in context of libel action, cemetery association was considered private entity).

[11] Under Nebraska's cemetery association laws, and as recognized by other jurisdictions, it is apparent that there is a

public nature to certain of the statutory authority given cemetery associations with regard to cemetery property. Like a public entity, cemetery associations are authorized to take property by the power of eminent domain. See § 12-506. Compare *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 720, 605 N.W.2d 472, 478 (2000) (stating that actions involving eminent domain have "public nature"). Like public property in Nebraska, the property held by a cemetery association is exempt from taxation and execution. See §§ 12-506 and 12-517. Compare Neb. Rev. Stat. §§ 15-844 (Cum. Supp. 2004) (relating to tax-exempt and execution-exempt status of cities) and 77-202 (Supp. 2005) (relating to tax-exempt status of state).

[12] The authority and exemptions given to cemetery associations with regard to cemetery property are very similar to those given to public entities, and we conclude that with regard to cemetery property owned by a cemetery association, the Legislature intended that such property was quasi-public in nature. See *Edholm v. Missouri P. R. Corporation*, 114 Neb. 845, 847, 211 N.W. 206, 208 (1926) (stating in part that right-of-way seized by railroad under eminent domain power was possessed by railroad for "public use"). We agree with the district court that in the context of appellants' claim of a prescriptive easement against cemetery property owned by Granville that has not been abandoned, the cemetery property is similar in nature to public property. Thus, consistent with § 39-1404, which ordinarily precludes obtaining an interest in "public grounds," as a matter of law, appellants were not entitled to a prescriptive easement to operate an irrigation system across the cemetery property.

For the sake of completeness, we note that we are aware of certain authorities in other jurisdictions suggesting that adverse possession or prescriptive easement claims can be brought against cemetery property. See, e.g., *Bogner v. Villiger*, 343 Ill. App. 3d 264, 796 N.E.2d 679, 277 Ill. Dec. 593 (2003); *Trout v. Summit Lawn Cemetery Assoc.*, 160 Ind. App. 552, 312 N.E.2d 498 (1974); *Phinney v. Gardner*, 121 Me. 44, 115 A. 523 (1921). However, because each of these cases failed due to failure of proof, and none of these cases involved a legal discussion of cemetery association statutes similar to those enacted in Nebraska, we find these cases inapposite.

CONCLUSION

In summary, we conclude that given the public nature of certain characteristics possessed by cemetery associations with regard to cemetery property, the district court did not err when it determined that the cemetery property owned by Granville that has been in continuous use as a burial ground was in the nature of public property and, thus, was not subject to a prescriptive easement. The court did not err when it sustained Granville's motion for summary judgment, overruled appellants' motion for summary judgment, and dismissed appellants' quiet title complaint seeking a prescriptive easement over Granville's cemetery property to operate an irrigation system. Appellants' assignment of error is without merit. We affirm.

AFFIRMED.

AARON FERER AND ROBIN MONSKY, APPELLANTS, V. ERICKSON & SEDERSTROM, P.C., A LIMITED LIABILITY ORGANIZATION, A NEBRASKA CORPORATION, APPELLEE.

718 N.W.2d 501

Filed July 28, 2006. No. S-05-619.

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. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor, and a complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery.
3. ____: ____. Complaints must set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted.
4. **Negligence: Actions: Attorneys at Law.** An attorney's alleged professional misconduct gives rise to a professional negligence action.
5. **Uniform Commercial Code: Stock.** Pursuant to Neb. U.C.C. § 8-404(a)(1) (Reissue 2001), an issuer is liable for wrongful registration if the issuer has registered the transfer of security to a person not entitled to it as a result of an ineffective endorsement or instruction.
6. **Derivative Actions: Words and Phrases.** A derivative action is a suit by a shareholder to enforce a cause of action belonging to the corporation.
7. **Derivative Actions: Corporations.** A shareholder may not commence or maintain a derivative proceeding unless the shareholder adequately represents the interests of the corporation in enforcing the right of the corporation.

8. **Derivative Actions: Corporations: Standing: Proof.** Whether a plaintiff fairly and adequately represents other shareholders and the corporation involves a factual determination by the court, and the burden of proof is on the party challenging the plaintiff's standing. The derivative plaintiff is not required to prove that he or she is the proper representative of the shareholders.
9. **Actions: Corporations: Standing.** A determination of adequate representation of other shareholders and the corporation depends on two factors: (1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the litigation, and (2) the plaintiff must not have interests antagonistic to those of the class.
10. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Because a motion pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. However, while a court's consideration of a rule 12(b)(6) motion is generally confined to the allegations in the complaint, a court may take judicial notice of matters of public record without converting a rule 12(b)(6) motion to dismiss into a motion for summary judgment.
11. **Derivative Actions: Corporations.** A plaintiff in a shareholder derivative action owes the corporation his or her undivided loyalty. The plaintiff must not have ulterior motives and must not be pursuing an external personal agenda.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed in part, and in part reversed.

James D. Sherrets and Jason M. Bruno, of Sherrets & Boecker, L.L.C., for appellants.

Michael F. Kinney and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The appellants, Aaron Ferer (Aaron) and Robin Monsky, brought derivative claims on behalf of Aaron Ferer & Sons Co. (AFSC) against Erickson & Sederstrom (E&S) and AFSC, to recover for E&S' allegedly negligent representation of AFSC. Aaron brought an individual action against the same defendants to recover for the alleged wrongful registration of his AFSC shares of common stock.

The district court granted E&S' motion to dismiss. With regard to Aaron's individual claim, the district court treated it as a claim for professional malpractice and concluded that E&S, who served as corporate counsel and transfer agent for AFSC, did not owe a duty to Aaron individually. With regard to the appellants' derivative claims, the district court found that the appellants did not fairly and adequately represent the shareholders of AFSC.

Following the entry of a final order, the appellants perfected the instant appeal, which we removed to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

BACKGROUND

The appellants brought the present action against E&S and AFSC. This action was filed concurrently with separate actions against AFSC and majority shareholders, which are not part of this appeal.

In the operative complaint, Aaron asserts one individual claim against E&S and the appellants assert four counts against E&S and AFSC.

Count I is an individual claim on behalf of Aaron for wrongful registration against E&S only. Under this count, Aaron alleges that he was gifted 11,764 shares of common stock in AFSC by his father, Harvey Ferer, and that E&S, in its capacity as transfer agent for AFSC, canceled the stock certificate representing his 11,764 shares of common stock and caused another stock certificate to be issued for those shares in the name of Harvey Ferer. Aaron further alleges that E&S subsequently recorded a transfer of those shares to Matthew Ferer and Whitney Ferer and issued those individuals new stock certificates which represented their purported ownership of that stock. Aaron alleges that the transfer of stock to Harvey Ferer and then to Matthew Ferer and Whitney Ferer was wrongful because it was done so without Aaron's endorsement or authority.

Counts II through V are derivative claims on behalf of AFSC for breach of duty of care, breach of duty of loyalty, wrongful registration, and unjust enrichment and accounting. The appellants allege that Aaron made demand on AFSC to pursue an action against E&S and that over 90 days had elapsed without action.

Under count II, the appellants allege, inter alia, that E&S negligently advised AFSC regarding the effect of the appellants' dissent from the asset sale of AFSC, the appellants' rights to payment of the fair value of their stock under the dissenters' rights provisions found in Neb. Rev. Stat. § 21-20,141 (Reissue 1997) of the Business Corporation Act, and the appellants' entitlement to payment under AFSC's plan of partial liquidation. The appellants claim that E&S' negligent advice has and will cause AFSC to sustain numerous financial damages.

Under count III, the appellants essentially allege that E&S breached its duty of loyalty to AFSC by representing Matthew Ferer and Whitney Ferer at the same time as they represented AFSC and by facilitating the appropriation of corporate opportunities by Matthew Ferer and Whitney Ferer.

Under count IV, the appellants allege that E&S is liable for damages sustained by AFSC as a result of E&S' actions in the wrongful registration of Aaron's stock, which was ultimately reissued in the names of Matthew Ferer and Whitney Ferer.

Finally, under count V, the appellants allege that E&S is not entitled to the attorney fees paid to it by AFSC due to its negligent advice and its representation of conflicting interests. The appellants claim that to allow E&S to retain those fees would result in E&S' being unjustly enriched.

The district court granted E&S' motion to dismiss filed pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). With regard to the appellants' derivative claims, the district court found that the appellants did not fairly and adequately represent AFSC's interests as required in derivative actions. With regard to Aaron's individual claim for wrongful registration, the district court treated it as a claim for legal malpractice and concluded that E&S did not owe Aaron any duty.

The appellants filed an appeal of the dismissal of their claims to the Nebraska Court of Appeals. The Court of Appeals dismissed the appeal on the ground that the appellants were not appealing a final order. See *Ferer v. Erickson & Sederstrom*, 13 Neb. App. xlvi (No. A-04-1299, Apr. 8, 2005). On remand, the appellants filed a motion for a final order pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004), and a motion to strike AFSC as a defendant, which motion was granted. Upon the district

court's entry of a final order, the appellants timely filed the present appeal.

ASSIGNMENTS OF ERROR

The appellants assert, restated and consolidated, that the district court erred in (1) dismissing Aaron's individual claim against E&S for wrongful registration, (2) failing to find that the appellants fairly and adequately represent the corporation in their derivative claims, and (3) considering matters outside the pleadings.

STANDARD 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. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006); *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

ANALYSIS

Individual Claim

We first address whether Aaron failed to state a claim against E&S in his individual capacity. Aaron argues on appeal that the district court erred in dismissing his individual claim for wrongful registration against E&S on rule 12(b)(6) grounds.

[2,3] Complaints should be liberally construed in the plaintiff's favor, and a complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. *Anderson v. Wells Fargo Fin. Accept., supra*. Nonetheless, in *Anderson*, we stated that complaints must set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted. *Id.*

In his operative complaint, Aaron alleges that E&S registered a transfer of Aaron's stock to a person not entitled thereto because the transfer was registered pursuant to an ineffective endorsement or instruction. He claims the registration was ineffective because Aaron, the appropriate person, did not authorize the transfer. Specifically, Aaron alleges that E&S, in its capacity

as transfer agent for AFSC, issued stock certificate No. 468 for 11,764 shares of AFSC common stock to Aaron. Aaron further alleges that pursuant to a request by Matthew Ferer, E&S purportedly canceled certificate No. 468 and caused certificate No. 479 to be issued for 11,764 shares of AFSC common stock in the name of Harvey Ferer and subsequently in the names of Matthew Ferer and Whitney Ferer without any endorsement on certificate No. 468, duly executed stock power, or any other evidence of authority by Aaron.

The district court treated Aaron's individual claim as one based on legal malpractice. The court concluded that E&S did not owe Aaron a duty and therefore dismissed Aaron's individual claim. We disagree. We find instead that Aaron has stated a claim for wrongful registration under Neb. U.C.C. § 8-407 (Reissue 2001), and reverse the district court's order on this issue.

[4] We have stated that an attorney's alleged professional misconduct gives rise to a professional negligence action. See, *Swanson v. Ptak*, 268 Neb. 265, 682 N.W.2d 225 (2004); *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995). In the instant case, however, E&S was not acting as legal counsel with respect to the allegedly wrongful registration of Aaron's stock. Rather, it was alleged to be acting as transfer agent for AFSC.

Transfer agents are frequently employed to take charge of stock transfers on the corporate stock books and the issuance of new stock certificates in order to facilitate the transfer of shares and to guard against mistakes or overissues. 12 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 5485 (perm. ed., rev. vol. 2004). See, e.g., *Geiger v. S.E.C.*, 363 F.3d 481 (D.C. Cir. 2004); *Ins. Co. of N. America v. Breham*, 257 Or. 385, 478 P.2d 387 (1970). The transfer agent must pass on and satisfy himself as to the validity and propriety of the transfer, and the transfer agent is generally held liable for the improper issue and transfer of certificates, both to the corporation and to persons injured. 12 Fletcher, *supra*. See § 8-407. There is no restriction under Nebraska law that a transfer agent must be a lawyer or a law firm. See, e.g., Neb. U.C.C. § 8-102 (Reissue 2001). In fact, a transfer agent may be any individual or a department of the corporation itself, though the transfer agent is usually a bank or trust company with a special transfer

department and trained staff. 12 Fletcher, *supra*. Accordingly, an attorney or law firm may serve as transfer agent for a corporation notwithstanding its role as legal counsel for the corporation and, consequently, may be liable under § 8-407 for wrongful registration. Were we to conclude otherwise, we would in essence be saying that attorneys and law firms enjoy a special protection from liability under § 8-407, which holds a transfer agent liable to the owner of a security for the wrongful registration of that security. See § 8-407, official comment 1.

In the instant case, E&S was alleged to be acting in its capacity as transfer agent for AFSC, not in its capacity as legal counsel, when it transferred Aaron's shares of AFSC stock. Hence, E&S may potentially be held liable under § 8-407 for wrongful registration.

Having determined that E&S transferred Aaron's stock shares in its capacity as transfer agent, we must next determine whether Aaron alleged sufficient facts to state a claim for wrongful registration under § 8-407.

[5] Section 8-407 bestows on a transfer agent the same obligations to the holder or owner of a security as the issuer and holds a transfer agent liable where the issuer would itself be liable. Neb. U.C.C. § 8-404(a)(1) (Reissue 2001) provides that an issuer is liable for wrongful registration if the issuer has registered the transfer of security to a person not entitled to it as a result of an ineffective endorsement or instruction. The official comment 1 to this section explains in part that "[t]he fact that the issuer had no reason to suspect that the [e]ndorsement was forged or that the issuer obtained the ordinary assurances under section 8-402 does not relieve the issuer from liability."

Aaron has alleged in his operative complaint that E&S transferred his shares of AFSC to Harvey Ferer and then to Matthew Ferer and Whitney Ferer, despite his failure to endorse the stock certificate or authorize the transfer. If Aaron's allegations are true, which we must assume for purposes of a motion to dismiss, see *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006), E&S would be liable under § 8-407 because of the alleged ineffective endorsement. We therefore conclude that Aaron has stated a claim for wrongful registration, and the district court erred in concluding otherwise.

Derivative Claims

The appellants next argue that the district court erred in dismissing their derivative claims against E&S.

The appellants assert that the district court's determination that they do not fairly and adequately represent the interest of the company was erroneous.

[6,7] A derivative action is a suit by a shareholder to enforce a cause of action belonging to the corporation. *Sadler v. Jorad, Inc.*, 268 Neb. 60, 680 N.W.2d 165 (2004). A shareholder may not commence or maintain a derivative proceeding unless the shareholder adequately represents the interests of the corporation in enforcing the right of the corporation. Neb. Rev. Stat. § 21-2071 (Reissue 1997). This requirement is particularly important because the derivative plaintiff occupies the position of a fiduciary character vis-a-vis the shareholders. *Cohen v. Beneficial Loan Corp*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

[8] "[W]hether a plaintiff fairly and adequately represents other shareholders and the corporation involves a factual determination by the court and the burden of proof is on the party challenging the plaintiff's standing." 13 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 5981.40 at 152-53 (perm. ed., rev. vol. 2004). See, also, *Smallwood v. Pearl Brewing Company*, 489 F.2d 579, 592 n.15 (5th Cir. 1974) ("[t]he burden is on the defendants to obtain a finding of inadequate representation"). Thus, the derivative plaintiff is not required to prove that he or she is the proper representative of the shareholders. *Id.*

[9] A determination of adequate representation depends on two factors: " '(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.' " *Vanderbilt v. Geo-Energy Ltd.*, 725 F.2d 204, 207 (3d Cir. 1983) (quoting *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975)). There has been no challenge to the qualifications of the appellants' attorney; thus, our inquiry is limited to the question of whether the appellants' interests are antagonistic to those of the corporation.

As described by the Connecticut Supreme Court, "[t]he kind of assurance demanded by due process and the equitable requirement of adequate and fair representation is that the nominal plaintiff 'be free of any interest which holds the potential of influencing his conduct of the litigation in a manner inconsistent with the interests' of [the] shareholders." *Barrett v. Southern Connecticut Gas Co.*, 172 Conn. 362, 377, 374 A.2d 1051, 1058 (1977). Although our focus in the instant case is on the interests of the corporation, rather than the interests of the shareholders, we find that the same assurances apply.

According to E&S, the appellants do not fairly and adequately represent the interests of the corporation because they are motivated by their personal interests. In support of this contention, E&S asserts that it asked the district court to take judicial notice of the multiple lawsuits brought by the appellants against AFSC. See, Ferer v. Aaron Ferer & Sons Co. et al., Douglas County District Court, docket 1007, No. 217; Ferer v. Aaron Ferer & Sons Co. et al., Douglas County District Court, docket 1031, No. 621; Ferer v. Aaron Ferer & Sons Co. et al., Douglas County District Court, docket 1038, No. 306.

[10] Because a rule 12(b)(6) motion tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. See *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977 (9th Cir. 2002). However, while a court's consideration of a rule 12(b)(6) motion is generally confined to the allegations in the complaint, a court may take judicial notice of " 'matters of public record' " without converting a rule 12(b)(6) motion to dismiss into a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); Neb. Rev. Stat. § 27-201(6) (Reissue 1995) ("[j]udicial notice may be taken at any stage of the proceeding"). See, also, *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993). Thus, the district court may, and in this case did, consider the other lawsuits filed by the appellants in determining whether the district court erred in granting E&S' rule 12(b)(6) motion.

[11] In *Smith v. Ayres*, 977 F.2d 946 (5th Cir. 1992), the plaintiff was a shareholder of a family corporation owning what the court described as an infinitesimal stake in the corporation. The

court described the suit as a "protracted internecine feud" and said that the trial court could properly consider the plaintiff's vindictiveness toward the defendant in determining whether the plaintiff was an adequate representative. *Id.* at 947. The court further stated that "[a] plaintiff in a shareholder derivative action owes the corporation his undivided loyalty. The plaintiff must not have ulterior motives and must not be pursuing an external personal agenda." *Id.* at 949. A review of the record in this case reveals that the appellants' personal interests are at the forefront of this litigation.

The appellants' derivative claims are each connected to how AFSC treated the appellants in regard to their stock. In addition, the facts which form the basis of the appellants' derivative claims in the instant case also form the basis for the appellants' claim against AFSC and the majority shareholders in Ferer v. Aaron Ferer & Sons Co. et al., Douglas County District Court, docket 1007, No. 217. The appellants cannot, based on the same facts, fairly and adequately represent the interests of AFSC while simultaneously suing AFSC based upon the same set of facts. The appellants' derivative claims in this case are representing their own interests and not enforcing the rights, if any, of AFSC against E&S. We, therefore, conclude that the district court did not err in dismissing the appellants' derivative claims against E&S.

[12] Having determined that the district court did not err in concluding the appellants do not fairly and adequately represent the interests of AFSC and, therefore, in dismissing their derivative claims against E&S, we need not address E&S' argument on appeal that the appellants' derivative claims are barred by the statute of limitations. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

Considering Matters Outside Pleadings

In their final assignment of error, the appellants argue that the district court erred in considering matters outside the pleadings in its evaluation of the merits of E&S' rule 12(b)(6) motion. As previously explained, a court may consider matters over which it could take judicial notice in ruling on a rule 12(b)(6) motion. Accordingly, we conclude that the district court did not err in

considering the other cases brought by the appellants against AFSC and the majority shareholders.

CONCLUSION

For the reasons discussed above, we conclude that Aaron has stated a claim against E&S for wrongful registration under § 8-407. We therefore reverse the district court's dismissal of Aaron's individual claim against E&S. We affirm, however, the court's dismissal of the appellants' derivative claims against E&S for the reason that they do not fairly and adequately represent AFSC.

AFFIRMED IN PART, AND IN PART REVERSED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JOHN F. KEEN, APPELLANT.

718 N.W.2d 494

Filed July 28, 2006. No. S-05-945.

1. **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.
2. **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.
3. **Judgments: Collateral Attack.** When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
4. **Judgments.** A judgment is an adjudication of all the matters that are essential to support it, and every proposition assumed or decided by the court leading up to the final conclusion and on which such conclusion is based is as effectually passed upon as the ultimate question which is finally resolved.
5. **Res Judicata.** The rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause.
6. **Constitutional Law.** A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.
7. **Constitutional Law: Statutes.** Not even a statute which is declared unconstitutional is void ab initio insofar as a previous judgment based upon the statute is concerned.
8. **Res Judicata.** The conclusiveness of the judgment in a case extends not only to matters actually determined, but also to other matters which could properly have been

> raised and determined therein. The rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of diligence.

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. Judgment of District Court affirmed.

James Walter Crampton for appellant.

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

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

HANNON, Judge, Retired.

NATURE OF CASE

In the county court for Sarpy County, John F. Keen pled guilty to having violated Neb. Rev. Stat. § 60-6,196 (Reissue 2004) and was convicted of second-offense driving while under the influence (DUI). The enhancement to second offense was based on a DUI conviction Keen received in 1998 under Omaha Mun. Code, ch. 36, art. III, § 36-115 (1995). In county court and on appeal to the district court, Keen unsuccessfully maintained that the 1998 conviction could not be used for enhancement purposes because it was not a "[p]rior conviction" as defined in Neb. Rev. Stat. § 60-6,197.02(1)(a) (Reissue 2004). He contended that under § 60-6,197.02(1)(a), the 1998 conviction was neither a conviction "[f]or a violation of section 60-6,196" nor a conviction "for a violation of a city or village ordinance enacted in conformance with section 60-6,196." To support his argument, Keen cited *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003), in which § 36-115 (1998) of the Omaha Municipal Code was declared unenforceable because it was inconsistent with § 60-6,196 (Cum. Supp. 2000). The State maintained and the district court found that Keen's position was an impermissible collateral attack on his 1998 conviction. We agree and affirm Keen's conviction and sentence.

STANDARD OF REVIEW

[1] The issue presented by this appeal is a question of law. 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).

[2] 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. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

FACTS AND PROCEDURAL BACKGROUND

On October 13, 2004, Keen was arrested for DUI. On November 19, the State charged Keen with, among other charges, second-offense DUI and alleged that he had previously been convicted of DUI in 1998. On January 13, 2005, pursuant to a plea agreement, Keen pled guilty to the DUI charge.

After accepting Keen's plea and finding him guilty on the DUI charge, the county court held an enhancement hearing. As evidence of a prior conviction, the State offered exhibit 1, which consisted of copies of several documents related to Keen's 1998 conviction in Douglas County under § 36-115 (1995) of the Omaha Municipal Code, a DUI ordinance. Exhibit 1 showed that on July 21, 1998, Keen was represented by counsel when he pled no contest to the DUI charge and was convicted and sentenced for that offense. The court received exhibit 1 into evidence without objection and ordered a presentence investigation.

On March 18, 2005, Keen asked the county court to reconsider its finding of second-offense DUI because his 1998 conviction was not a valid "[p]rior conviction" for enhancement purposes, given that the Omaha ordinance under which he was convicted did not conform to the state DUI statute, as required by § 60-6,197.02(1)(a). Keen cited *Loyd* as authority for his position. On April 8, the county court reopened the case in order to reconsider the enhancement issue, and the parties were allowed to make an evidentiary record. The court acknowledged that exhibit 1 offered by the State had already been received into evidence. Keen introduced a copy of the Omaha ordinance under which he was convicted in 1998. The court again found that Keen's latest conviction was a second offense and proceeded to sentence him. Keen was ordered to serve 60 days in jail (with

credit for 1 day served) and to pay a fine of $500. The court also revoked his driver's license for 1 year.

Keen appealed from the conviction, enhancement, and sentence to the district court, alleging the county court had erred in finding that he had a valid prior conviction, in denying probation, and in imposing an excessive sentence. The district court found that Keen was attempting to collaterally attack his 1998 conviction, in violation of *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). The district court determined that Keen's 1998 DUI conviction was valid for enhancement purposes and affirmed the conviction and sentence.

Keen appealed, and this court moved the appeal to its docket on its own motion, pursuant to its 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

We summarize Keen's assignments of error as alleging the district court erred in finding (1) that Keen was attempting to collaterally attack the validity of his prior conviction, (2) that his 1998 DUI conviction under an Omaha city ordinance constituted a prior conviction for purposes of DUI sentence enhancement, and (3) that the sentence was not excessive.

ANALYSIS

Keen claims he is not making a collateral attack on his 1998 DUI conviction under the Omaha city ordinance because he is not arguing that the 1998 conviction was invalid but that it could not be used to enhance his current DUI conviction under the state DUI statutes. State law provides for enhanced penalties when a DUI defendant has one or more prior convictions. See Neb. Rev. Stat. § 60-6,197.03 (Reissue 2004). A prior conviction, as defined in § 60-6,197.02(1)(a), includes "[a]ny conviction for a violation of a city or village ordinance enacted in conformance with section 60-6,196" which was received within the 12-year period immediately preceding the current offense.

Keen maintains that to use the 1998 conviction for enhancement purposes, the State must prove he was convicted under an ordinance which was enacted "in conformance with" the DUI statute. See § 60-6,197.02(1)(a). He bases his position on *State*

v. Loyd, 265 Neb. 232, 655 N.W.2d 703 (2003), in which this court held on a direct appeal by the State that § 36-115 (1998) of the Omaha Municipal Code was unenforceable because the penalty provisions therein were inconsistent with those in § 60-6,196 (Cum. Supp. 2000).

Keen received his 1998 conviction under a 1995 version of § 36-115, whereas in *Loyd*, this court reviewed a 1998 version of the same ordinance. The 1995 version of the ordinance was slightly different from the 1998 version and was somewhat inconsistent with the controlling version of § 60-6,196. Given our conclusion in this opinion, however, we need not decide whether that distinction is significant. For purposes of this opinion, we assume that the DUI ordinance under which Keen was convicted in 1998 would be unenforceable under *Loyd* and that if Keen had pled not guilty and raised the issue of the ordinance's invalidity when he was prosecuted in 1998, the ordinance would have been invalidated.

[3] The State maintains that Keen is collaterally attacking his 1998 DUI conviction in the present case. When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). When the court has jurisdiction over the person and subject matter, a party to the proceeding will be bound by the judgment in the case when collaterally attacking it, even though the judgment was irregularly or erroneously entered. See, *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985); *State ex rel. Ritthaler v. Knox*, 217 Neb. 766, 351 N.W.2d 77 (1984). Until such judgment is rendered void in a proper proceeding and set aside, it remains " ' " 'valid and binding for all purposes and cannot be collaterally attacked.' " ' " *Mayfield*, 221 Neb. at 124, 375 N.W.2d at 148.

In *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), this court held that the validity of a prior DUI conviction used for sentencing enhancement could not be collaterally attacked. This court opined that "[a]t some point, judgments of conviction must become final and the State should not be required to 'rummage through frequently nonexistent or difficult to obtain . . .

transcripts or records' in order to defend them against collateral attack." *Id.* at 187, 595 N.W.2d at 926. *Louthan* overruled several cases which had held that a defendant could object to the validity of a judgment if he or she initiated a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.

[4] This court has recognized that a judgment is an adjudication of all the matters that are essential to support it, and every proposition assumed or decided by the court leading up to the final conclusion and on which such conclusion is based is as effectually passed upon as the ultimate question which is finally resolved. *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970). In *Norlanco, Inc.*, the city of Norfolk had passed an ordinance in 1959 annexing the plaintiff's property to the city. Following annexation proceedings in the district court, the plaintiffs' property was formally annexed in 1963. In 1967, the plaintiffs sought an injunction enjoining the county from assessing and levying municipal taxes on the plaintiffs' property annexed to the city. The plaintiffs contended that a statute similar to the one under which their property was annexed had been declared unconstitutional by this court in a 1967 case and that, thus, the Norfolk ordinance and the annexation decree were null and void as unconstitutional. This court declined to consider whether the relevant statute was unconstitutional, choosing instead to dispose of the case on res judicata grounds.

[5,6] In *Norlanco, Inc.*, 186 Neb. at 105, 181 N.W.2d at 122, this court stated that the "rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause." The court noted that at the time of the annexation proceedings, the plaintiffs in *Norlanco, Inc.*, had questioned neither the jurisdiction of the court nor the constitutionality of the act under which the proceeding had been commenced and had in effect waived those claims. Quoting the U.S. Supreme Court, this court declared that " ' " '[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " . . .' " *Id.* at 106, 181 N.W.2d at 123, quoting

Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

[7] Similar reasoning was applied in *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979). In that case, property owners sought to have a sanitary and improvement district declared void ab initio although they had not appealed the decree which established the district years earlier. This court opined that "[n]ot even a statute which is declared unconstitutional is void ab initio insofar as a previous judgment based upon the statute is concerned," *id.* at 323, 282 N.W.2d at 580, and found that the earlier decree was not subject to collateral attack because the court had jurisdiction of the parties and the subject matter.

In the present case, we deal not with an ordinance which was declared unconstitutional but one which might have been unenforceable on the basis of the statutory interpretation adopted in *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003). The principles and reasoning which support holdings that parties are generally not permitted to collaterally attack prior judgments, even when the prior judgment is based upon an unconstitutional statute, also support a holding that a defendant cannot collaterally attack a conviction by alleging that it is invalid because it was obtained pursuant to an ordinance which was later declared to be unenforceable as inconsistent with a statute.

[8] Keen claims he is not questioning the validity of his 1998 DUI conviction but merely asserting that the conviction could not be used to enhance his current conviction given that the Omaha DUI ordinance was subsequently invalidated in *Loyd* for being inconsistent with the state DUI statute. He is in fact seeking to attack one of the determinations in the 1998 conviction, that is, that the 1995 ordinance was valid. Keen's argument ignores the breadth of the doctrine of res judicata, which this court recognized in *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970). The doctrine of res judicata, precluding subsequent litigation of the same cause of action,

> "is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which

> could properly have been raised and determined therein. The rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of diligence."

Id. at 106, 181 N.W.2d at 123.

Inherent in Keen's 1998 conviction was a determination that the Omaha DUI ordinance to which he pled no contest and under which he was convicted was enforceable, and inherent in that determination was a finding that the city ordinance under which he was convicted was "in conformance with" the state statute. See § 60-6,197.02(1)(a). Thus, Keen could have and should have raised these issues in the 1998 prosecution.

Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). Only a void judgment is subject to collateral attack. *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985). Although Keen's 1998 DUI conviction may have been voidable and subject to reversal upon appeal, it was not void.

We conclude that Keen's 1998 DUI conviction was valid for the purpose of sentence enhancement and that Keen is attempting to collaterally attack that conviction. Therefore, we affirm the judgment of the district court on this issue.

Keen also assigns as error his sentence. He claims that his sentence was excessive and that he should have been sentenced to probation. His argument, however, is based upon the assumption that we would rule in his favor on the enhancement issue. His theory is that the county court should have imposed a sentence appropriate for a first-offense DUI conviction. 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. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006). Upon reviewing the record on appeal from the county court, the district court found that Keen's sentence was not excessive and that probation would not have been appropriate. We conclude that the district court did not err in affirming Keen's sentence, and thus, we affirm the judgment of the district court.

CONCLUSION

The district court correctly determined that Keen was attempting to collaterally attack his 1998 DUI conviction in the enhancement proceedings concerning his current DUI conviction. The district court also correctly affirmed Keen's sentence. We affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

HAZEL I. WILSON, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES AND RON ROSS, DIRECTOR OF THE NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

718 N.W.2d 544

Filed August 4, 2006. No. S-04-1085.

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. **Medical Assistance: Federal Acts: States.** The Medicaid program, 42 U.S.C. § 1396 et seq. (2000 & Supp. II 2002), was established by Congress in 1965 as a cooperative federal-state program in which the federal government reimburses states for a portion of the costs of medical care for persons in need.
3. **Medical Assistance: Federal Acts.** The purpose of the Medicaid program is to provide medical assistance to those whose resources are insufficient to meet the costs of necessary medical care.
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. **Administrative Law: Medical Assistance: Federal Acts: States.** 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 the Department of Health and Human Services is responsible for the administration of the Medicaid program in this state.
6. ____: ____: ____: ____. Under federal law, a state participating in the Medicaid program must establish resource standards for the determination of eligibility. These standards must take into account only such income and resources as are available to the

applicant or recipient, as determined in accordance with standards prescribed by the Secretary of the U.S. Department of Health and Human Services.

7. **Medical Assistance: Federal Acts: Time.** The 1993 amendment to the Medicaid act applies only to trusts established after August 10, 1993, the effective date of the enactment.
8. **Medical Assistance: Federal Acts: Statutes.** To the extent that state Medicaid regulations conflict with the federal Medicaid statutes, the federal provisions prevail.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded with directions.

Kimberli D. Dawson and Bruce L. Hart, of Hart, Dawson & Sudbeck, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, Michael J. Rumbaugh, Royce N. Harper, and Patricia R. Wenzl, Special Assistant Attorney General, for appellee.

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

GERRARD, J.

NATURE OF CASE

An applicant for Medicaid was found ineligible for benefits because she transferred resources to her sons for less than fair market value within 60 months preceding her application for benefits. On appeal to the district court, the order was affirmed. The applicant appeals the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The appellant, Hazel I. Wilson, and her husband, Ray C. Wilson, executed a revocable trust agreement in April 1991 to establish the Ray and Hazel Wilson Trust (the Trust). The Trust agreement was later amended in February 1994. The Trust agreement provided, in part:

> At any time or times prior to the death of a GRANTOR by a duly executed and acknowledged written instrument substantially in the form set forth at Appendix "B" attached hereto, GRANTORS may, either jointly or individually, amend or alter this Trust Agreement in any manner, in whole or in part; and may revoke this Trust Agreement in whole or in part.

The Trust agreement provided that upon the death of either Ray or Hazel, the Trust estate would be divided into two new trusts, "Trust A" and "Trust B." The Trust agreement specified the assets to be placed in each of the trusts. Ray died on July 23, 1998, and pursuant to the Trust agreement, the Trust estate was divided into Trusts A and B.

The Trust agreement instructed the trustee to distribute from the net income of Trust A, and to the extent that the income is insufficient, from the principal of Trust A, all amounts required for the medical care, education, support, and maintenance of Hazel. Further, Hazel was given the power to withdraw all or any part of the principal of Trust A by delivering a signed document describing such property to the trustee. Upon receipt of the document, the trustee would distribute the property to Hazel. The Trust agreement similarly instructed the trustee to distribute from the net income of Trust B all amounts required for the health, education, support, and maintenance of Hazel. While the income generated by Trust B was available to Hazel, she was not entitled to invade the principal of Trust B.

In 1999, Hazel transferred property totaling $636,638.07 to her sons, Douglas L. Wilson and Randy R. Wilson. The property included real estate that had been held in the Trust. The property was deeded from the Trust to Hazel by trustee's deed and then deeded by Hazel to Douglas and Randy. Hazel also directed the trustee to distribute various stock and bond accounts, cash, and other personal property to Douglas and Randy.

On January 28, 2003, while residing in a nursing home, Hazel applied for Medicaid benefits with a local office of the Nebraska Department of Health and Human Services (DHHS) in Kearney, Nebraska. The application was revised in part on February 21. Hazel was found ineligible for benefits as a result of her gifting resources for less than fair market value within the 60 months preceding her application. Further, Hazel was instructed that she would remain ineligible until approximately August 2014.

Hazel filed a request for hearing with DHHS. After an administrative hearing, the director of DHHS affirmed the decision finding Hazel to be ineligible for Medicaid benefits. Hazel filed a petition for review in the district court; a hearing was held, and

the court affirmed the judgment of the director. Hazel filed this timely appeal.

ASSIGNMENTS OF ERROR

Hazel assigns, restated, that the district court erred in affirming the decision of DHHS (1) finding Hazel to be ineligible for Medicaid assistance because she transferred resources for less than fair market value within the 60 months preceding the date of her application and (2) determining that Hazel may not reapply for Medicaid benefits until approximately August 2014.

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified 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).

ANALYSIS

Hazel assigns that the district court erred in affirming the decision of DHHS finding Hazel to be ineligible for Medicaid benefits as a result of her gifting of resources for less than fair market value within the 60 months preceding her application for assistance. Specifically, Hazel asserts that DHHS incorrectly applied a 60-month look-back period in determining Hazel's eligibility for benefits.

Medicaid Background.

[2-6] The Medicaid program, 42 U.S.C. § 1396 et seq. (2000 & Supp. II 2002), was established by Congress in 1965 as a cooperative federal-state program in which the federal government reimburses states for a portion of the costs of medical care for persons in need. See *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 659 N.W.2d 848 (2003). The purpose of the program is to provide medical assistance to those whose resources are insufficient to meet the costs of necessary

medical care. *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006). 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. *Id.* 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. *Pohlmann, supra*. Under federal law, a state participating in the Medicaid program must establish resource standards for the determination of eligibility. These standards must take into account only such income and resources as are available to the applicant or recipient, as determined in accordance with standards prescribed by the Secretary of the U.S. Department of Health and Human Services. *Id.*

Prior to 1986, irrevocable trusts were not considered assets in determining eligibility for Medicaid benefits. As a result, many people were receiving benefits when they had irrevocable trusts containing assets that would otherwise have made them ineligible for public assistance. Many people began to take advantage of the "trust gap" in Medicaid, establishing trust funds to shield their assets. In 1986, Congress passed an amendment attempting to close the gap so that assets in certain trusts would be counted in determining whether a Medicaid applicant satisfied the maximum assets requirement. *Boruch, supra*. See § 1396a(k) (Supp. IV 1986). Congress repealed § 1396a(k) in 1993 and passed § 1396p(d), expanding the types of trusts that could be considered to preclude applicants from Medicaid eligibility. See, § 1396p (Supp. V 1993); *Pohlmann, supra*.

Section 1396p(d)(3)(B) states, in relevant part:

> In the case of an irrevocable trust—
>
> (i) 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, and payments from that portion of the corpus or income—

> (I) to or for the benefit of the individual, shall be considered income of the individual, and
>
> (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and
>
> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

If an institutionalized individual disposes of assets for less than fair market value on or after the look-back date specified by federal law, the individual is ineligible for medical assistance for a period of time. See § 1396p(c)(1)(A). Section 1396p(c)(1)(B) states:

> (i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) of this section, 60 months) before the date specified in clause (ii).
>
> (ii) The date specified in this clause, with respect to—
>
> (I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan[.]

In other words, the look-back period is calculated from the date that an institutionalized individual applies for Medicaid assistance. The look-back period is generally 36 months, except for a 60-month look-back period for payment from a revocable trust, see § 1396p(d)(3)(A)(iii), or portions of an irrevocable trust not payable to the individual, see § 1396p(d)(3)(B)(ii).

[7,8] Congress specified that the 1993 amendment to the Medicaid act applies only to trusts established after August 10,

1993, the effective date of the enactment. *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 659 N.W.2d 848 (2003). The Nebraska regulation implementing the extended look-back periods is located at 469 Neb. Admin. Code, ch. 4 § 005.03A (2001), which states, "[t]o determine if a client or his/her spouse deprived himself/herself of a resource to qualify for medical assistance, the worker shall look back 36 months. The worker shall look back 60 months in cases of a trust or annuity." To the extent that state regulations conflict with the federal statutes, the federal provisions prevail. See, *Reames v. Oklahoma ex rel. OK Health Care*, 411 F.3d 1164 (10th Cir. 2005); *Ramey v. Reinertson*, 268 F.3d 955 (10th Cir. 2001); *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006). Although § 005.03(A) purports to apply a 60-month look-back period to all trust assets, federal law requires us to consider whether a 36- or 60-month look-back applies to the trust assets at issue in this case.

Application of Medicaid Provisions to Present Case.

DHHS, and the district court, determined that the transfers at issue here fell within the 60-month look-back period. Hazel argues that the 60-month look-back period in § 1396p(c)(1)(B)(i) does not apply to the transfers at issue because the Trust from which the transfers were made was established on April 13, 1991, before the effective date of the amendment creating the trust-specific, 60-month look-back period. Thus, Hazel argues that transfers from the Trust are subject to review under the look-back provision as it existed prior to the amendment; specifically, § 1396p(c)(1) (Supp. IV 1992), which specified a 30-month look-back period for examining the disposal of resources for less than fair market value. Hazel argues that application of the 30-month look-back period would require DHHS to examine transfers that occurred only as far back as July 28, 2000 (30 months preceding Hazel's Medicaid application), that Hazel's transfers to her sons occurred over 7 months prior to that date, and that thus, DHHS erred in finding Hazel to be ineligible for Medicaid benefits based on such transfers.

In contrast, DHHS asserts that the transfers at issue in this case were made from Trusts A and B, which were established

upon Ray's death in 1998. Accordingly, DHHS argues that the trusts at issue were established after the effective date of the 1993 amendment and are, therefore, subject to review under the more inclusive trust provisions added in 1993.

However, we need not determine whether the transfers are subject to the 30-month look-back period in place prior to the 1993 amendment, or the look-back period as it exists now, because the transfers at issue do not render Hazel ineligible for benefits under the application of either version of the statutes. DHHS incorrectly applied a 60-month look-back period when the look-back period specified by federal law was no longer than 36 months.

Assuming, for the sake of argument, that DHHS is correct in arguing that Trusts A and B were created upon Ray's death in 1998 by operation of the original Trust agreement, then the asset transfers at issue are subject to the 1993 Medicaid amendments. Those amendments impose a 36-month or 60-month look-back period for reviewing asset transfers for Medicaid eligibility. Under § 1396p(c)(1)(B)(i), the 60-month look-back period applies only to "payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d)." The Trust at issue in this case became irrevocable upon Ray's death and therefore falls under § 1396p(d)(3)(B)(i) or (ii), of which only the latter is subject to a 60-month look-back period.

The Trust agreement provides that Hazel shall receive distributions from the income of Trusts A and B and the principal of Trust A. Therefore, such sums are considered resources available to the individual, and any transfer of such sums is considered a transfer of assets under § 1396p(d)(3)(B)(i), subject to the 36-month look-back period in § 1396p(c)(1)(B). The principal of Trust B, to which Hazel was not entitled under the Trust agreement, is considered to be disposed of or transferred by Hazel on the date upon which Hazel was no longer entitled to payment from such amount; such disposal is subject to the 60-month look-back period of § 1396p(c)(1)(B).

The property transferred by Hazel to her sons in this case was necessarily from the income and principal of Trust A or the income of Trust B. Hazel was not entitled to any distribution or

use of the corpus of Trust B and, therefore, could not have legally initiated transfers of property from the principal of Trust B to her sons. None of the parties to this case have offered argument or evidence suggesting that any of the Trusts at issue were not created, funded, or managed according to their terms. Therefore, the transfers in this case could have been made only from the income and principal of Trust A or the income of Trust B. The 60-month look-back period does not apply to either source of property. Consequently, even assuming that the 1993 amendments to the Medicaid act are applicable to Trusts A and B, DHHS may only look as far back as January 2000 for transfers affecting Hazel's eligibility for benefits, 36 months prior to Hazel's January 28, 2003, application. The transfers took place in 1999 and, therefore, are not considered for purposes of determining Hazel's eligibility for benefits.

The 1999 transfers made by Hazel to her sons were outside the look-back period for Medicaid eligibility when considered under either the pre-1993 Medicaid statutes or the statutes as amended in 1993. The transfers do not render Hazel ineligible for benefits. Thus, the district court erred in affirming the findings and order of DHHS.

CONCLUSION

Based on the foregoing, we reverse the judgment of the district court with directions to reverse the order of DHHS and remand the cause for reinstatement of Hazel's Medicaid benefits.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
CLIFFORD J. DAVLIN, APPELLANT.

719 N.W.2d 243

Filed August 4, 2006. No. S-05-547.

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. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **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. 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. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
6. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
7. **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.
8. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
9. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution. Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.
10. **Indictments and Informations.** Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.
11. **Jury Instructions.** In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
12. **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.
13. **Trial: Expert Witnesses.** 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.
14. **Trial: Rules of Evidence: Expert Witnesses.** A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert by reference to his or her knowledge, skill, experience, training, and education. If it is necessary for the court to conduct an analysis under *Daubert v. Merrell Dow Pharmaceuticals,*

Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. 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 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 probative value of the expert evidence and the opinions related thereto are substantially outweighed by the danger of unfair prejudice, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

15. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision under these evidentiary rules will not be reversed absent an abuse of discretion.
16. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
17. **Homicide: Photographs.** If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome.
18. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
19. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
20. **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.

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

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Matthew G. Graff for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and CASSEL, Judge, and HANNON, Judge, Retired.

MILLER-LERMAN, J.

NATURE OF CASE

Clifford J. Davlin appeals his conviction and sentence for second degree murder. After his first conviction was reversed by this court in *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002), Davlin was convicted a second time. Following his second conviction, Davlin was sentenced to life in prison. On appeal, Davlin assigns error to the jury instructions given by the district court for Lancaster County, the court's denial of his motion to continue the trial, and the court's admission of certain evidence including expert testimony, Davlin's statements to detectives, and photographs of the victim's body. Davlin also raises issues with regard to double jeopardy, the form of the verdict, sentencing, and ineffective assistance of counsel. We affirm Davlin's conviction and sentence.

STATEMENT OF FACTS

The underlying facts of this case were described in Davlin's appeal of his first conviction as follows:

> Tamara Ligenza, also known as Tamara Martin, was found dead in her Lincoln apartment after a fire on September 7, 1993. Ligenza was legally blind and was 6 months pregnant at the time of her death. Ligenza had been living with Davlin, but on September 6, Ligenza told Davlin to leave the apartment. . . . Davlin remained at or near the apartment building on September 6 and into the morning of September 7.
>
> Ligenza was last seen alive, by her roommate, at about 1 a.m. on September 7, 1993. Ligenza lived in a house that had been converted to a duplex with one entrance that led to both apartments. Witnesses who lived in the building testified that they were awakened at approximately 4:30 a.m. by reports of a fire in the building. Davlin was identified as being in the duplex at the time of the fire, staying in the other apartment. Firefighters removed a severely burned body from the bedroom of Ligenza's apartment; the body

> was later identified by dental records as Ligenza's. An autopsy was performed, and the coroner's physician concluded that Ligenza had been killed by manual strangulation prior to the fire.

State v. Davlin, 263 Neb. at 286-87, 639 N.W.2d at 638-39.

Davlin was charged in 1997 with first degree murder in connection with the death of Ligenza. Davlin was also charged with arson. Following a trial in 2000, the jury found Davlin guilty of second degree murder and arson. He appealed to this court and assigned various errors. We first rejected Davlin's assertion that the district court erred in retroactively applying this court's decision in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), and in therefore not instructing the jury that malice was an element of second degree murder. However, we concluded that the district court had committed reversible error when it instructed the jury on the essential elements of second degree murder by stating that in order to convict Davlin, the jury must find that Davlin caused Ligenza's death " 'intentionally, but *without malice*.' " (Emphasis supplied.) *Davlin*, 263 Neb. at 292, 639 N.W.2d at 642. We therefore reversed Davlin's conviction for second degree murder and remanded the cause for a new trial on that count. We noted that because the jury acquitted Davlin of first degree murder, the Double Jeopardy Clause barred the State from retrying Davlin for first degree murder but did not prevent the State from proceeding with a new trial on a charge of second degree murder because the evidence at the first trial was sufficient to support Davlin's conviction. We rejected Davlin's remaining assignments of error and affirmed his conviction and sentence for arson. *Davlin, supra*. Among the assignments of error we rejected were assertions that the district court erred in admitting the expert testimony of Ken Scurto, a fire investigator for the State Fire Marshal's office, and Brian Nehe, a fire inspector for the city of Lincoln.

Upon remand, the State, on April 12, 2002, filed an amended information charging Davlin with having caused the death of Ligenza "intentionally, but without premeditation." On July 3, Davlin filed a motion to quash the amended information. He argued that the information should be quashed because it failed to allege that the killing was committed with "malice" and because

it failed to allege that the killing was committed with the "specific intent to kill." The district court denied the motion to quash.

On December 27, 2002, Davlin filed a plea in bar asserting that a second prosecution for second degree murder would violate the Double Jeopardy Clause of the 5th and 14th Amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution. The district court overruled the plea in bar, and Davlin filed an interlocutory appeal of the denial to this court. We granted the State's motion for summary affirmance and affirmed the district court's order overruling the plea in bar. *State v. Davlin*, 266 Neb. xxiv (No. S-03-151, July 16, 2003). The State filed a second amended information on December 6, 2004, charging Davlin with second degree murder.

Prior to the new trial, Davlin filed a motion for a hearing regarding the State's experts including, inter alia, the fire experts, Scurto and Nehe, and the pathologists, Drs. John Porterfield, Matthias Okoye, and Thomas Bennett. Davlin sought a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). Davlin also moved in limine to preclude the State from presenting the opinion testimony of such witnesses. Davlin specified that his challenge was not to the qualifications of the witnesses or to the validity of the scientific methods used, but, rather, that he was challenging the reliability of the experts' application of the scientific methods to the facts of this case. Following a hearing, the court denied Davlin's motion in limine with regard to the opinions of Porterfield, Okoye, and Bennett. The court generally denied the motion in limine with regard to the opinions of Scurto and Nehe, but sustained the motion in limine as to Scurto's opinion regarding the duration of the fire. The testimony of the pathologists and of the fire experts was admitted at trial over Davlin's objections.

Jury selection began on January 18, 2005. Before the jurors were brought into the courtroom, Davlin moved to continue the trial on the basis that he wished to secure the appearance of two witnesses who had appeared for the State in the first trial and who had been subpoenaed but had not been located by the State. Davlin asserted that both could provide potentially exculpatory

testimony. The court denied Davlin's motion to continue, and jury selection and trial proceeded. Neither the State nor Davlin offered the testimony of these witnesses from the prior trial into evidence at this trial.

At trial, the court admitted over Davlin's objection recordings of three conversations between Davlin and certain Lincoln police detectives. These included a September 7, 1993, conversation with Det. Larry Barksdale, a September 11 conversation with Det. James Breen, and a November 22 conversation with Barksdale. Each of the conversations concerned events surrounding the fire, Davlin's relationship with Ligenza, and the police investigation of the fire and Ligenza's death. The court also admitted, over Davlin's objections, various photographs and slides of Ligenza's body. These included two photographs of the back of the body, five slides taken during the autopsy, and five photographs that were made from the autopsy slides.

The case was submitted to the jury on January 31, 2005. The court instructed the jury on the elements of second degree murder by stating that in order to find Davlin guilty, the jury must find that Davlin caused the death of Ligenza and that he "did so intentionally, but without premeditation." On February 1, the jury returned a verdict of guilty of second degree murder. The verdict form signed by the presiding juror stated "**We, the Jury**, duly impaneled and sworn in the above-entitled cause, do find the defendant, CLIFFORD J. DAVLIN, **guilty of second degree murder**."

On April 5, 2005, the court sentenced Davlin to life imprisonment and ordered that the sentence be served consecutively to any other sentences being served by Davlin, including the sentence previously imposed for arson. In imposing the sentence, the court stated:

> Having regard for the nature and circumstances of the crime and the history, character and condition of . . . Davlin, the Court finds that imprisonment of . . . Davlin is necessary for the protection of the public and because a lesser sentence would depreciate the seriousness of his crime and promote disrespect for the law.
>
> I do not believe that I am in a position to change the sentence that I imposed previously for the same offense.

> It is therefore the judgment and the sentence of the Court that you, Clifford J. Davlin, be and hereby are ordered committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of life.

Davlin appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Davlin asserts on appeal that his conviction for second degree murder in this case was in violation of the Double Jeopardy Clause. Davlin also asserts that the district court erred in (1) failing to quash the information because it did not contain and allegation that Davlin had the specific intent to kill Ligenza and failing to instruct the jury that it must find that Davlin had the specific intent to kill Ligenza, (2) failing to instruct the jury that malice was a material element of second degree murder, (3) failing to grant his motion to continue trial, (4) admitting into evidence the opinions of the fire investigators as to the cause and nature of the fire, (5) admitting into evidence the opinions of the pathologists as to the cause of Ligenza's death, (6) admitting into evidence the tape recordings of his statements to police detectives, and (7) admitting into evidence photographs and slides of Ligenza's body. Davlin also asserts (1) that the jury verdict form was unclear and ambiguous because it did not specify that Ligenza was the victim of second degree murder, (2) that the court abused its discretion in sentencing him because the court felt bound to impose the same sentence that it had imposed after the prior conviction, and (3) that he was denied effective assistance of counsel in various respects.

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. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

[2,3] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be

disturbed on appeal absent an abuse of discretion. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id*.

[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. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005). 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*.

[5,6] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *Mason, supra*. A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005).

[7] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

ANALYSIS

Double Jeopardy.

Davlin first asserts that his conviction for second degree murder on retrial subjected him to double jeopardy in violation of the federal and Nebraska Constitutions. We conclude that because the issue has already been decided by this court in this prosecution, reconsideration of the issue is precluded in this appeal. See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

Davlin argues that he was " 'impliedly acquitted' " of second degree murder in the first trial because at that trial, the court instructed the jury that to convict Davlin of second degree murder, it must find that he caused Ligenza's death " 'intentionally, but *without malice*.' " (Emphasis supplied.) Brief for appellant at 18-19. The court in the first trial wherein Davlin was convicted of second degree murder defined "malice" as an intentional act, and Davlin argues that when the jury in that trial found that he

acted "without malice," it found that he did not act intentionally. Because it is a necessary element of second degree murder that the defendant acted " 'intentionally, but without premeditation,' " Davlin argues that the jury in the first trial effectively acquitted him of second degree murder and that therefore, it was a violation of double jeopardy to try him a second time for second degree murder. *Id*. at 18.

However, we have already decided the issue against Davlin. In remanding the cause in the first appeal, we specifically stated that the Double Jeopardy Clause did not "prevent the State from proceeding with a new trial on a charge of second degree murder." *Davlin*, 263 Neb. at 309, 639 N.W.2d at 653. In addition, prior to the second trial, Davlin filed a plea in bar on double jeopardy grounds. Davlin took an interlocutory appeal of the district court's denial of the plea in bar, and we summarily affirmed the denial. *State v. Davlin*, 266 Neb. xxiv (No. S-03-151, July 16, 2003).

[8,9] Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution. *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005). Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *Id*. Davlin has presented no such facts.

Our previous holdings that the Double Jeopardy Clause did not prevent retrial constitute the law of the case and preclude reconsideration of the issue in this appeal. We therefore reject Davlin's first assignment of error.

"Specific Intent" in Information and in Elements Instruction.

Davlin next asserts that the district court erred in failing to quash the amended information because it failed to allege that Davlin had the specific intent to kill Ligenza and that the court erred in failing to instruct the jury that in order to find Davlin

guilty of second degree murder, the jury needed to find that Davlin had the specific intent to kill Ligenza. Because both the information and the elements instruction used statutory language, we conclude that the district court did not err in denying the motion to quash or in giving its elements instruction.

[10] In the operative information, the State charged Davlin with second degree murder pursuant to Neb. Rev. Stat. § 28-304 (Reissue 1995) and alleged that Davlin "did cause the death of [Ligenza] intentionally, but without premeditation." Davlin moved to quash the information on the basis that, inter alia, the information failed to allege that Davlin had the specific intent to kill. The district court rejected the motion. We have stated that where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). The information in this case used the language of § 28-304(1) which provides, "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." We therefore conclude that the district court did not err in rejecting Davlin's motion to quash the information.

With respect to the elements instruction, we note that Davlin concedes that trial counsel failed to object to the instruction and therefore failed to preserve the issue for appeal. However, we consider the instruction issue because Davlin also asserts that he received ineffective assistance of trial counsel when counsel failed to object to the instruction. We conclude that the instruction was not erroneous and that therefore, Davlin was not prejudiced when counsel did not object to the instruction.

Davlin argues that the elements instruction, which stated that the jury must find Davlin caused the death of Ligenza "intentionally, but without premeditation," defined second degree murder as a general intent crime and that therefore, the jury could find him guilty if it found that he intentionally set in motion events that caused Ligenza's death even though he did not specifically intend to kill her. Davlin argues that this court has recognized second degree murder as a specific intent crime because we have said that second degree murder "require[s] the intentional killing of another human being," *State v. McCracken*, 260

Neb. 234, 251, 615 N.W.2d 902, 917-18 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), and that "[t]he distinction between second degree murder and manslaughter is the presence or absence of intent to kill," *State v. Jackson*, 258 Neb. 24, 38, 601 N.W.2d 741, 752 (1999).

[11] We have stated that "in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute." *State v. Sanders*, 269 Neb. 895, 913, 697 N.W.2d 657, 672 (2005). The elements instruction in this case used the language of the statute and stated that in order to find Davlin guilty, the jury was required to find Davlin "caused the death" of Ligenza "intentionally, but without premeditation."

Furthermore, the instruction as stated requires a finding of specific rather than general intent. The instruction requires that the jury find Davlin intentionally "caused the death" of Ligenza; therefore, contrary to Davlin's assertion, the instruction would not permit the jury to find Davlin guilty of second degree murder if the jury found that, without an intent to cause Ligenza's death, Davlin simply set in motion events that happened to cause her death.

We conclude that the elements instruction was not erroneous in the respect challenged, and we further conclude that the fact counsel did not object to the instruction did not prejudice Davlin's defense.

"Malice" in Information and in Elements Instruction.

Davlin asserts that the district court erred in failing to quash the information because it did not allege malice and in failing to include malice as an element of second degree murder in its instructions to the jury. Davlin argues that the trial court erred by retroactively applying this court's holding in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Davlin concedes that this court decided this question against him in the appeal of his first conviction. See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). We reject this assignment of error, both on its merits for the reasons set forth in *Davlin, supra*, and on the further ground that our holding in that opinion is the law of the case. See, *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

Motion to Continue Trial.

Davlin asserts that the district court abused its discretion by failing to grant his motion to continue the trial. We find no abuse of discretion.

Davlin moved for a continuance to allow time to locate two witnesses who had testified at the first trial. Davlin concedes that his motion to continue trial was an oral motion rather than a written motion as required under Neb. Rev. Stat. § 25-1148 (Reissue 1995). However, he notes that this court has stated that failure to comply with § 25-1148 "is but a factor to be considered in determining whether a trial court abused its discretion in denying a continuance." *State v. Santos*, 238 Neb. 25, 28, 468 N.W.2d 613, 615 (1991). Davlin further argues that if his motion was properly denied because it was an oral rather than a written motion, then trial counsel provided ineffective assistance by failing to make a written motion.

A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Gales, supra*. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

Davlin asserts in his appellate brief that one of the two witnesses who had testified at the first trial could have been helpful to the defense because his fingerprints were found on a can of charcoal lighter fluid in the commons area of the house in which Ligenza was killed. He further asserts that the other witness was "thought to" have seen a " 'mystery man' " who was at Ligenza's apartment on the night she was killed. Brief for appellant at 26. He also generally asserts that both men were "possible" alibi witnesses. *Id.*

We conclude that the district court did not abuse its discretion when it denied a continuance. At the trial level, Davlin generally described the testimony the witnesses could have provided as noted above, and he made the assertion that they "might" have exculpatory information. Upon questioning by the court, Davlin's counsel could not give any reason to think that the witnesses would be found within days or weeks if a continuance

were granted. We further note that Davlin's argument that the witnesses could have provided helpful testimony is belied by the fact that although both witnesses were apparently unavailable, he did not attempt to enter any of their prior testimony into evidence at this trial. We reject this assignment of error, and we conclude that trial counsel's failure to file a written motion did not prejudice Davlin's defense.

Testimony of Fire Experts.

Davlin asserts that the district court erred in admitting into evidence the opinions of the fire investigators Scurto and Nehe. He argues that their opinions as to the cause and nature of the fire were not admissible because the fire investigation methodology they used was not valid in the abstract and was not applied in a reliable manner. We conclude that the district court did not abuse its discretion in admitting the testimony of Scurto and Nehe.

We note first that the State argues that law-of-the-case doctrine bars consideration of the issue in this appeal because the issue of admissibility of Scurto's and Nehe's testimony was decided against Davlin in the appeal from the prior trial. However, because an expert's testimony and opinions may vary from one trial to the next, we determine that the law-of-the-case doctrine does not necessarily preclude a foundational challenge to an expert's testimony in a retrial. We further note that in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), we adopted the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and ordered that such standards be applied prospectively for trials commencing on or after October 1, 2001. The *Daubert/Schafersman* standards were not applicable in Davlin's first trial which commenced in March 2000, *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002), but were applicable in the retrial which commenced in January 2005. We therefore consider the district court's decision of the *Daubert/Schafersman* challenge to the expert testimony presented at retrial.

[12,13] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006). 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. *Mason, supra*. When the opinion involves scientific or specialized knowledge, this court held in *Schafersman, supra*, that we will apply the principles of *Daubert, supra*. 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*.

[14] A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. *Mason, supra*. The court must first determine whether the witness is qualified to testify as an expert by reference to 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 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 probative value of the expert evidence and the opinions related thereto are substantially outweighed by the danger of unfair prejudice, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). See *Mason, supra*.

The district court in this case noted that as to both Scurto and Nehe, Davlin did not challenge their individual qualifications, nor did he challenge the scientific validity or reliability of the methodology they employed. Instead, Davlin's challenge was to whether the methodology was applied in a reliable manner. The

court noted that Scurto and Nehe both generally followed the guidelines set forth in the National Fire Protection Association's publication No. 921 (NFPA 921). The court noted that although neither Scurto nor Nehe rigidly followed the guidelines of NFPA 921, such guidelines were intended as a model, and that Scurto's and Nehe's deviations did not affect the reliability of their opinions. The district court found that a reasonable basis existed for Scurto's and Nehe's opinions as to the origin of the fire and as to whether the fire was intentionally set. The court did not find a reasonable basis for, and therefore did not allow, Scurto's opinion as to the duration of the fire.

On appeal, Davlin criticizes the methodology followed by Scurto and Nehe as well as their application of such methodology. The district court noted that Scurto and Nehe generally followed the guidelines of NFPA 921. As we have recently noted, NFPA 921 has been accepted as a valid and reliable methodology. See *Perry Lumber Co. v. Durable Servs.*, 271 Neb. 303, 710 N.W.2d 854 (2006). Davlin does not appear to have challenged the scientific validity and reliability of the methodology set forth by NFPA 921 at the trial level, and nothing in the record calls such validity and reliability into question. As we noted in *Perry Lumber Co.*, the *Daubert* and *Schafersman* standards do not require that courts " ' " 'reinvent the wheel each time that evidence is adduced,' " ' " 271 Neb. at 311, 710 N.W.2d at 861, and because Davlin did not present evidence to call the methodology into question, a *Daubert* analysis of the methodology itself was not necessary in this case.

Rather than challenging the methodology, Davlin challenged Scurto's and Nehe's application of such methodology. The district court in this case thoroughly reviewed the procedures used by Scurto and Nehe and, as noted above, found that a reasonable basis existed for their opinions as to the origin of the fire and as to whether the fire was intentionally set. Although Davlin asserts that Scurto and Nehe failed to properly follow certain aspects of the NFPA 921 methodology, our review of the district court's consideration of procedures followed by Scurto and Nehe leads us to conclude that the district court did not abuse its discretion in determining that they had reasonable bases for the opinions the court allowed them to give and that the district

court therefore did not abuse its discretion by admitting the opinion testimony of Scurto and Nehe. We reject this assignment of error.

Testimony of Pathologists.

Davlin also asserts that the district court erred in rejecting his *Daubert* challenges and admitting the opinions of the pathologists, Porterfield, Okoye, and Bennett. He argues that their opinions regarding the cause of Ligenza's death failed to meet *Daubert* standards because they did not apply their methodologies in a reliable manner. We conclude that the district court did not abuse its discretion in admitting the testimony of Porterfield, Okoye, and Bennett.

Similar to its response with respect to the challenges to the fire experts' testimony, the State asserts that consideration of Davlin's challenges to the pathologists' testimony is barred by the law-of-the-case doctrine because the same evidence was challenged in the first appeal. However, as noted above with regard to the fire experts, an expert's testimony and opinions may vary from one trial to the next, and the law-of-the-case doctrine does not necessarily preclude a foundational challenge to the expert's testimony in a retrial. We therefore consider Davlin's challenges to the pathologists' testimony.

Davlin does not challenge the doctors' qualifications, nor does he question their methodologies. Instead, he claims that there were failings in the manner in which Porterfield conducted the original autopsy and that such failings made his opinions unreliable. He further argues that the failings in Porterfield's autopsy also made Okoye's and Bennett's opinions unreliable because, in addition to their own failings, they based their opinions in part on Porterfield's findings.

The district court in this case thoroughly reviewed the procedures used by Porterfield, Okoye, and Bennett and, as noted above, found that a reasonable basis existed for their opinions. We note that much of Davlin's argument challenging the reliability of Porterfield's examination is based on the testimony of a pathologist who testified at Davlin's first trial and critiqued Porterfield's procedures and opinions. Although testimony critiquing the procedures and opinions of another expert is an acceptable form of expert testimony, *Perry Lumber Co. v. Durable*

Servs., 271 Neb. 303, 710 N.W.2d 854 (2006), a reasonable critique of an expert's procedures and opinion does not necessarily indicate that such procedures were so unreliable as to make the expert's opinion testimony inadmissible. Our review of the district court's consideration of the procedures followed by Porterfield, Okoye, and Bennett leads us to conclude that the district court did not abuse its discretion in determining that they had reasonable bases for their opinions and that the court therefore did not abuse its discretion by admitting the opinion testimony of Porterfield, Okoye, and Bennett. We reject this assignment of error.

Tape Recordings of Davlin's Statements to Police Detectives.

Davlin asserts that the district court erred in admitting tape recordings of three conversations Davlin had with police detectives Breen and Barksdale. He argues that his statements were not relevant and that even if they were relevant, they should have been excluded pursuant to Neb. Evid. R. 403, § 27-403, because the probative value of the statements was substantially outweighed by the danger of unfair prejudice. We conclude that the evidence was relevant and that it was not unfairly prejudicial.

Davlin argues that the tape recordings were not relevant because in the conversations, he did not make an admission of guilt, and because his statements shed no light on how Ligenza died or whether Davlin had the opportunity to cause her death. He further argues that even if the statements were relevant, they were unfairly prejudicial because they contained statements that portray him in a negative light. These statements included the following: a reference to the fact that Davlin had been in the military during the Vietnam War, references to Davlin's attempts to hire a private investigator to look into Ligenza's death, references to the fact that Davlin had gone on a "flower drive" to raise money to buy flowers for Ligenza's funeral, and a reference that Davlin had found a lock of Ligenza's hair after her death and had kept it as a keepsake. He argues that these statements portray him as "a rather strange individual who seemed to be discussing peculiar subject matter" with the police. Brief for appellant at 43.

[15] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat.

§ 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, § 27-403, and a trial court's decision under these evidentiary rules will not be reversed absent an abuse of discretion. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). We conclude that the district court did not abuse its discretion in admitting the statements. Davlin's conversations with the police detectives included discussion of various matters concerning Davlin's activities preceding and following Ligenza's death. The conversations also included discussion regarding Davlin's relationship with Ligenza. We determine that the court could reasonably have concluded that these discussions were relevant to establish that Davlin had the opportunity to commit the crime, in that he was near Ligenza's apartment at the time she was killed and the fire was started and that he had a motive to commit the crime because of the nature of his relationship with Ligenza. We also determine that the court could reasonably have concluded that the tape recordings were not unfairly prejudicial. The portions of the conversations which Davlin claims portray him as a "strange" individual were of minor duration in the context of the entire conversations and do not portray Davlin in such a negative light that they would be unfairly prejudicial in the context of the entirety of the statements. We conclude that the district court did not abuse its discretion by admitting the tape recordings into evidence, and we reject this assignment of error.

Admission of Photographs and Slides of Ligenza's Body.

Davlin asserts that the district court erred in admitting into evidence photographs of the back of Ligenza's body, photographs taken during the autopsy, and slides of the autopsy photographs. Davlin argues that the photographs were not relevant and that even if they were relevant, their admission was unfairly prejudicial. We conclude that the photographs were relevant and that their admission was not unfairly prejudicial.

Davlin argues that the photographs were not relevant because none of the photographs showed physical injury to the throat and they therefore did not support the State's theory that Ligenza was strangled. He also argues that the photographs were not necessary to establish identity, nor were they relevant to any issue regarding the condition of the body or the nature of the injuries or to establishing malice or intent. Davlin argues that

even if the photographs were relevant, their probative value was outweighed by the danger of unfair prejudice. He asserts that the shocking, gruesome, and grisly nature of the photographs of a burned corpse would be so emotionally overwhelming as to override the jury's objectivity.

[16,17] The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). Likewise, in a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999).

We determine that the photographs were relevant. The photographs of the back of the body were used to illustrate testimony by the pathologists who stated that the fact that the back was not as badly burned as the front and sides indicated that the fire started after Ligenza was dead because otherwise she would have attempted to escape and the burns would have been more evenly distributed. The slides and photographs from the autopsy were used to illustrate portions of the testimony of the doctor who performed the autopsy. The photographs illustrated observations made by the doctor from which he formed opinions regarding the cause and timing of death. The testimony of the pathologists and the doctor who performed the autopsy was relevant because it indicated that Ligenza's death was not caused by the fire, therefore supporting the State's theory that Davlin strangled Ligenza before he started the fire, and because it contradicted an alternative finding that the fire caused Ligenza's death. The photographs supported the testimony and were relevant to the same issues.

Because the photographs and slides were relevant to important issues in the case, we conclude that the district court did not abuse its discretion in determining that their probative value

outweighed their potential prejudicial effect and in admitting the photographs and slides into evidence. We reject this assignment of error.

Verdict Form.

Davlin asserts that the verdict form returned by the jury was insufficient as a matter of law because it was unclear and ambiguous. Davlin concedes that no objection was made at trial to the verdict form, but he additionally argues ineffective assistance of counsel for failure to object. We conclude that the verdict form was sufficient and that the fact counsel did not object to the verdict form did not prejudice Davlin's defense.

Davlin argues that the verdict form was insufficient because it simply stated that Davlin was guilty of second degree murder and it did not name Ligenza as the victim. Davlin notes that there was evidence that Ligenza was pregnant at the time of her death, and he argues that the jury might have found that he had caused "a death other than the death of Tamara Ligenza." Brief for appellant at 48.

We do not find the verdict form in this case to be indefinite or uncertain. The verdict form states that the jury found Davlin "guilty of second degree murder." Although the form does not name the victim, the jury instructions made clear to the jury that the charges involved the death of Ligenza. The court instructed the jury that in order to find Davlin guilty of second degree murder, it needed to find that he caused the death of Ligenza. Therefore, the verdict form stating that the jury found Davlin guilty of second degree murder sufficiently indicates that the jury found Davlin had caused the death of Ligenza. We reject Davlin's assignment of error and conclude that the fact counsel did not object to the verdict form did not prejudice his defense.

Sentencing.

Davlin asserts that the district court abused its discretion when it imposed a sentence of life imprisonment simply because the court had given the same sentence after his first conviction. We conclude that the court did not abuse its discretion in sentencing Davlin.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

State v. Aldaco, 271 Neb. 160, 710 N.W.2d 101 (2006). Second degree murder is a Class IB felony, § 28-304(2), and a sentence of life imprisonment is within the statutory limits for a Class IB felony, Neb. Rev. Stat. § 28-105 (Reissue 1989). Therefore, we will not disturb the sentence absent an abuse of discretion.

Davlin argues that the court felt that it was bound to give the same sentence it gave after his first conviction and that the court therefore did not consider all relevant factors. Davlin notes that at sentencing, the court stated, "I do not believe that I am in a position to change the sentence that I imposed previously for the same offense." Davlin argues that this statement indicates that the court did not consider the appropriate factors and did not use its discretion but simply gave the same sentence that was given in the first trial.

We do not read the court's statement as indicating that the court felt it was bound to give the same sentence as in the first trial. To the contrary, the court stated:

> Having regard for the nature and circumstances of the crime and the history, character and condition of . . . Davlin, the Court finds that imprisonment of . . . Davlin is necessary for the protection of the public and because a lesser sentence would depreciate the seriousness of his crime and promote disrespect for the law.

We read the court as stating that after reviewing the presentence report prepared for this trial and considering all the relevant factors, the court had not seen anything that would change its conclusion that a sentence of life imprisonment was appropriate. The court used its discretion and simply noted that it had come to the same conclusion it had come to in the first trial. We therefore conclude that the court did not abuse its discretion in sentencing Davlin.

Other Assignments of Error.

In his brief on appeal, Davlin makes additional arguments not repeated here in which he claims error at the retrial. We have considered all such claims and find them to be without merit.

Ineffective Assistance of Counsel.

Finally, Davlin asserts that he was denied effective assistance of trial counsel. Davlin gives various reasons why trial counsel

was ineffective, including, inter alia, failure to adequately investigate and prepare the case, failure to adequately cross-examine and confront witnesses, failure to present certain witnesses, and failure to adequately challenge certain evidence. We conclude that each of Davlin's claims of ineffective assistance of counsel not previously commented on in this opinion either is without merit or is not capable of adequate review on direct appeal.

[18] To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). Certain of Davlin's allegations of ineffective assistance of counsel have been considered herein with respect to other assignments of error, specifically, trial counsel's purported failures to object to the elements instruction, to file a written motion to continue, and to object to the verdict form. We have determined that such purported failures did not prejudice Davlin's defense, and we therefore reject Davlin's claims of ineffective assistance with respect to such claims.

[19,20] Davlin has different counsel on appeal, and 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. See *id*. 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. *Id*.

In order to preserve his claims of ineffective assistance of counsel, Davlin has raised various claims which he recognizes require an evidentiary hearing and cannot be resolved on direct appeal. We conclude that the record on appeal is not sufficient to review Davlin's claims of ineffective assistance, other than those claims rejected above, and we therefore do not address Davlin's remaining claims of ineffective assistance of counsel.

CONCLUSION

Having rejected each of Davlin's assignments of error, we affirm Davlin's conviction and sentence.

AFFIRMED.

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

IRVING F. JENSEN COMPANY, INC., AN IOWA CORPORATION, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

719 N.W.2d 716

Filed August 11, 2006. No. S-04-1315.

1. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
2. **Contracts: Claims.** The State Contract Claims Act governs all contract disputes between the claimant and the State of Nebraska or a Nebraska state agency.
3. **Contracts: Claims: Time.** Neb. Rev. Stat. § 81-8,306 (Reissue 2003) of the State Contract Claims Act provides that contract claims permitted under the act are barred unless the claim is filed with the risk manager within 2 years of the time at which the claim accrued.
4. **Limitations of Actions.** Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
5. **Actions: Contracts: Time: Damages.** A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to. This is so even though the nature and extent of damages may not be known.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded.

Thomas H. DeLay, of Jewell, Collins & DeLay, for appellant.

Jon Bruning, Attorney General, and Martel J. Bundy for appellee.

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

McCormack, J.

NATURE OF CASE

Irving F. Jensen Company, Inc. (Jensen), appeals the decision of the district court which found that Jensen's petition against the State of Nebraska, Department of Roads (DOR), was time barred.

BACKGROUND

In April 1998, Jensen and the DOR entered into a written contract whereby Jensen was the contractor on two construction projects commonly known as the Tarnov Wetland Site and US-81 South of Tarnov projects. The Tarnov Wetland Site, which is the subject of this action, involved the excavation and construction of a wetlands mitigation site.

With regard to the construction of the wetlands mitigation site, the contract provided:

> The contractor will be required to remove 300,000 cubic meters of material from the wetland bank as "Excavation, Borrow" for [the US-81 South of Tarnov project]. The remainder of the material will be removed and paid for as "Excavation" for [the Tarnov Wetland Site].
>
> The bottom one-half meter of the mitigation site and the 3 pond areas will be at or near the water table. This material will be wet and may be wasted at the site shown in the plans, not to exceed elevation 465.0, as directed by the engineer. This material would be suitable for use in the embankment, but will be slow to dry.

The contract also included by reference the "1996 Metric Supplemental Specifications to the Standard Specifications for Highway Construction Series 1985" (the Specifications), published by the DOR. Section 102.08 of the Specifications required in pertinent part that the bidder carefully examine the site of proposed work before submitting a proposal. Section 102.08 further provided that the submission of the bid was considered conclusive evidence that the bidder examined the site and was satisfied with and understood the conditions to be encountered in performing the work and other requirements of the contract.

Before commencing construction of the wetlands mitigation site, Jensen and its subcontractor for excavation of the site, J.P. Theisen & Sons, Inc. (Theisen), determined that the soil conditions were wetter than anticipated at the time of bidding. As a

result of the wetter conditions, Jensen and Theisen determined that excavation measures different from those anticipated at the time of bidding would need to be employed and that the excavation of the site would be more costly than originally anticipated.

Section 104.02 of the Specifications provided as follows:

> (1) Differing site conditions:
>
> a. The Contractor shall notify the Department in writing of the specific differing conditions before they are disturbed, before any additional work is performed, and as soon as the condition is discovered.
>
> (1) This includes subsurface or latent physical conditions which differ materially from those indicated in the contract.
>
> (2) It also includes unknown physical conditions of an unusual nature and differing materially from those ordinarily encountered and generally recognized as inherent in the work provided in the contract.
>
> b. Before the site is disturbed or the affected work is performed, the Engineer shall be given an opportunity to investigate.
>
> c. Upon written notification, the Engineer will investigate the differing conditions. If the Engineer determines that they do materially differ and will result in an increase or decrease in the cost or time required for the performance of any work under the contract, a cost (excluding loss of anticipated profits) or time allowance adjustment will be made. The Engineer will make a written determination, and the contract will be modified in writing if a change is warranted.
>
> d. No contract adjustment which results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice.

Section 109.05(9)(a) of the Specifications provided:

> In any case where the Contractor feels that extra compensation is due for "extra work" or material neither clearly covered in the contract nor ordered in writing by the Engineer, the Contractor shall give written notice of his/her intention to make a claim for such extra compensation before the work begins.

In the spring of 1998, Jensen and Theisen notified the DOR that conditions were wetter than anticipated at the time of bidding

and requested additional payment. Jensen and Theisen also notified the DOR that it intended to seek damages for the "extra work" not included in its original bid.

In May and July 1998, the DOR conducted two meetings regarding the wetlands mitigation site project. An engineer for the DOR testified that at the May meeting, the president of Theisen inquired into how the DOR had determined the volume of material to be removed from the wetlands mitigation site and the water table information. The engineer testified that he advised Jensen and Theisen that the DOR had estimated this information based on soil borings that the DOR had taken. The engineer testified that Jensen and Theisen did not request the information from the soil borings at that time. At the July meeting, Jensen again informed the DOR that it believed the water table was higher than stated in the contract and that in order to complete the project, it would have to proceed differently at an additional cost.

On July 29, 1998, the DOR informed Jensen that site conditions were not different from those indicated in the contract, and it denied in writing Jensen's claim for additional compensation. Thereafter, rather than suffer liquidated damages, which Jensen faced under the terms of the contract if it did not complete the project within the authorized timeframe, Theisen began the excavation of the wetlands mitigation site. Following the completion of the excavation, Jensen calculated the extra costs it incurred as a result of the alleged differing site conditions and on September 7, 2000, made a claim for payment in the amount in excess of that allowed under the contract. On May 22, 2001, the DOR denied Jensen's claim. Thereafter, the DOR issued its final acceptance of the work and completion of the project. Under the terms of the contract, the DOR reserved the right to make changes to the contract or changes to the estimated compensation until final acceptance.

On August 29, 2001, Jensen filed a claim against the DOR under the State Contract Claims Act, Neb. Rev. Stat. § 81-8,302 et seq. (Reissue 2003), with the State Claims Board. The DOR objected to the submission of Jensen's claim to the State Claims Board, and the claim was withdrawn from consideration, allowing for the filing of a claim with the district court pursuant to

§ 81-8,305(3). In its operative petition, Jensen asserted causes of action for breach of contract, fraudulent misrepresentation, negligent misrepresentation, and breach of implied covenant of good faith and fair dealing. The DOR denied liability and raised as an affirmative defense the statute of limitations. The matter was then bifurcated, and a bench trial was held on the issue of the statute of limitations.

On October 29, 2004, the district court entered an order dismissing Jensen's claims. With regard to Jensen's breach of contract claim, the district court found that the breach of contract occurred and that Jensen's cause of action accrued in July 1998 when the DOR first denied Jensen's claim for additional compensation. The court stated that Jensen's claim was not filed with the risk manager until July 2001, and thus it concluded that Jensen's breach of contract action and claim for breach of implied covenant of good faith and fair dealing were time barred. With regard to Jensen's misrepresentation claims, the district court determined that the alleged misrepresentations occurred when the proposal plans and special provisions were published for bid solicitation and Jensen had signed the contract. It concluded, however, that Jensen was unaware of the misrepresentation at that time, and, applying the discovery rule, found that Jensen was put on inquiry notice in approximately May 1998, when Jensen acknowledged knowing that the site conditions differed from those represented by the DOR. Accordingly, the district court held that Jensen's claims for misrepresentation were also barred. Jensen appealed the denial of its petition, and we granted Jensen's petition to bypass review by the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Jensen assigns, consolidated and restated, that the district court erred in determining that Jensen's claims for breach of contract, fraudulent misrepresentation, negligent misrepresentation, and breach of implied covenant of good faith and fair dealing were barred by the statute of limitations.

STANDARD OF REVIEW

[1] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision

of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997).

ANALYSIS

Breach of Contract

Jensen claims that the district court erred in dismissing its breach of contract claims against the DOR.

[2,3] The State Contract Claims Act governs all contract disputes between the claimant and the State of Nebraska or a Nebraska state agency. § 81-8,303. Section 81-8,306 of the State Contract Claims Act provides that contract claims permitted under the act are barred unless the claim is filed with the risk manager within 2 years of the time at which the claim accrued.

[4,5] Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to. *Snyder v. EMCASCO Ins. Co., supra*; *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995). This is so even though the nature and extent of damages may not be known. *Cavanaugh v. City of Omaha*, 254 Neb. 897, 580 N.W.2d 541 (1998); *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989).

Jensen contends that the district court erred when it determined that the breach of contract occurred in 1998 when the DOR denied the existence of differing site conditions and first refused Jensen's request for additional compensation. We agree and instead find that the breach of contract occurred on May 22, 2001, when the DOR denied Jensen's claim for extra compensation for extra work resulting from the differing conditions.

Under the terms of the contract, in order for it to be modified to account for the differing conditions, Jensen was required to notify the DOR of the differing site conditions before they were disturbed, before any additional work was performed, and as soon as they were discovered. See § 104.02(1)(a) of the Specifications.

In order to make a claim for extra work not covered under the contract or ordered in writing by the engineer, Jensen was required to give written notice of its intention to make a claim for such extra compensation before work began. See § 109.05(9)(a) of the Specifications.

Jensen adhered to both of these requirements. In 1998, before excavation of the wetlands site commenced, Jensen notified the DOR of the differing site conditions, requested additional compensation for the additional work anticipated as a result of those conditions, and, pursuant to § 109.05(9)(a), notified the DOR of its intent to seek damages for the "extra work."

Section 104.02(2) of the Specifications provided that upon notification of the differing site conditions, the engineer would investigate the differing conditions and make a written determination. The engineer did so and, in July 1998, denied Jensen's request for additional compensation based upon its determination that site conditions did not differ. The DOR claims that it was at this point that the statute of limitations commenced on Jensen's breach of contract claim. We disagree.

Under § 109.01(1)(a)(2) of the Specifications, the DOR's ultimate obligation was to pay Jensen for "the actual quantity of work performed in accordance with these Specifications." Regardless of whether the DOR breached the contract by refusing to modify the contractual obligations or expressly authorize extra work, the DOR's failure to pay Jensen for extra work that Jensen performed in compliance with the Specifications would, if proved, constitute a separate and distinct breach of contract that did not accrue until the DOR refused Jensen's claim for extra compensation. In other words, Jensen alleges that it performed extra work for which the DOR has refused to pay—a breach of § 109.05(9)(a), the extra-compensation provision. We, therefore, conclude that Jensen has stated a cause of action for a breach of contract occurring on May 22, 2001.

Because the breach of contract occurred within 2 years of the filing of Jensen's claim, we determine that the district court erred in finding that Jensen's breach of contract claim was time barred and that the court committed reversible error by dismissing the claim.

Remaining Assignments of Error

Jensen's complaint also alleges that the act constituting the breach of the implied warranty of good faith and fair dealing was the DOR's determination in 1998 that site conditions did not differ from those described by the DOR in the contract. Jensen's claim was not filed with the risk manager until August 29, 2001. We, therefore, conclude that this claim of Jensen is time barred. We have also reviewed Jensen's assignment of error regarding misrepresentation and find it to be without merit.

CONCLUSION

For the reasons discussed above, we reverse the district court's order with regard to its dismissal of Jensen's breach of contract claim. As to Jensen's claims for fraudulent and negligent misrepresentation and breach of implied covenant of good faith and fair dealing, we affirm the district court's decision that those claims were time barred. We remand the cause for further proceedings consistent with this opinion.

Affirmed in part, and in part
reversed and remanded.

Wright, J., not participating.

National American Insurance Company, appellant, v. Constructors Bonding Company, doing business as Constructors Bonding and Insurance, appellee.

719 N.W.2d 297

Filed August 11, 2006. No. S-05-251.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.

4. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

William M. Lamson, Jr., and Michele E. Young, of Lamson, Dugan & Murray, L.L.P., and R. Patrick Gilmore for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

WRIGHT, J.

NATURE OF CASE

National American Insurance Company (NAICO) sued Constructors Bonding Company, doing business as Constructors Bonding and Insurance (CBI). NAICO alleged that CBI negligently breached its duty to inform NAICO of certain facts which would have affected the issuance of surety bonds that NAICO provided for a third party, C.R. Welshiemer Co. (Welshiemer). The district court sustained CBI's motion for summary judgment and dismissed NAICO's complaint. NAICO appeals.

SCOPE OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

FACTS

On March 15, 2000, NAICO and CBI entered into an agreement that authorized CBI to receive and accept applications for

surety bonds covering classes of risks authorized by NAICO. In October, the vice president of CBI wrote to NAICO, stating that he wanted to build a "book of business" with NAICO and that he was seeking a new bonding company for Welshiemer. The vice president stated that CBI was terminating its relationship with Mid-State Surety, a bonding company that had previously provided surety bonds to Welshiemer.

After NAICO was required to pay certain claims on the surety bonds it had issued for Welshiemer, NAICO filed an action against CBI, alleging that CBI had negligently breached its duty to NAICO by not informing it of facts which would have impacted NAICO's decision to write certain surety bonds for Welshiemer. NAICO claimed that it relied upon CBI's professional skill and expertise in the area of bond applications and that based upon CBI's representations, NAICO issued several surety bonds for Welshiemer. NAICO alleged that CBI had also negligently failed to inform NAICO of claims against Welshiemer involving Mid-State Surety.

NAICO asserted that CBI was under a duty to inform NAICO of any claims activity, including unresolved, outstanding, or pending claims, made by another surety against Welshiemer. NAICO argued that because it relied upon CBI to inform NAICO of any claims, it did not independently investigate whether any other claims had been made against Welshiemer at the time the surety bonds covering Welshiemer were issued. NAICO claimed that CBI knew or should have known of the claims against Welshiemer with Mid-State Surety and that CBI was under a duty to disclose such information.

On September 15, 2000, CBI had received a memorandum from Mid-State Surety which contained criticisms or concerns regarding Welshiemer's financial status. NAICO issued its first surety bond for Welshiemer on December 27. The surety bond was prepared and executed by CBI pursuant to its power of attorney for NAICO. Between January and March 2001, CBI received copies of stop-payment letters written by Mid-State Surety concerning claims on surety bonds written for Welshiemer.

When the operative complaint in this case was filed, the surety bonds issued by NAICO had claims against them for which NAICO had been required to pay $857,908.45. NAICO alleged

that it did not discover Welshiemer's problems with Mid-State Surety until November 2002 and that it would not have issued the surety bonds to Welshiemer had it known of these claims.

In its answer, CBI alleged that any duties between NAICO and CBI were covered by the terms of the March 15, 2000, agreement. CBI denied that it was negligent in any manner in the performance of its duties or in handling the Welshiemer surety bonds. CBI further alleged that if NAICO sustained any damages, it was because of NAICO's negligence in handling the Welshiemer surety bonds. CBI alleged that NAICO failed to properly investigate Welshiemer before issuing the surety bonds, failed to follow recognized underwriting standards, and failed to follow its own underwriting standards in issuing the surety bonds.

In its summary judgment order, the district court determined the following: (1) CBI was an independent contractor or independent insurance agent representing numerous surety bonding companies; (2) CBI's authority to act for NAICO was limited to receiving and accepting applications for surety bonds, providing notice of claims affecting NAICO surety bonds, and collecting premiums; (3) the decision to write surety bonds for a particular contractor for a specific project was solely that of NAICO; (4) NAICO did its own underwriting of potential risks and did not expect CBI to do its underwriting; and (5) NAICO recognized that CBI was acting for the contractor.

The district court found that NAICO's representatives had admitted in deposition and by affidavit that CBI was authorized to bind NAICO to surety bonds " 'following underwriting approval by NAICO.' " The court concluded that the agreement did not extend binding authority to CBI and that NAICO had its own underwriting department and could make the final decision on whether to issue a particular surety bond on an application for a bond submitted by CBI. The court further concluded that the agreement did not expressly impose any duty with respect to disclosure of information regarding Welshiemer and that if those duties were described in the underwriting rules and regulations referred to in the agreement, such rules and regulations were not part of the record and were not provided to CBI during the period in question.

The district court sustained CBI's motion for summary judgment, and NAICO's complaint was dismissed. NAICO timely appeals.

ASSIGNMENT OF ERROR

NAICO assigns as error the district court's sustaining of CBI's motion for summary judgment.

ANALYSIS

[3] The issue is whether CBI had a duty to disclose to NAICO certain facts which CBI knew or had reason to know related to claims against Welshiemer prior to the time that NAICO issued surety bonds for Welshiemer. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005).

NAICO argues that CBI was dutybound to provide it with information so NAICO could underwrite surety bonds. NAICO claims the evidence establishes that there are material facts in dispute which support its claim that CBI's failure to disclose such information to NAICO caused it to suffer losses on the surety bonds issued to cover Welshiemer.

The record shows that CBI had received at least two stop-payment letters from Mid-State Surety, in which it demanded that no further payments be made on certain Welshiemer surety bonds. CBI did not furnish the stop-payment letters to NAICO, even though NAICO was writing surety bonds for Welshiemer at the time CBI received the letters. The president of CBI testified that such letters from Mid-State Surety regarding the stop-payment letters were important information that a surety company would want to know.

A former vice president at NAICO testified that NAICO relied on its agents, such as CBI, to inform NAICO as to a surety bond applicant's character. He stated that companies like CBI also developed information that a surety would need in order to make a proper analysis of a contractor. The former vice president admitted that the contract between NAICO and CBI established the relationship between NAICO and CBI as it related to surety bonds. He stated that pursuant to such agreement, NAICO

reserved the right to decide whether it would accept an application for a surety bond and whether to write a surety bond on a particular project. To his knowledge, NAICO had not sent any underwriting rules or regulations to CBI.

David Alsip, the current vice president of surety bonds for NAICO, testified that after an application for insurance on a surety bond was submitted, the decision whether to issue the particular surety bond rested with NAICO. An agent's authority was limited to soliciting business, collecting premiums, and activities of that nature. The decision to insure a particular risk was made by NAICO. Alsip admitted that CBI was an independent contractor, as opposed to an employee of NAICO. Under the agreement, CBI had authority to receive and accept applications for surety bonds. CBI would then forward those applications to NAICO for its review and analysis. After NAICO conducted its review and analysis pursuant to its guidelines, NAICO made the decision as to whether to write a surety bond on a contractor for a particular project. According to Alsip, the decision whether to write or to decline a particular surety bond was made by NAICO personnel only and NAICO did its own underwriting work. Between December 27, 2000, and August 8, 2001, NAICO wrote 10 surety bonds for Welshiemer.

Alsip further stated that in evaluating whether to issue surety bonds for a contractor, NAICO reviewed the contractor's financial statements, tax returns, work programs, working capital, equity, and other factors. Upon acceptance, NAICO required the contractor to submit an application for each job for which the contractor wanted to be bonded. NAICO conducted two reviews: one to accept the contractor and one to accept the specific project involved. NAICO's policies required its own underwriters to conduct a thorough review of a contractor's prior experience with other companies, but Alsip did not believe this was done in Welshiemer's case. NAICO's underwriting guidelines provided that the final assessment of the financial condition of the contractor applying for a surety bond was a function to be performed by NAICO. NAICO's internal guidelines also provided that it must have three fiscal yearend statements from the contractor applying for the surety bond. Alsip could not recall if such statements were obtained before NAICO began writing surety bonds for Welshiemer.

Alsip testified that as an underwriter for NAICO, he had rejected eight of Welshiemer's applications for surety bonds. NAICO rejected the first application on November 14, 2000. Another application by Welshiemer was rejected because Alsip felt the proposed job was too large for the company. He stated that NAICO was trying to get Welshiemer to restructure some of its debt. Between October 8 and 23, 2001, Alsip rejected seven applications by Welshiemer for surety bonds.

NAICO obtained Dun & Bradstreet reports on Welshiemer, beginning on October 13, 2000, with periodic updates. It also obtained indemnity agreements from Welshiemer, as well as from the company owner and his wife personally. Alsip stated these indemnity agreements provided the backbone of the relationship between NAICO and Welshiemer. NAICO did its own internal financial analysis of Welshiemer as a part of its underwriting process. According to Alsip, NAICO had never asked CBI about the claim history of Welshiemer and had never contacted any of Welshiemer's prior sureties.

[4] In summary, the question is whether CBI had a duty to disclose to NAICO information regarding stop-payment letters that it had received from Mid-State Surety which showed that Mid-State Surety had halted payments on certain Welshiemer surety bonds. In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005). In the case at bar, the district court found that a duty to disclose the information concerning Welshiemer could arise only if there was a fiduciary, special, or confidential relationship between NAICO and CBI.

NAICO argues that there is at least a material issue of fact regarding whether CBI was an agent of NAICO. It is upon this claim of agency that NAICO asserts CBI had a fiduciary relationship and, hence, a duty to inform it of "any claims activity, including unresolved, outstanding or pending claims, to another surety regarding Welshiemer."

In *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992), we noted that whether an insurance intermediary is an

agent of the insured or the insurer is generally a question of fact. We therefore examine the record to determine if there is a material issue of fact regarding whether CBI was the agent of NAICO.

NAICO authorized CBI to solicit and accept proposals for business. Pursuant to section II of the agreement between the parties, CBI's authority was limited to receiving and accepting applications for surety bonds covering classes of risks that NAICO would from time to time authorize. CBI was required to comply with NAICO's underwriting rules and regulations, but the record does not disclose that NAICO's rules and regulations were ever provided to CBI.

The undisputed facts establish that CBI was an independent contractor. Alsip, NAICO's vice president of surety bonds, testified that CBI was an independent contractor. Evidence showed that CBI had contractual relationships with more than 10 surety companies. CBI's authority to act for NAICO was limited to receiving and accepting applications for surety bonds, providing notice of claims affecting NAICO bonds, and collecting premiums. The record does not establish that CBI was an agent of NAICO, which would create a fiduciary relationship between them.

Having concluded that CBI was an independent contractor, we must determine whether CBI had any duty to disclose to NAICO the information about Welshiemer. In *Jones v. Stewart*, 62 Neb. 207, 210, 87 N.W. 12, 13 (1901), this court stated: "[W]here persons are dealing with each other upon equal terms, and no confidential relation exists between them, neither is bound to disclose superior information he may have respecting the transaction, and, in the absence of fraud or deception to induce the contract, the courts can afford no relief." As a general rule, a party to a transaction does not have a duty to disclose facts to the other unless there is a fiduciary relationship between the parties. *Midland Nat. Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404 (Minn. 1980). The record does not establish that a fiduciary relationship existed between NAICO and CBI, and there is no allegation that CBI's conduct was fraudulent or that the information it furnished to NAICO was false.

The relationship between NAICO and CBI was defined by the "Surety Producer Agreement." This document, which was

prepared by NAICO, described the obligations between the parties. Absent a fiduciary relationship, the duty to disclose to NAICO any information concerning Welshiemer would have to arise under the terms of the agreement. We conclude that no duty to provide such information was set forth in the agreement.

The facts are undisputed that it was NAICO's decision whether to issue the surety bonds for a particular contractor based upon its own underwriting of potential risks and that NAICO did not expect or require CBI to complete any underwriting on its own. NAICO's representatives testified that CBI was authorized to bind NAICO to surety bonds following underwriting approval by NAICO. Although the agreement provided that CBI would comply with NAICO's underwriting rules and regulations, it was undisputed that NAICO did not provide any rules or regulations to CBI.

Alsip testified that NAICO's guidelines provided for underwriters to make a thorough review of a principal's prior experience with other companies, but he did not believe that this was done in Welshiemer's case. He stated that NAICO's guidelines provided that it would assess a contractor's financial condition and that NAICO would obtain three fiscal yearend statements before issuing surety bonds for a contractor. The guidelines also provided for reference checks with a contractor's major subcontractors, suppliers, architects, and engineers and that prior sureties would be contacted if there was any conflict in other information obtained.

NAICO conducted its own debt-to-equity analysis of Welshiemer after it was advised that the ratio was too high. NAICO reduced Welshiemer's aggregate bonding limit after the first claim against Welshiemer was submitted. It received Dun & Bradstreet financial reports on Welshiemer and obtained an indemnity agreement from Welshiemer, as well as from the company's owner and his wife. NAICO never inquired of CBI regarding Welshiemer's claim history.

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. *Wise v. Omaha Public*

Schools, 271 Neb. 635, 714 N.W.2d 19 (2006). We conclude that CBI had no duty to disclose to NAICO information regarding Welshiemer's relationship with Mid-State Surety. There is no genuine issue of material fact which would establish that CBI had a duty to disclose such information to NAICO. The district court did not err in granting CBI's motion for summary judgment and dismissing NAICO's complaint.

CONCLUSION

NAICO has not established that CBI had a duty to disclose to NAICO any claims activity involving Welshiemer and another surety. The district court correctly sustained CBI's motion for summary judgment and dismissed NAICO's complaint.

AFFIRMED.

CONNOLLY and MCCORMACK, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
LUCKY I. IROMUANYA, APPELLANT.

719 N.W.2d 263

Filed August 11, 2006. No. S-05-367.

1. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. ____: ____. The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
3. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
4. **Criminal Law: Witnesses.** A defendant's attempted intimidation of a witness is evidence of the defendant's conscious guilt that a crime has been committed and is a circumstance from which an inference may be drawn that the defendant is guilty of the crime charged.
5. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.

6. **Evidence: Words and Phrases.** Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
7. **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.
8. **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.
9. **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.
10. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
11. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
12. **Trial: Appeal and Error.** The responsibility for conducting a trial in an orderly and proper manner for the purpose of ensuring a fair and impartial trial rests with the trial court, and its rulings in this regard will be reviewed for an abuse of discretion.
13. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned. Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed.
14. **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.
15. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
16. **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.
17. ____: ____: ____. 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.
18. **Intent.** From circumstances around a defendant's voluntary and willful act, a finder of fact may infer that the defendant intended a reasonably probable result of his or her act.
19. **Homicide: Intent: Weapons.** Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death.

20. **Jury Instructions: Appeal and Error.** 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.
21. ____: ____. 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.
22. **Criminal Law: Homicide.** Malice is not an element of second degree murder.
23. **Self-Defense: Jury Instructions.** A trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense.
24. **Self-Defense.** To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances.
25. **Self-Defense: Evidence: Jury Instructions.** If the trial evidence does not support a claim of self-defense, the jury should not be instructed on it.
26. **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.
27. **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.
28. **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.
29. ____: ____. An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
30. **Sentences.** A judge should take into account facts obtained from victim impact statements in imposing a sentence, as he or she should consider all facts pertinent to sentencing, but a judge must not and cannot allow the judgments and conclusions of the victim's family to be substituted for those of the court in imposing a sentence.
31. ____. 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, and motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

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

Korey L. Reiman, of Reiman Law Firm, and John Stevens Berry, Sr., John S. Berry, and Jason M. Caskey, Senior Certified Law Student, of Berry & Kelley Law Firm, for appellant.

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

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

STEPHAN, J.

During a party at a Lincoln, Nebraska, residence in the early morning hours of April 25, 2004, Lucky I. Iromuanya fired a single shot from a derringer handgun which wounded Nolan Jenkins and killed Jenna Cooper. Following a jury trial, he was convicted on one count of attempted second degree murder and a related count of use of a weapon to commit a felony in connection with the injury to Jenkins, and one count of second degree murder and a related count of use of a weapon to commit a felony relating to the death of Cooper. He was sentenced to 25 to 35 years' imprisonment on the attempted second degree murder conviction and 10 to 20 years' imprisonment on the related weapons conviction. He received a sentence of not less than life imprisonment nor more than life imprisonment on the second degree murder conviction and 10 to 20 years' imprisonment on the weapons conviction related to that charge. The four sentences were ordered to run consecutively. Iromuanya appeals from these convictions and sentences.

I. FACTS

On the evening of April 24, 2004, University of Nebraska-Lincoln students Cooper and Lindsey Ingram hosted a barbeque and party at the Lincoln residence they shared. Both women were members of the university's varsity soccer team. The evening was planned because spring soccer season had just ended and final examinations were approaching. An initial group of 10 to 15 people gathered in the early evening hours. In addition to Cooper and Ingram, this group included several of their current teammates and a former teammate who was visiting Lincoln. Also present were Jenkins, who was dating Ingram, and Jenkins' cousin. Throughout the evening hours, most of those present consumed alcohol, and some played "drinking games." Witnesses testified that the party attendees were drinking and having a good time but that the party was not "wild."

After midnight, more people arrived at the party in several groups. One group included Carrington Hartley and Nathanial Buss, who both practiced against the women's soccer team and were acquainted with Cooper and other players. Another group included Margaret Rugh, who had been given directions to the party by someone who accompanied Hartley and Buss. Rugh had been acquainted with Iromuanya for several weeks. Shortly after her arrival, Rugh called Iromuanya and asked him to come to the party. Iromuanya and his friend Aroun Phaisan, who had both been at a downtown bar from approximately 11:45 p.m. until closing time, arrived at the party at approximately 1:30 a.m. in Phaisan's vehicle. Each had consumed one beer at the bar. When they arrived at the party, Phaisan parked his vehicle across the street from the house. Rugh greeted them outside the residence, took them inside, and introduced them to others who were present. Phaisan testified that during this time, people at the party were friendly to him and Iromuanya.

The events leading to the shooting began in the living room of the residence where a shot glass collection belonging to Cooper was displayed on open shelves. Several persons, including Phaisan and Iromuanya, had been standing in the general vicinity of the collection. Phaisan testified that he observed a Caucasian male handling some of the shot glasses. Buss testified that one of his friends showed him some shot glasses he had taken from the collection and asked for the keys to the vehicle which Buss had driven to the party. Buss gave him the keys. Buss knew that the collection belonged to either Ingram or Cooper, so he advised Ingram that "somebody," a male, had taken some shot glasses from the collection. Buss did not identify the individual by name but generally pointed him out to Ingram. Angered, Ingram confronted the individual. There is conflicting testimony as to whether this confrontation occurred in the house or in the driveway to the house. In any event, the individual admitted taking the shot glasses and placing them in a vehicle, and Ingram demanded that they go to the vehicle to retrieve them. In the meantime, Buss had gone to another room where Cooper was talking on a telephone and informed her of the incident. Upon hearing this, Cooper ended her telephone conversation and went outside. Buss followed shortly thereafter.

Inside the house, Phaisan had heard mention of the missing shot glasses and became concerned that he and Iromuanya might be accused of the theft because they had been standing in the area of the collection and were unknown to most of the persons at the party. He told Iromuanya that they should leave, and they exited the residence several minutes later. As Ingram was walking to the vehicle to retrieve the shot glasses, she observed Phaisan and Iromuanya leaving the house "very quickly." Knowing that they had been standing in the same area of the living room as the individual who had taken the glasses, and uncertain whether they had had any involvement in the incident, Ingram told them "very assertively" that no one could leave until everything was returned.

Adam Ellingson, who had been invited to the party by his friend Jenkins, had arrived at approximately 9 p.m. Later in the evening, he observed a group of people whom he did not know, including Phaisan and Iromuanya, standing in the general vicinity of the shot glass collection in the living room. He did not see anyone handle or take the shot glasses. At approximately 2 a.m., Ellingson went outside to check the windows of his vehicle, which was parked on the street in front of the house. Standing in the front yard, he observed a male whom he did not know come out of the house, followed closely by Ingram. Ellingson heard Ingram say that she wanted the shot glasses returned. During this conversation, Ellingson observed another male approaching the person to whom Ingram was talking and also observed Iromuanya and Phaisan come out of the house. He heard Ingram say that no one could leave until the shot glasses were returned. At that point, Ellingson went to the front door and called to Jenkins to come outside. He then returned to the front yard.

When Jenkins came out of the house, he grabbed Iromuanya's sweatshirt with both hands, pushing him backward, and asked if he had stolen items from the house. Iromuanya tried to push Jenkins away, stating that he had done nothing, and the two scuffled for approximately 5 seconds. Ellingson stepped in and placed Iromuanya in a bear hug to keep him from Jenkins, and Phaisan ultimately separated Iromuanya from Ellingson. Hartley also helped by pushing Jenkins backward. As they were being separated, Iromuanya punched Jenkins in the back of the head.

Ellingson testified that Iromuanya denied taking anything or doing anything wrong and said Ellingson could search him. Ellingson replied that he did not wish to search Iromuanya, but asked him not to leave until the shot glasses had been retrieved. Buss, who was also present during this confrontation, told Jenkins that Iromuanya had not taken the shot glasses.

After the scuffle, Brooke Bredenberg, one of the party guests, told Jenkins that Iromuanya was not the person who had taken the shot glasses. Seeing that Iromuanya "appeared to be very, very angry and appeared . . . like he still wanted to fight," Ingram approached him and told him several times to "calm down" and "chill out." Ingram testified that Iromuanya appeared not to pay attention to her and was focused on Jenkins, who was behind her. Iromuanya did not become calm. At that point, Ingram and Jenkins went to retrieve the shot glasses from the vehicle.

Buss, Hartley, Ellingson, and Cooper remained with Iromuanya. Phaisan was also in the area. Iromuanya was very upset, jumping around and repeating phrases such as "you don't know me" and "[d]on't mess with me." Iromuanya repeatedly asked who had run up on him. Observing that Iromuanya "was obviously pretty perturbed, pretty upset," Hartley approached him in an effort to calm him. Hartley testified that Iromuanya did not appear to be afraid, but, rather, was "riled up. I mean I would parallel his behavior to a fighting cock. He was all riled up, he was ready to go basically." Hartley believed that because he and Iromuanya were members of the same racial minority group and because Hartley knew the people at the party and Iromuanya did not, Hartley could provide Iromuanya with assurance that "nobody would be messing with him, that he would be fine and he would calm down." Hartley tried to talk to Iromuanya, but Iromuanya was still focused on Jenkins and was still yelling. Iromuanya tried to get around Hartley, so Hartley grabbed his arm. Iromuanya gave Hartley a "cold stare," and Hartley released his grasp. Iromuanya kept moving back and forth and Hartley had to move correspondingly in order to keep himself between Iromuanya and the direction of Jenkins.

At that point, Cooper stepped in and attempted to speak to Iromuanya in order to calm him, but he continued yelling in

the direction that Jenkins had gone. Buss had informed Cooper that Iromuanya had not taken the shot glasses. Iromuanya eventually acknowledged Cooper and seemed to become calmer, but then Cooper mentioned the shot glasses and he again became upset, stating that he had not taken them. Buss attempted to calm him down, telling him that everyone knew that he had not taken the shot glasses, but Iromuanya remained agitated. Buss then attempted to move Cooper away from Iromuanya. By that time, approximately 5 minutes had elapsed since the initial confrontation between Iromuanya and Jenkins.

Jenkins then walked back across the yard toward Iromuanya. He was walking at a normal pace, and some witnesses testified that his hand was outstretched, as if he intended to shake hands with Iromuanya. Jenkins testified that this was his intent. Bredenberg observed that Iromuanya appeared to become more upset as Jenkins approached, and she yelled to Iromuanya to "chill out, he's trying to apologize." Phaisan, who was nearby, heard this and thought there was no longer any reason for concern. Both Phaisan and Bredenberg thought Jenkins appeared calm as he approached Iromuanya. Hartley, who was also near Iromuanya, saw Jenkins coming and was initially worried that Iromuanya might think Jenkins was coming to hit him. But then Hartley heard Bredenberg shout out that Jenkins was coming to apologize and assumed that Iromuanya heard it too.

Jenkins approached within one step of Iromuanya, but not as aggressively as in the previous confrontation. Iromuanya then shoved Jenkins in the chest with both hands, knocking Jenkins backward. Hartley quickly stepped in between them and put his hands on Iromuanya's ribcage, and Phaisan reached his arm out in front of Jenkins to restrain him. Phaisan's back was to Iromuanya. Ellingson observed Iromuanya remove a handgun from the pocket of his trousers, "point it right at" Jenkins, who was approximately 5 feet away, and fire. Hartley, who was facing Iromuanya with his back to Jenkins, heard an explosion and then observed the handgun in Iromuanya's hand. Hartley grabbed Iromuanya's hand and pointed it toward the street. Hartley testified that at this point, Iromuanya yelled, "[Y]eah, what's up now? I'm the ghetto." Iromuanya and Phaisan then

ran to Phaisan's vehicle and drove away. Ellingson gave conflicting testimony regarding Hartley's position with respect to Iromuanya when the shot was fired.

After the shooting, Jenkins grabbed his head and walked toward the house. Buss testified that when he and Cooper had walked away from Iromuanya, he heard the shot and realized that Cooper had also been hit. He called out for emergency assistance. It was later determined that a single bullet entered Jenkins' left temple and exited above his left ear. The bullet then pierced Cooper's neck, causing her death.

When they were several blocks away from the scene of the shooting, Phaisan asked Iromuanya what had happened and he replied that he thought he had hit someone. At about that same time, Phaisan's cellular telephone rang and he recognized the caller as Rugh. Phaisan gave the telephone to Iromuanya and heard him say, "Charles Allen" and "you don't know me." Rugh had been in the house at the time of the shooting, but when she became aware of it, she suspected that Iromuanya was involved because she knew that he had carried a handgun in the past. Rugh testified that during their telephone conversation after the shooting, Iromuanya told her to say that his name was "Charles Allen" and that she did not know him. She testified that she told Iromuanya that he had shot a girl and that he said, " 'A girl?' " She stated at trial that she was not sure whether he was surprised that a girl was shot or that someone was shot. Four days after the shooting, however, Rugh told an investigator that when she told Iromuanya that he shot a girl, his response was " 'not a guy?' "

Phaisan drove to his apartment and told Iromuanya to go home. Phaisan then went in and told his girl friend that Iromuanya had shot at someone and missed and hit some girl. Although at trial Phaisan stated that he did not know Iromuanya's intent at the time of the shooting, he admitted that immediately after the incident, it "made sense to [him]" Iromuanya had shot at someone, and that he thought Iromuanya had shot at Jenkins.

After initially identifying Iromuanya as "Charles Allen," Rugh informed police of his identity. Police were then dispatched to the Lincoln address where Iromuanya resided. Iromuanya was observed leaving the house, and after being engaged in conversation, he told officers he had been home all night. Iromuanya

was patted down, and the weapon was found inside his right front jeans pocket. Chain of custody testimony at trial established that the handgun was in the same condition from the time of seizure until ballistics testing was conducted by Mark S. Bohaty, a criminalist employed by the Nebraska State Patrol crime laboratory. Bohaty identified the weapon as a single action .32-caliber derringer with two barrels in an "over and under" configuration. Bohaty testified that the weapon could only be fired by the separate steps of first cocking the hammer all the way back and then pulling the trigger. Test firing revealed a trigger pull of 9.5 pounds, which Bohaty described as "quite heavy" compared to other handguns. The shot which struck Jenkins and killed Cooper was fired out of the bottom barrel of the gun. There was an unfired round in the top barrel on which the primer was dimpled, indicating a misfire, although Bohaty could not say that this occurred on the day of the shooting. Test firing established that the derringer was relatively accurate.

Iromuanya did not testify or present any evidence in his behalf. The State offered videotaped and handwritten statements given by Iromuanya to Lincoln police following his arrest on the day of the shooting. The statements were received without objection. In the videotaped statement which was played for the jury, Iromuanya described the initial confrontation with Jenkins and Iromuanya's anger at being accused of stealing the shot glasses. He admitted that he intentionally fired the shot, but stated that he did not intend to kill either Jenkins or Cooper and that he was attempting to shoot "to the side" in order to scare Jenkins away from him. In his handwritten statement, Iromuanya acknowledged that a girl told him that she knew he did not steal anything and that when "the guy," presumably Jenkins, approached him the second time, the girl said, "don't worry he just wants to apologize." He further wrote that when the approaching male remarked that Iromuanya had punched him, Iromuanya pushed him back and drew the weapon. When the male continued to approach, Iromuanya stated, "I shot by him hoping to scare him and his friends."

In his closing argument, defense counsel characterized the issue to be decided by the jury as "murder or manslaughter." He argued that the evidence did not establish that Iromuanya acted

with the requisite intent to constitute second degree murder and attempted second degree murder, and he urged the jury to return a guilty verdict on a single count of manslaughter. The jury found Iromuanya guilty of all four charged offenses, and he was subsequently sentenced.

Additional facts will be set forth in our discussion of specific assignments of error.

II. ASSIGNMENTS OF ERROR

Iromuanya assigns, consolidated, restated, and renumbered, that the trial court erred in (1) receiving testimony suggesting that Iromuanya was involved with a gang; (2) permitting Cooper's mother to testify and receiving certain portions of her testimony over his relevance objections; (3) not taking steps to shield jurors from "memorial buttons" worn by members of Cooper's family; (4) giving jury instruction No. 8, pertaining to the element of intent; (5) refusing to give three jury instructions requested by the defense; (6) failing to set aside the convictions based on insufficiency of the evidence; (7) ordering consecutive sentences on the two convictions for use of a weapon to commit a felony; and (8) imposing excessive sentences.

III. ANALYSIS

1. Claimed Suggestion of Street Gang Involvement

(a) Additional Facts

Phaisan testified that after the initial altercation, he saw Iromuanya being "pushed back" away from Jenkins by another person. When asked if the other person was Hartley, Phaisan responded that he thought so, but that the person had a different hairstyle on the night of the shooting than at the trial. The State then asked Phaisan whether Iromuanya had a different hairstyle that evening, to which Phaisan responded, "I think his hairstyle — I think it was braided . . . ." At that point, Iromuanya objected on the basis of relevance, raising concerns that the prosecution was trying to insinuate that he was in a gang, and the objection was sustained. Iromuanya did not move to strike, make a motion for a mistrial, or ask that the jury be instructed in any manner with respect to the remark.

During Rugh's testimony, she was asked who, other than Phaisan, Iromuanya normally hung out with. The trial court overruled Iromuanya's relevancy objection, and Rugh testified that Iromuanya told her that "he hung — I don't know if he hung out with his — like went and played basketball with his boys. . . . He went and played basketball with his boys, his friends."

Rugh testified that after the shooting, she lied to police and told them Iromuanya's name was "Charles Allen" because Iromuanya told her to and she was scared. During her testimony, she stated that she did not go back to her dormitory room the night of the shooting because she was "scared." When pressed by the State to explain what she was afraid of, she said she was afraid that somebody, "maybe some of [Iromuanya's] friends," would do something to her. Iromuanya objected to this testimony, arguing it was irrelevant and more prejudicial than probative. The objections were overruled.

(b) Standard of Review

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005); *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[2] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Davlin, ante* p. 139, 719 N.W.2d 243 (2006); *State v. Sanders, supra*; *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

(c) Resolution

[3] The testimony about Iromuanya's hairstyle on the day of the shooting was clearly irrelevant, as there was no issue in

this case as to his identity. The district court properly sustained the relevance objection. Because Iromuanya did not request additional action from the court, he cannot now complain of error in that regard. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Reed*, 266 Neb. 641, 668 N.W.2d 245 (2003). Moreover, it is unclear how the mere fact that a person wears his hair in braids implicates gang involvement. The record includes nothing to correlate braided hair with street gangs; indeed, it includes no specific reference to street gangs whatsoever. Thus, Phaisan's answer standing alone could not have resulted in prejudice to Iromuanya.

Rugh's testimony concerning her knowledge of who Iromuanya "hung out with" was relevant to the issue of how well she knew him, which would affect the credibility of her testimony at trial and her statements made the night of the shooting. In addition, her brief reference to "his boys," standing alone, was not prejudicial to Iromuanya. Rugh quickly explained that by "boys" she meant "friends." There is nothing in the record to correlate the phrase "his boys" with street gangs. During the cross-examination of Ellingson in which defense counsel sought to establish his friendship with Jenkins, counsel asked, "Nolan's one of your boys, right?" The only inference with respect to the phrase which can be drawn from this record is that it is used by young people in reference to male friends.

[4] The testimony that Rugh was afraid of Iromuanya's friends was relevant to the issue of her credibility, which was challenged during trial. Rugh's trial testimony differed from the statements she had previously given to police regarding the shooting. In her prior statements, she stated that when she told Iromuanya that he had shot a girl, he replied, " 'not a guy?' " At trial, however, she testified that Iromuanya was surprised that someone was shot, not that a girl was shot. The fact that she was afraid after speaking to Iromuanya after the shooting is relevant to the jury's evaluation of which of Rugh's versions of events to believe. In addition, her testimony supports an inference that Iromuanya attempted to intimidate her into giving false information to the police soon after

the shooting had occurred. In this respect, we have held that a defendant's attempted intimidation of a witness is evidence of the defendant's conscious guilt that a crime has been committed and is a circumstance from which an inference may be drawn that the defendant is guilty of the crime charged. See *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). See, also, *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004). The trial court did not abuse its discretion in receiving this testimony.

Alternatively, Iromuanya argues that the combined effect of the admission of the testimony regarding his hairstyle, his "boys," and Rugh's fear of his friends amounted to prejudicial error because it suggested that he had gang ties. In support of this argument, he cites *Thomas v. State*, 625 So. 2d 1149 (Ala. Crim. App. 1992), and *People v. Parrott*, 40 Ill. App. 3d 328, 352 N.E.2d 299 (1976). *Thomas* was reversed by the Supreme Court of Alabama in *Ex parte Thomas*, 625 So. 2d 1156 (Ala. 1993). In reversing the case, however, the Alabama Supreme Court agreed with the premise that purposefully elicited testimony directly indicating gang membership was highly prejudicial to a defendant. *Ex parte Thomas, supra*. In that case, the state directly asked a witness about the defendant's gang ties in a case involving a driveby shooting after the defendant had specifically raised the impropriety of such questions. The Alabama Supreme Court found this was prejudicial error. *Id*. Similarly, in *Parrott*, the court held that in an action charging illegal sale of guns, it was irrelevant and highly prejudicial to allow evidence that the sale was made to street gangs. The instant case differs significantly from both *Thomas* and *Parrot* because, as noted above, the record includes no explicit reference to street gangs. We conclude that the evidence, even considered cumulatively, does not support Iromuanya's assignments of error.

2. Testimony of Mary Ellen Cooper

(a) Additional Facts

The State's first witness was Dr. Reginald Burton, a trauma surgeon who treated Cooper for the gunshot wound. Asked to identify a person shown receiving medical treatment in a photograph, Burton testified: "That appears to be [Cooper]." The

photograph was received into evidence without objection. With respect to a similar photograph, Burton testified, "that would be [Cooper] again." That photograph was also received into evidence without objection.

Mary Ellen Cooper (Ellen) of Louisville, Kentucky, is Cooper's mother. Prior to trial, Iromuanya filed a "Motion to Exclude Witness" in which he asked the court to determine the propriety of permitting Ellen to testify at trial. The motion was argued at a pretrial hearing and was denied. On the first day of trial, the State called Ellen as its third witness. Before Ellen testified, defense counsel stated that he was renewing the objection made in the pretrial motion "to preserve my [rule] 403 objection." The trial court made no specific ruling at that time, but permitted the State to call Ellen as a witness.

Ellen testified without objection that Cooper was born on September 28, 1982, and that she also has a son who was 2 years older than Cooper. Over a relevance and rule 403 objection, Ellen testified that Cooper's interests included various sports, that she was involved in many school activities, and that she was "just an incredibly, incredibly well-rounded person." Also over a defense objection, Ellen testified as to Cooper's reasons for coming to the University of Nebraska-Lincoln to play soccer and the course of study which Cooper was pursuing at the university. In overruling the objection to this testimony, the court noted that it was relevant to show "how [Cooper got] here and that this was a soccer party and the people that are at the party and why they're there."

Without objection, Ellen explained Cooper's hobby of collecting shot glasses. She also testified that she left Lincoln on the morning of April 24, 2004, after staying with Cooper and Ingram for approximately 10 days. She testified that she had a telephone conversation with Cooper that evening, but the court sustained a hearsay objection regarding its substance.

Ellen testified that she returned to Lincoln on the afternoon of April 25, 2004, after learning of the shooting, and that she was taken to the hospital to see Cooper. At this point, Iromuanya's counsel objected and a sidebar conference was held, during which the prosecutor advised the court that he intended to have Ellen identify one of the photographs which was received during

Burton's testimony. The court indicated that it would allow the testimony for that purpose. When shown the photograph, Ellen responded, "That's my baby girl Jenna." In a sidebar conference immediately thereafter, defense counsel made the following statement:

> I'd like the record to reflect that, that was fairly dramatic there at the end and [Ellen] broke down into tears as [counsel] showed her a picture that's been received into evidence. So, for the record, I'm objecting to when [Ellen] started breaking down and crying. And I think this is also going to relate to my [rule] 403 motion, as she goes back there and sits in the courtroom. So that's all I have to say. Thank you.

Neither the prosecutor nor the trial court responded to this statement. There was no motion for a mistrial nor any further direct or cross-examination, and Ellen was excused and released from the sequestration order.

In denying Iromuanya's motion for new trial, the trial court further explained its rulings with respect to the testimony of Ellen as follows:

> A review of the record reflects that most of the testimony of Ellen Cooper was received without objection. Many of the objections made during her testimony were sustained. This court attempted to limit her testimony to areas relevant to the issues in the trial. The court notes that Ellen Cooper was one of the first witnesses called during the trial. She testified that Jenna Cooper had been collecting shot glasses for some time, similar to her aunt's Kentucky Derby glass collection. The evidence at trial revealed that shot glasses had been stolen from Jenna Cooper's house. There was a strong reaction from Jenna Cooper and her roommate Lindsay Ingram when it was discovered that the shot glasses had been stolen. This testimony put perspective on the reaction of the victims as these weren't just glasses that had been stolen, they were glasses that were part of a collection that had strong sentimental value to Jenna Cooper. The testimony about Jenna Cooper being a soccer player and an engineering major simply put in perspective the reason for the party at her house and explained who was there and why. It was the end of the Spring season and just before finals. The court notes that

> there was no objection to the testimony about the shot glass collection. There was no objection to Ellen Cooper testifying that she had been to Lincoln to watch Jenna Cooper play soccer and had left on April 24 to return to Louisville. There were no objections to numerous other questions asked of Ellen Cooper concerning returning to Lincoln after she had been informed that Jenna Cooper had been shot. [Iromuanya] did object to Ellen Cooper identifying her daughter in a photograph. The court notes that this photograph had already been received into evidence during the testimony of the treating physician. There was no testimony that the treating physician knew Jenna Cooper prior to her being brought to the hospital. . . . The court notes that this was a photograph of Jenna Cooper at the hospital which had already been received into evidence, and was not a family photograph or a "Senior" picture. The State bears the burden of proving beyond a reasonable doubt each and every element of the crime charged, including proving the identity of the victim. (It is customary to have someone who knows the victim to identify the body.) As noted, Ellen Cooper was one of the first witnesses to be called after the doctor testified. If no one who knew Jenna Cooper identified the photograph, could an argument be made that the State had failed to identify the victim since the doctor did not know whether the person he treated was Jenna Cooper or some other gunshot victim? Arguably, circumstantial evidence could have been introduced to prove identity or some other witness could have later identified Jenna Cooper. If it was unnecessary to allow Ellen Cooper to identify her daughter as the person in the photograph, it is the conclusion of the court that this was not so prejudicial as to have denied [Iromuanya] his right to a fair trial, and does not require this court to grant him a new trial. The court notes that on numerous occasions the court reminded the jur[ors] that they must not let emotion, sympathy, or prejudice play a role in their deliberations.

(b) Standard of Review

The exercise of judicial discretion is implicit in determinations of relevancy under rule 401 and prejudice under rule 403,

and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005); *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

(c) Resolution

The district court did not err in overruling the defense motion to preclude Ellen's testimony in its entirety. Our rules of evidence provide: "Every person is competent to be a witness except as otherwise provided in these rules." Neb. Evid. R. 601, Neb. Rev. Stat. § 27-601 (Reissue 1995). The issue on appeal, therefore, is whether the district court erred in overruling defense objections and permitting Ellen to testify on specific substantive issues as to which error has been assigned.

(i) Identification

[5] In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999). Here, there was no objection to admission of the photographs depicting Cooper or the identification by the physician who treated her. The issue is whether the district court erred in permitting additional identification by a family member.

Iromuanya urges that we adopt a rule similar to that followed by Florida courts which precludes a family member of the deceased from identifying a homicide victim unless there are independent reasons to call the family member. See *Welty v. State*, 402 So. 2d 1159 (Fla. 1981). The basis for this rule, as articulated by the Supreme Court of Florida, is to "assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt." *Id.* at 1162. Iromuanya contends that application of this rule to the instant case would have and should have prevented Ellen from giving the emotional identification of Cooper.

We have not previously addressed the specific issue of whether a family member should be precluded from identifying the victim of a homicide case. Numerous jurisdictions other than Florida

have no per se rule against family member identification of murder victims. See, *People v. Combs*, 34 Cal. 4th 821, 101 P.3d 1007, 22 Cal. Rptr. 3d 61 (2004); *Grayson v. State*, 824 So. 2d 804 (Ala. Crim. App. 1999); *People v. Harris*, 177 Misc. 2d 903, 679 N.Y.S.2d 242 (1998); *Matchett v. State*, 941 S.W.2d 922 (Tex. Crim. App. 1996); *State v. Moseley*, 336 N.C. 710, 445 S.E.2d 906 (1994); *State v. Buzzard*, 110 Idaho 800, 718 P.2d 1238 (Idaho App. 1986). These jurisdictions instead generally apply principles of rules 401 and 403 in determining the admissibility of the testimony on a case-by-case basis. See *id*. In doing so, they note that family member identification testimony is relevant because it is the State's burden to prove the identity of the victim and that such burden need not be met simply by a stipulation between the parties. See *id*. We note that even under the Florida rule, identification of a homicide victim by a family member can be considered harmless error in certain circumstances, as was the case in *Welty v. State, supra.*

We decline to adopt a bright-line rule on this issue, and instead, we align with those jurisdictions which utilize rules 401 and 403 to determine whether identification of a homicide victim by a family member is permissible under specific circumstances. The fact that Ellen became emotional when she made the identification must be considered in this analysis. However, Ellen's testimony was brief and occurred on the first day of a 9-day trial in which she was the third of 29 witnesses. Jurors were instructed at the beginning of jury selection and again upon final submission of the case that they should not permit sympathy or prejudice to influence their verdict. As noted, our review of this issue is for abuse of discretion. Based upon our review of the record and the reasoning given by the district court for receiving the identification testimony, we cannot conclude that it abused its discretion in doing so.

(ii) Cooper's Background and Accomplishments

Iromuanya argues that Ellen's testimony regarding Cooper's background and accomplishments was irrelevant and "did nothing but create bias and prejudice and had no relationship to . . . guilt or innocence." Brief for appellant at 35. His argument is premised upon the principle that a defendant " 'has the right to

expect that his fate will be fixed with reference only to the circumstances of the crime with which he is charged.' " *People v. Hope*, 116 Ill. 2d 265, 278, 508 N.E.2d 202, 208, 108 Ill. Dec. 41, 47 (1986), quoting *People v. Gregory*, 22 Ill. 2d 601, 177 N.E.2d 120 (1961).

[6] Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). Portions of Ellen's testimony about Cooper were clearly relevant to the circumstances of the crimes with which Iromuanya was charged. The fact that Cooper came to the University of Nebraska-Lincoln to play soccer was relevant to the circumstances under which she and Iromuanya came to be in the same place at the same time and was established by the testimony of many witnesses in addition to Ellen. The testimony that Cooper's hobby was collecting shot glasses, to which no objection was made, was relevant to the circumstances which led directly to the fatal shooting.

However, Ellen's testimony regarding Cooper's other hobbies and interests and Cooper's aspirations as a soccer player does not fall within the legal definition of relevancy in this criminal prosecution. Neither does Ellen's testimony that Cooper was a good student and a well-rounded person, as none of this evidence makes it more or less probable that Iromuanya committed the crimes with which he was charged. Accordingly, the trial court erred in receiving this evidence.

[7-9] 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. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Neal*, 265 Neb. 693, 658 N.W.2d 694 (2003). 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. Robinson, supra*; *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. *State v. Freeman, supra.*

We conclude that the error was harmless. The record reflects undisputed evidence that Iromuanya fired the shot which wounded Jenkins and killed Cooper. The critical issue at trial was whether he did so with an intent to kill Jenkins so as to constitute attempted second degree murder and second degree murder under the doctrine of transferred intent. On this point, there was testimony from several eyewitnesses regarding the circumstances of the shooting, including detailed accounts of Iromuanya's words and actions before and after the shot was fired. The jury also saw and heard Iromuanya's account of the events in the statements he gave to police. The jury was instructed that it was to determine intent from Iromuanya's "words and acts and all of the surrounding circumstances." While legally irrelevant, Ellen's brief testimony regarding Cooper's background had no prejudicial bearing on the issue of intent.

[10] In addition, witnesses other than Ellen testified without objection that Cooper was an accomplished student-athlete who enjoyed a good relationship with her teammates. It is certainly possible that the jury could have felt sympathy for Cooper, just as any jury could feel sympathy for the innocent victim of a homicide. That is the reason why jurors are routinely instructed, as was done in this case, that they must not allow sympathy or prejudice to influence their verdict. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). We conclude from the entire record that the verdict was surely unattributable to the erroneously received testimony of Ellen, and the error was therefore harmless.

(iii) Attendance at Trial

[11] The remaining assignment of error with respect to Ellen is that the trial court erred in allowing her to be present in the courtroom after her testimony was concluded. This assignment, however, is not argued in Iromuanya's brief. Errors that are assigned but not argued will not be addressed by an appellate

court. *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

3. "Memorial Buttons" Worn by Spectators

(a) Additional Facts

The record reflects that jury selection lasted 2 days. Prior to the resumption of voir dire examination on the second day, and out of the presence of the prospective jurors, Iromuanya's counsel informed the court:

> I think some of the family [are] starting to wear buttons with Jenna Cooper's face or photo or something like that. . . . So, I am going to move in limine that we exclude all nice buttons or stuff like that, or with Lucky Iromuanya's or Nolan Jenkins' picture on them. The jury is going to be coming in and seeing this stuff pretty quickly.

The prosecutor commented that he did not notice anything, "but I didn't talk to them this morning." When the court asked who was wearing a button, Iromuanya's counsel stated, "I thought the lady that was just talking." The prosecutor replied, "She has an overcoat and I think she's taken her overcoat off." The court then asked to see counsel in chambers, but we are presented with no verbatim record of that conference. When the verbatim record resumed, Iromuanya's counsel made the following statement:

> Your Honor, as I was walking out, I noticed that at least one, I believe, family member of Jenna Cooper's has some buttons on her coat. I am moving in limine to exclude those buttons . . . .
>
> Again, for the record, as I was walking out, I believe a female lady in the gallery has a coat with a couple of pictures. I believe that to be Jenna Cooper, I didn't look real close. Then, once we took a break, apparently she went outside, was around the jury again, walked back in with her coat on, so those buttons were visible.

When asked for case law in support of his position, Iromuanya stated:

> I don't have any case law, except if it continues, if we're heading down this direction, at some point if there's an influence on the jury, yes, there's going to be a mistrial. But, do I have any specific case law as to buttons? No, but

> I can find case law that when sympathy overcomes the jury or anybody tries to persuade the jury, that's a mistrial.

Iromuanya did not move for a mistrial on these grounds during the trial. The court took the oral motion in limine under advisement, but the record does not reflect a ruling on the motion.

In his motion for new trial and a supporting affidavit received over the State's objection, Iromuanya's counsel stated that he recalled that "it was not until the third day of trial after the entire panel had been exposed to this inadmissible evidence that the Court requested visitors not wear these memorials in the Courtroom." In denying the motion for new trial, the trial court stated: "There is no evidence before the court that any juror ever saw any of these 'buttons' or that any juror was influenced in any way by any button."

(b) Standard of Review

[12] The responsibility for conducting a trial in an orderly and proper manner for the purpose of ensuring a fair and impartial trial rests with the trial court, and its rulings in this regard will be reviewed for an abuse of discretion. See *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

(c) Resolution

[13] The colloquy between the trial court and counsel regarding the wearing of buttons by spectators occurred during the jury selection proceedings, before the jury was sworn and presentation of evidence began. Because the record does not reflect the court's ruling on the oral motion in limine, we are unable to review it. It is incumbent upon the appellant to present a record which supports the errors assigned. *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001). Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

[14] Although defense counsel indicated during jury selection that the wearing of buttons could lead to a mistrial, no such motion was filed during the trial. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable

result, assert the previously waived error. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004); *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

The inadequacy of the record to support this assignment of error is illustrated by comparison to *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005), *cert. granted sub nom. Carey, Warden v. Musladin*, 547 U.S. 1069, 126 S. Ct. 1769, 164 L. Ed. 2d 515 (2006), the single case cited by Iromuanya in support of his argument. *Musladin* involved a murder prosecution in which the defendant contended he killed the victim in self-defense. There was evidence that on each day of the 14-day trial, at least three members of the victim's family sat in the front row of the gallery, directly behind the prosecution and in clear view of the jury, wearing buttons several inches in diameter displaying a photograph of the victim. The trial court denied a defense request to instruct the spectators to refrain from wearing the buttons. A divided panel of the Ninth Circuit Court of Appeals held that the defendant was entitled to a writ of habeas corpus because the wearing of the buttons created an unacceptable risk that impermissible factors came into play, which was inherently prejudicial. See *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

In contrast to the detailed evidence of spectators wearing buttons in *Musladin*, the record in this case gives us little information on which to evaluate Iromuanya's assigned error. We do not know how many spectators wore buttons, where they were seated in the courtroom, the size and specific content of the buttons, or the precise nature of the trial court's ruling with respect to the oral motion made by Iromuanya's counsel. From the scant record before us, we cannot conclude that the trial court abused its discretion with respect to the wearing of buttons by spectators.

4. Jury Instructions

(a) Additional Facts

Iromuanya's counsel objected to the district court's proposed jury instruction regarding intent because of the following language included in the instruction: "You may infer, but are not required to infer, that a person intended a reasonably probable

result of his or her act." The objection was overruled, and the instruction was given to the jury as instruction No. 8.

At the instruction conference, Iromuanya's counsel presented a proposed instruction asserting Iromuanya's position that his acts made him guilty of "involuntary manslaughter, not murder and attempted murder," and further stating:

> Unless you are convinced beyond a reasonable doubt that this is false, you must find [Iromuanya] not guilty of the attempted murder and murder charges. If a reasonable doubt exists whether Lucky Iromuanya intended anything short of killing Nolan Jenkins, then you must find [Iromuanya] not guilty of attempted murder and murder[.]

The district court declined to give the proposed instruction, noting that its content was included in other instructions given. Iromuanya's counsel also requested that the court instruct the jury that malice is an element of second degree murder, and the court denied the request. Iromuanya's counsel further submitted a proposed self-defense instruction, which the district court declined to give.

(b) Standard of Review

[15,16] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (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. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005); *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005).

[17] 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*, 271 Neb. 16, 709 N.W.2d 638 (2006); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

(c) Resolution

(i) Instruction No. 8

The first paragraph of instruction No. 8 instructed the jury as follows: "Intent is an element of the crimes charged against the defendant. In deciding whether the defendant acted with intent, you should consider his words and acts and all of the surrounding circumstances." This language tracks that of NJI2d Crim. 5.1. However, the pattern instruction does not include the second paragraph of instruction No. 8, regarding the permissive inference that a person intends the reasonably probable result of an act, to which Iromuanya objected and has now assigned error.

[18,19] This court has held that "[f]rom circumstances around a defendant's voluntary and willful act, a finder of fact may infer that the defendant intended a reasonably probable result of his or her act." *State v. Keup*, 265 Neb. 96, 109, 655 N.W.2d 25, 36 (2003). Thus, intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death. *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992). See *State v. Keup, supra*. Iromuanya correctly points out that our holding in *Rokus* was in the context of determining the sufficiency of the evidence to support a conviction for second degree murder, and the same is true of the holding in *Keup*. While Iromuanya does not contend that the language in question is an incorrect statement of the law, he argues that its inclusion in the jury instruction was prejudicial because it allowed jurors "to infer that since Iromuanya said he pulled the trigger, and the consequence was hitting Jenkins in the head, he intended that result." Brief for appellant at 38.

In reaching the holding in *Rokus* that intent may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death, this court relied in part upon *United States v. Kimmel*, 777 F.2d 290, 292 (5th Cir. 1985), in which the court approved the following jury instruction:

> "As a general rule it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious

> omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant did possess the required intent."

The court reasoned that because the instruction permitted but did not require an inference of intent, it did not have the constitutionally impermissible effect of relieving the government of its burden to prove intent as an element of the crime.

Similarly, in this case, the challenged instruction stated a permissive inference which could be drawn from Iromuanya's admittedly knowing and intentional act of firing the handgun. The jury was presented with two versions of what occurred: Iromuanya's statement to police that he "shot by him" with the intent of scaring, but not killing, Jenkins and testimony from other witnesses that Iromuanya pointed the weapon in Jenkins' direction before firing. The challenged portion of instruction No. 8 did not preclude the jury from considering and accepting Iromuanya's version of the shooting. Rather, it correctly informed the jury that if it found that Iromuanya pointed the weapon at Jenkins and fired, it *could* infer an intent to kill despite the fact that such intent was not expressly stated.

[20] 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); *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). In this case, instruction No. 3 clearly informed the jury that the intent element with respect to the charge of attempted murder of Jenkins meant the intent to "cause the death of Nolan Jenkins." Instruction No. 5 informed the jury that the intent element with respect to the charged murder of Cooper was the intent to kill. Further, instruction No. 7 informed the jury of the doctrine of transferred intent and specifically stated that if it found Iromuanya "intended to kill Nolan Jenkins," the element of intent was satisfied as to Cooper even if he did not "intend to kill" her. The first sentence of instruction No. 8 informed the jury that in determining whether Iromuanya acted with the requisite intent, it should consider "his words and acts and all of the surrounding circumstances." We conclude that the permissive

inference language in instruction No. 8 was a correct statement of the law which did not prejudice Iromuanya.

(ii) Requested "Theory of Defense" Instruction

[21] 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. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). If there is evidence to support it, a defendant is entitled to have an instruction given on his theory of the case. See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). However, such an instruction is not needed where other instructions adequately cover the defense theory. *State v. Fitzgerald*, 1 Neb. App. 315, 493 N.W.2d 357 (1992).

The instructions given by the court in this case included an instruction on manslaughter as a lesser-included offense of second degree murder and repeatedly informed the jury of the State's burden to prove guilt beyond a reasonable doubt. We conclude that the instructions given by the court adequately covered all pertinent matters included in Iromuanya's proposed "theory of defense" instruction.

Based on *People v Lester*, 406 Mich. 252, 277 N.W.2d 633 (1979), Iromuanya argues that he was nevertheless entitled to a separate instruction on his theory of defense. In *Lester*, the Michigan Supreme Court held that a separate instruction on accidental homicide was mandated whenever the defense requested an instruction on the theory and there was evidence to support it, arguably even if the jury instructions given implicitly covered the theory. Notably, however, *Lester* has been overruled, and Michigan now applies a harmless error analysis when reviewing a failure to give an accidental homicide instruction. *People v. Hawthorne*, 474 Mich. 174, 713 N.W.2d 724 (2006). We have taken a similar approach. In *State v. Brown*, 220 Neb. 849, 374 N.W.2d 28 (1985), we stated that a separate accidental homicide instruction was not necessary when the intent instruction given to the jury adequately covered the issue. Thus, even if the proposed theory of the case instruction offered by Iromuanya was an attempt to help the jury distinguish between intent and accident, in this case, the jury was clearly instructed

that "[i]ntentionally" meant "willfully or purposely, not accidentally or involuntarily."

For these reasons, we conclude that the district court did not err in refusing to give Iromuanya's proposed instruction stating his theory of defense.

(iii) Requested Malice and Self-Defense Instructions

[22] Iromuanya argues that the district court erred in failing to either instruct the jury on malice as an element of second degree murder or give his requested self-defense instruction. Malice is not an element of second degree murder, and the district court therefore did not err in refusing to instruct that it was. Neb. Rev. Stat. § 28-304(1) (Reissue 1995); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001); *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[23] In *Burlison*, we overruled prior cases which held that malice was an essential element of second degree murder. Iromuanya's argument that he was entitled to a self-defense instruction if the court declined to instruct on malice as an element is based on the following language in *Burlison*:

> We are now persuaded that when read in conjunction with Neb. Rev. Stat. § 28-102(1) (Reissue 1995), which defines the general purpose of the criminal code as "[t]o forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests," and the provisions of Neb. Rev. Stat. §§ 28-1406 to 28-1413 (Reissue 1995) dealing with justification for use of force, the Legislature's definition of second degree murder set forth in § 28-304(1) is not unconstitutionally overbroad. See *State v. Ryan, supra* (Gerrard, J., dissenting). Likewise, we are satisfied that in this context the statutes dealing with justification for use of force do not impose upon a defendant an unconstitutional shifting of the burden of proof, but, rather, a constitutionally permissible allocation of the burden of production, which when met by anything more than a scintilla of evidence requires the State to prove the lack of justification beyond a reasonable doubt.

255 Neb. at 196-97, 583 N.W.2d at 36. Prior and subsequent to *Burlison*, we have stated that a trial court must instruct the jury

on the issue of self-defense when there is "any evidence" adduced which raises a "legally cognizable" claim of self-defense. E.g., *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). We apply that standard here.

[24] Self-defense is a statutorily affirmative defense in Nebraska. *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). Neb. Rev. Stat. § 28-1409 (Reissue 1995) provides in pertinent part:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> . . . .
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a right thereto or by complying with a demand that he abstain from any action which he has no duty to take . . . .

Neb. Rev. Stat. § 28-1406(3) (Reissue 1995) defines "[d]eadly force" as

> force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances. *State v. Faust, supra*; *State v. Urbano, supra*.

[25] There is no evidence in the record to support a reasonable and good faith belief that Iromuanya was threatened with death or serious bodily harm at the time he fired the handgun. An instruction that no one was to leave until the shot glasses were retrieved cannot support an inference of such a threat. Several minutes had passed after the initial confrontation with Jenkins, which was broken up after a few seconds with no use of deadly force by anyone. Assuming the truth of Iromuanya's statement to police that when Jenkins approached a second time, he asked if Iromuanya was the person who had punched him previously, we conclude that neither that statement nor any other circumstance reflected in the record would warrant a reasonable or good faith belief in the necessity of using deadly force. There is no evidence that anyone, other than Iromuanya, was in possession of a deadly weapon. If the trial evidence does not support a claim of self-defense, the jury should not be instructed on it. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). Because there was no evidence to support a claim of self-defense in this case, the district court did not err in refusing to give the requested instruction.

5. Sufficiency of Evidence

(a) Standard of Review

[26] 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. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

(b) Resolution

Our standard of review as stated above requires substantial deference to the factual findings made by the jury. As an appellate court, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence, as such matters are for the finder of fact. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

Iromuanya was charged with and convicted of one count of attempted second degree murder, one count of second degree

murder, and two counts of using a weapon to commit a felony. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. § 28-304(1). Murder in the second degree is a Class 1B felony. § 28-304(2). A person is guilty of an attempt to commit a crime if he or she intentionally "engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime." Neb. Rev. Stat. § 28-201(1)(b) (Cum. Supp. 2004). Criminal attempt is a Class II felony when the crime attempted is a Class I, Class IA, or Class IB felony. § 28-201(4)(a). Any person who uses a firearm to commit any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony. Neb. Rev. Stat. § 28-1205(1) (Reissue 1995). Use of a deadly weapon which is a firearm to commit a felony is a Class II felony. § 28-1205(2)(b).

As we have noted, it is undisputed that Iromuanya intentionally fired the shot which injured Jenkins and killed Cooper. Viewed in a light most favorable to the prosecution, the circumstantial evidence is sufficient to establish that he did so with the intent of killing Jenkins. The evidence thus supports the conviction of attempted second degree murder and, under the doctrine of transferred intent, the conviction of second degree murder. See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991) (holding evidence sufficient to support second degree murder conviction where defendant pointed gun at neck of person with whom he had exchanged angry words, fired and missed, but hit and killed another person). Because a firearm was used to commit both of these crimes, the evidence is also sufficient to support the convictions on two counts of use of a weapon to commit a felony.

There is no merit to Iromuanya's argument that the evidence was insufficient to support his convictions.

6. Sentencing Issues

(a) Additional Facts

At the sentencing hearing, Iromuanya objected to various documents included in the presentence investigation report

(PSI), which documents he characterized as "character letters" regarding Cooper. The court sustained the objection and stated it would only consider those portions of the PSI that "appropriately should be considered by the Court with respect to victim impact statements." After allocution and immediately prior to pronouncing sentence, the court made the following statement on the record:

> [T]his is a tragic case. It's a tragedy for the family and friends of Jenna Cooper, and for Nolan Jenkins, his family and his friends. And as in any murder case, whenever someone is murdered, there is a sense of loss for parents, brothers, relatives and friends, and that loss is immense. And when someone is shot and seriously injured, it has a significant emotional impact on the victim, their family, their friends, I recognize that.
>
> I also recognize that this is a tragedy for . . . Iromuanya's family and his friends. And I certainly consider [Iromuanya's] lack of any real significant criminal history. However, in determining the appropriate sentence, this Court must consider all of the surrounding facts and circumstances of these crimes.
>
> The jury determined that you intentionally tried to kill Nolan Jenkins, and the jury found you guilty of the murder of Jenna Cooper. You brought a gun with you. No one there had a gun that evening. No one had any type of a weapon that evening, except for you. It was your anger that caused you to pull that gun out of your pocket and you shot that gun in anger.
>
> In determining the appropriate sentence, this Court must consider the protection of the public, and I cannot ignore that you shot someone, simply because they pushed you and made you angry. I also must impose a sentence that will not depreciate the seriousness of these crimes.

The sentencing range for attempted murder in the second degree, a Class II felony, is a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2004) and §§ 28-201(4)(a) and 28-304(2). The court sentenced Iromuanya to imprisonment for

25 to 35 years on this conviction, charged in the information as count I. The sentencing range for use of a weapon which is a firearm to commit a felony, a Class II felony, is a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. §§ 28-105(1) and 28-1205(2)(b). The court sentenced Iromuanya to imprisonment for a period of 10 to 20 years on the weapons conviction related to the attempted second degree murder conviction, charged in the information as count II. The sentencing range for murder in the second degree, a Class IB felony, is a minimum of 20 years' imprisonment and a maximum of life imprisonment. §§ 28-105(1) and 28-304(2). The court sentenced Iromuanya to "not less than life imprisonment nor more than life imprisonment" on the second degree murder conviction, charged in the information as count III. On the separate weapons conviction relating to the second degree murder conviction, charged as count IV of the information, the court sentenced Iromuanya to imprisonment for a period of 10 to 20 years. The court further ordered that the sentence on count II is to run consecutively to count I, the sentence on count III is to run consecutively to counts I and II, and the sentence on count IV is to run consecutively to counts I, II, and III. Iromuanya was given credit for time served.

(b) Standard of Review

[27] 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).

[28,29] 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. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

(c) Resolution

(i) Multiple Punishments for Use of Weapon

Iromuanya argues that by imposing separate, consecutive sentences for the convictions of use of a weapon to commit a felony, the district court imposed multiple punishments for the same act in that both counts stemmed from the single shot that he fired. A similar issue was addressed in *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988), in which the defendant opened fire on a group of people, causing serious injury to Mark Heil. The defendant was found guilty of attempted second degree murder and the use of a firearm to commit that felony in connection with the injury to Heil. In a second prosecution, consolidated with the first for trial, the defendant was also convicted of first degree assault upon Heil and use of a firearm in the commission of that felony.

In his appeal from two consolidated cases, the defendant alleged that the two convictions for the use of a firearm against Heil offended the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution because they amounted to multiple punishments for the same conduct. In rejecting this contention, this court applied the principle that where a legislature specifically authorizes cumulative punishments under two statutes proscribing the same conduct, the prosecution may, in a single trial, seek and the court may impose such cumulative punishments without offending the Double Jeopardy Clause. *State v. Trevino, supra*, citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). We noted that under the Nebraska statute defining the offense of use of a weapon to commit a felony, the offense was to be " 'treated as a separate and distinct offense from the felony being committed' " and that the sentence " 'shall be consecutive to any other sentence imposed.' " *State v. Trevino*, 230 Neb. at 521, 432 N.W.2d at 521, quoting § 28-1205(3) (Reissue 1985). We concluded that because the defendant was found guilty of two distinct predicate offenses, attempted second degree murder and first degree assault, the trial court did not err in imposing consecutive sentences on the two corresponding convictions for use of a weapon to commit a felony. A dissent took the position that Nebraska law does not authorize cumulative punishment for attempted

murder and assault where both offenses arise from the same conduct, and the dissent concluded that the assault and corresponding firearm convictions should have been reversed and dismissed.

Nebraska law clearly authorizes cumulative punishments for the attempted second degree murder of Jenkins and the second degree murder of Cooper. Thus, when he fired the handgun, Iromuanya committed two predicate offenses. The language of § 28-1205 is the same today as it was at the time *Trevino* was decided. Because a firearm was used to commit each predicate offense, the district court properly found that there were two separate and distinct offenses of use of a weapon to commit a felony, and the court properly imposed consecutive sentences for each count.

Iromuanya's multiple punishments argument also relies on *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), in which we reiterated our statement in *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), that the Legislature's purpose in creating a separate offense of using a weapon in the commission of a felony was to "discourage individuals from carrying deadly weapons while they commit felonies." *State v. Pruett*, 263 Neb. at 105, 638 N.W.2d at 815. In both *Pruett* and *Ring*, we held that an unintentional crime could not serve as the predicate felony for a weapons charge under § 28-1205. In this case, however, intent is an essential element of both of the predicate felonies of which Iromuanya was convicted. Accordingly, we find no merit in the argument that his conviction on the two weapons counts amounted to impermissible multiple punishments.

(ii) Excessive Sentences

The sentences imposed by the district court fell within the statutory sentencing limits for each of the four offenses of which Iromuanya was convicted. Accordingly, we review the sentences for abuse of discretion. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Although Iromuanya generally contends that all of his sentences were excessive, his argument focuses exclusively on the maximum sentence he received on the second degree murder conviction. He argues that the trial court placed undue

weight on letters and materials received from Cooper's family and friends urging a maximum sentence, while disregarding materials submitted on his behalf arguing for leniency.

[30] As noted, Iromuanya's counsel objected to a "majority of the letters that were sent on behalf of Jenna Cooper and Nolan Jenkins" included in the PSI. The court sustained the objection, stating that it would only consider portions of the PSI that "appropriately should be considered by the Court with respect to victim impact statements." In this regard, we have stated that a judge should take into account facts obtained from victim impact statements in imposing a sentence, as he or she should consider all facts pertinent to sentencing, but a judge must not and cannot allow the judgments and conclusions of the victim's family to be substituted for those of the court in imposing a sentence. See *State v. Carlson*, 225 Neb. 490, 406 N.W.2d 139 (1987). After sustaining the objection, the court asked defense counsel if he was requesting that other materials be removed from the PSI, and defense counsel replied that removal was not necessary. Thus, it is unclear which portions of the voluminous PSI were actually considered by the sentencing court. However, unlike *Carlson*, we cannot conclude from this record that the court improperly relied on demands for a severe sentence made on behalf of the victims.

[31] 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, and motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005). In considering a sentence, a 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 court's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *Id.*

Iromuanya was 23 years old at the time of his crimes. Although his parents were born in Nigeria, he was born and was raised in Lincoln. He has four siblings. He was never married, but had a steady relationship and three dependent children. He

completed high school and attended 1 year of community college. He had been unemployed since July 2003. He reported moderate use of alcohol and a single experimentation with marijuana at the age of 17. He denied use or experimentation with chemical substances other than marijuana. Testing results included in the PSI reflect a "low risk" for violence and aggressiveness, but a "problem risk" for "stress coping."

As specifically noted by the sentencing court, Iromuanya had no significant criminal history. In 1998, he was fined $50 and costs for having no operator's license and a charge of not having proof of insurance was dismissed. In 1999, he was fined $25 for trespassing. In 2001, he was fined $25 for failure to appear and a charge of disturbing the peace was dismissed.

The motivation for his offenses seems apparent from the record. When Ingram announced that no one was to leave until the shot glasses were recovered and Jenkins physically confronted Iromuanya and asked him if he had taken the shot glasses, Iromuanya felt wrongly accused and reacted with anger directed primarily at Jenkins. His anger, perhaps initially justified, explains but does not excuse his subsequent violent act in firing the handgun at Jenkins.

All four of Iromuanya's crimes resulted from the same act. The indeterminate sentences imposed on the attempted murder and weapons counts fall generally near the midpoint of the statutory sentencing ranges, with the minimum term of each sentence set below the maximum term. Based on the relevant sentencing factors outlined above, particularly those articulated by the district court, these sentences do not constitute an abuse of discretion and are not excessive.

[32] The sentence of not less than life imprisonment nor more than life imprisonment imposed for the second degree murder conviction is at the very top of the range permitted by statute and was ordered to run consecutively to the sentences for attempted murder and the related weapons charges. At the sentencing hearing, the court explained that it must consider the protection of the public and must also impose a sentence that would not depreciate the seriousness of the crimes. Those are, of course, valid general considerations which were applicable to sentencing on all four counts.

We find no abuse of discretion in setting life imprisonment as the maximum term of the second degree murder sentence. Iromuanya arrived at the party carrying a loaded, concealed handgun and used it without justification to extinguish a life. The shooting was a senseless act of violence, and the imposition of the maximum term of life imprisonment properly reflected the seriousness of the criminal conduct and its consequences.

However, the minimum term of Iromuanya's indeterminate sentence, which is the term used to calculate parole eligibility, was also set at life imprisonment. See Neb. Rev. Stat. § 83-1,110 (Cum. Supp. 2004). The court could not have imposed a more severe minimum term for second degree murder on a hardened criminal with a lengthy history of violent felony convictions. A sentence should fit the offender and not merely the crime. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999), citing *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). The record contains no basis upon which we can discern why the minimum term of the sentence for second degree murder was the same as the maximum term, while the minimum terms of the sentences imposed for the other three crimes resulting from the same act were not. Taking into account all of the relevant circumstances, including but not limited to the fact that Iromuanya had no significant criminal record or history of violence, we conclude that the district court abused its discretion in setting life imprisonment as the minimum term of the sentence for second degree murder and that to that extent, the sentence was excessive. As noted, we find no abuse of discretion in sentencing on the other three counts.

Neb. Rev. Stat. § 29-2308 (Reissue 1995) provides in pertinent part that in criminal appeals brought in this court or the Nebraska Court of Appeals,

> the appellate court may reduce the sentence rendered by the district court against the accused when in its opinion the sentence is excessive, and it shall be the duty of the appellate court to render such sentence against the accused as in its opinion may be warranted by the evidence.

See, also, *State v. Etchison*, 188 Neb. 134, 195 N.W.2d 498 (1972); *State v. Oldenburg*, 10 Neb. App. 104, 628 N.W.2d 278 (2001). Based upon our statutory authority, we reduce Iromuanya's

sentence on count III, murder in the second degree, to imprisonment for not less than 50 years nor more than life. We further conclude that this sentence should run concurrently with the sentence of 25 to 35 years' imprisonment on count I, attempted murder in the second degree, which we affirm, inasmuch as both offenses resulted from the same act. We also affirm the sentences of 10 to 20 years' imprisonment each on counts II and IV, use of a weapon to commit a felony, and order that such sentences are to be served consecutively to the sentences on counts I and III, and to each other, as required by § 28-1205(3).

IV. CONCLUSION

For the reasons discussed herein, we affirm Iromuanya's convictions on all four counts. We also affirm the sentences on counts I, II, and IV. We conclude that the sentence imposed by the district court of not less than life imprisonment nor more than life imprisonment on count III, murder in the second degree, is excessive, and we modify that sentence to not less than 50 years' imprisonment nor more than life imprisonment, with the sentence on count III to be served concurrently with the sentence on count I. The sentences of 10 to 20 years' imprisonment on counts II and IV shall be served consecutively to the sentences on counts I and III, and to each other. Iromuanya shall receive credit for 305 days served, as ordered by the district court.

AFFIRMED AS MODIFIED.

WRIGHT, J., not participating.

CONNOLLY, J., concurring.

I join the majority opinion. I am, however, prompted to comment regarding how the trial court handled the issue of the spectators' wearing "memorial buttons." It is correct that we have a scanty record as to whether the "memorial buttons" affected the jury. However, this problem could have been easily averted. In this emotionally charged trial, the trial judge, at the first whiff of a problem, should have immediately smothered any incident that could have potentially prejudiced a jury.

It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias or prejudice can attach to any member thereof. *State v. Polinski*, 230 Neb. 43, 429 N.W.2d 725 (1988). "[C]ertain practices pose

such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.' " *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

Here, defense counsel informed the court on the second day of voir dire of a potential problem and moved in limine to exclude the buttons. Defense counsel stated at that time that "some of the family [are] starting to wear buttons with Jenna Cooper's face or photo . . . ." In response to the court's question, defendant's counsel also stated that he had seen at least one woman wearing buttons that morning. According to defense counsel's affidavit, submitted in support of Iromuanya's motion for new trial, the buttons included some type of slogan. The court's request of defense counsel for case law on the issue was wholly inadequate to address any potential prejudice. After being informed by counsel that family members were starting to wear the buttons, the court had a duty to immediately determine—out of the presence of the jury—who, if anyone, was wearing the buttons, and the message, if any, the buttons conveyed. Had the court appropriately reacted to the first indication of a potential problem, we would either not be dealing with this issue on appeal or have a sufficient record for review. Instead, after 2 days of trial, according to defense counsel's affidavit, the court requested that spectators not wear the memorial buttons. In many cases, this will be too little, too late—the infection will have already spread.

HENDRY, C.J., concurring in part, and in part dissenting.

I respectfully dissent from that portion of the opinion which modifies the sentence on count III, murder in the second degree, for which the district court sentenced Iromuanya to "not less than life imprisonment nor more than life imprisonment."

In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

It is true that the district court found that Iromuanya had no significant criminal history, but, as the majority notes, Iromuanya

brought a loaded, concealed handgun to the party. The gun was intentionally used in a senseless act of violence, resulting in the shooting of Nolan Jenkins in the head and Jenna Cooper's death. Regardless of whether this court would have imposed a sentence of life imprisonment for the minimum term of an indeterminate sentence under the same or similar circumstances, I cannot conclude that the sentencing court's reasons for the sentence, inter alia, protection of the public and imposition of a sentence that does not depreciate the seriousness of the crime, are clearly untenable and deprive Iromuanya of a substantial right and just result. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). I would find no abuse of discretion and affirm Iromuanya's original sentence on count III.

In all other respects, I concur with the majority opinion.

GERRARD, J., joins in this concurrence and dissent.

MILLER-LERMAN, J., concurring in part, and in part dissenting.

I respectfully dissent from that portion of the opinion which modifies the sentence on count III, murder in the second degree. Whether or not I would have imposed the same sentence, under the facts and our jurisprudence, I do not find an abuse of discretion.

In all other respects, I concur with the majority opinion.

PENNFIELD OIL COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLEE, V. W.L. WINSTROM, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF R.W. WINSTROM, APPELLEE AND CROSS-APPELLANT, AND ANDREW L. WINSTROM, APPELLANT AND CROSS-APPELLEE.

720 N.W.2d 886

Filed August 18, 2006. No. S-04-982.

1. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact

that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Contracts: Parol Agreement: Consideration.** The terms of a written executory contract may be orally modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration.
4. **Contracts: Appeal and Error.** Although a party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed.
5. **Decedents' Estates: Contracts: Stock.** The general rule is that while restrictions on the transfer of shares might not apply to testamentary dispositions in the absence of express terms that refer to such transfers, express share transfer restriction agreements will be enforced.
6. **Corporations: Contracts: Stock.** A transfer in violation of restrictions on the transfer of corporate stock is voidable in equity.
7. **Appeal and Error.** An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.
8. **Actions: Corporations: Equity.** The board of directors of a corporation, under ordinary circumstances, controls an action brought by the corporation, but a court of equity should interfere in the event of usurpation, fraud, gross negligence, or transgression of statutory limitations.
9. **Actions: Corporations.** A board of directors of a corporation has no right to dismiss an action through collusion with the defendant.
10. **Stock.** The intended beneficiaries of a share transfer restriction are entitled to enforce the restriction.
11. **Limitations of Actions: Words and Phrases.** "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress.
12. **Limitations of Actions.** A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit.
13. **Actions: Contracts: Time.** A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned to him or her.
14. **Breach of Contract.** The anticipatory breach of a contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evidencing an intention to refuse performance in the future.
15. ____. Anticipatory breach requires an unequivocal repudiation of the contract.
16. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.

17. **Contracts: Estoppel.** Recovery on a theory of promissory estoppel is based upon the principle that injustice can be avoided only by enforcement of a promise.
18. **Forbearance: Estoppel.** Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
19. **Contracts: Specific Performance: Stock.** Contracts for acquisition of shares of a closely held family corporation, which stock is not obtainable in the open market, are proper subjects for specific performance.
20. **Contracts: Specific Performance.** Specific performance is not generally demandable as a matter of absolute legal right; it is addressed to the legal discretion of the court and will not be granted where enforcement of the contract would be unjust.
21. ____: ____. In decreeing specific performance, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the agreed-upon time.
22. **Contracts: Specific Performance: Proof.** The party seeking specific performance must show that it has substantially complied with the terms of the contract, including proof that it is ready, able, and willing to perform its obligations under the contract.
23. **Injunction.** Generally, the purpose of a temporary injunction is to protect the subject matter of litigation and preserve the status quo of the parties until a determination of the case on the merits.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

David A. Domina and James F. Cann, of Domina Law, P.C., for appellant.

John R. Douglas, Brien W. Welch, and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee W.L. Winstrom.

Rodney M. Confer and Jeanelle R. Lust, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee Pennfield Oil Company.

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

GERRARD, J.

FACTUAL BACKGROUND

Pennfield Oil Company (Pennfield) is a closely held Nebraska corporation, formed in 1947 by R.W. Winstrom (R.W.). It has been a subchapter S corporation since 1987. At the time of the corporation's formation, R.W. held 50 shares of stock, as did

J.P. Stocker. Another 20 shares were later issued to V.J. Lich, and in 1948, the three shareholders entered into an agreement (the 1948 agreement) generally requiring redemption of the stock at book value upon the death of a shareholder or a shareholder's desire to sell stock. Stocker's shares were redeemed by Pennfield in 1949, and Pennfield's board of directors authorized the sale of Lich's stock to R.W. in 1951. Thus, in 1951, there were 70 outstanding shares of Pennfield stock, all held by R.W.

In 1960, R.W. gifted 20 shares of stock each to his two sons, W.D. Winstrom (Dean) and W.L. Winstrom (Bill). The three shareholders and their wives entered into a new agreement (the 1960 agreement), restricting ownership to the three shareholders and providing that "in the event of the demise" of any of the three shareholders, or if any of the three desired to dispose of stock, Pennfield "shall buy the stock at the book value of the stock, determined by a stockholders' meeting within thirty days of the date of demise or date of desiring to sell."

Dean's stock was redeemed by Pennfield in 1969. At this point, then, there were 50 outstanding shares of stock: 30 held by R.W., and 20 held by Bill.

In 1987, three stock certificates were issued to Bill, consisting of 5.27 shares gifted to Bill by R.W. This gave Bill a majority interest in the company—25.27 of the 50 outstanding shares. Later that year, R.W. died testate, and his will devised his Pennfield stock, or proceeds of its sale, to Bill. Bill also was the personal representative of R.W.'s estate (the Estate).

The Pennfield stock was a substantial portion of the Estate's assets, and the Estate elected to defer estate tax liability pursuant to I.R.C. §§ 6166 and 303 (1994), which permit deferral of estate tax liability for stock of qualifying closely held corporations. Evidence was presented that Pennfield's board of directors met on or about December 14, 1987, and resolved to invoke the 1960 agreement, but over an extended period of time because of the financial burden of redeeming the stock. Bill denied that any such meeting took place. As previously noted, the 1960 agreement required a meeting of "shareholders"; at this time, all the shares were owned by either Bill, in his personal capacity, or the Estate, of which Bill was the personal representative.

In 1988, Pennfield and all the shareholders (i.e., Bill and the Estate) entered into a new stock repurchase agreement (the 1988 agreement). Bill signed the agreement three times, on behalf of himself, the Estate, and Pennfield. The stated purpose of the 1988 agreement was "to confirm[,] restate, formalize and clarify" the existing 1948 and 1960 agreements. The 1988 agreement expressly applied to all outstanding stock as of the date of the agreement and stated that no transfer of shares would be made or recognized unless the transferee accepted the 1988 agreement and agreed to be bound by it. As with the previous agreements, the 1988 agreement provided for the redemption of stock at book value upon the death of a stockholder, "an offer by a Stockholder to sell stock to a person who is not a Stockholder of Pennfield, or the acceptance of an offer by a Stockholder of an offer to purchase such Stockholder's stock or any part thereof," or separation of a stockholder from employment with Pennfield.

The 1988 agreement further provided that

> redemption of shares pursuant to this Agreement shall be closed at such time and place as shall be mutually agreed, not earlier than thirty (30) days, nor later than fifteen (15) months from the effective date, provided, that in the case of redemption of the stock of a deceased Stockholder, closing with respect to so much of the deceased Stockholder's shares as are required to be retained to enable Stockholder's estate to qualify for federal estate tax deferral pursuant to I.R.C. Sec. 6166 (or the parallel provision of any subsequent Code) shall be deferred, if requested by the Personal Representative, until the balance of such deferred federal estate tax is paid.

The 1988 agreement also provided:

> Pennfield may waive its right to redeem and Stockholder or Personal Representative may waive the right to sell the stock to Pennfield as follows;
>
> > a) in the case of redemption by reason of death, if such stock will pass, pursuant to the will or other testamentary disposition of such Stockholder or the applicable laws of descent and distribution, or

> b) in the case of redemption by reason of proposed transfer, if such stock will be transferred,
>
> to a person who is an employee of Pennfield and who had endorsed this Agreement with respect to the stock to be transferred.

Bill's son, Andrew Winstrom (Andrew), became president of Pennfield later in 1988. Andrew agreed to be bound by the 1988 agreement in 1990. At that time, all the outstanding stock was still owned by either Bill or the Estate. In 1990, Pennfield repurchased a total of 16.24 shares of stock from the Estate. This action was approved by Pennfield's shareholders (Bill and the Estate) and board of directors (Bill, Andrew, and another board member). At the same time, the board adopted a resolution to sell Andrew 15.89 shares. Andrew's obligation to pay for the stock was assigned to the Estate in partial satisfaction of the redemption price of the 16.24 shares Pennfield had repurchased, with Pennfield paying the difference directly to the Estate. When these transactions were completed, Bill held 25.27 shares, Andrew held 15.89 shares, and the Estate held 8.49 shares.

The Estate's tender of 8.09 shares of the stock redeemed by Pennfield was accomplished in a new stock redemption agreement (the 1990 agreement). The 1990 agreement was signed by Bill on behalf of the Estate, Andrew on behalf of Pennfield, and accepted by Bill in his individual capacity. The 1990 agreement specified that the 8.09 shares of stock were tendered pursuant to the 1948, 1960, and 1988 agreements and that all the parties "confirm[ed] and ratif[ied]" the 1960 agreement "as restated" in the 1988 agreement. The 1990 agreement also stated:

> It is further agreed the rights and obligations of the [1988] Repurchase Agreement are continuing and either Estate or [Pennfield] shall have the right to enforce same at any time. Estate and [Pennfield] each stipulate and agree that any statute of limitations or rule of law of Nebraska or any other state which limits the time for filing any action pursuant to the agreement, whether in law or equity, is extended and tolled from the date hereof until either party hereto shall notify the other that such statute shall again commence to run.

In 1992, Andrew was gifted an additional 8.43 shares from Bill, bringing Andrew's interest in Pennfield to 24.32 shares. Bill still held 16.84 shares, and the Estate held 8.49 shares, for a total of 25.33 shares under Bill's control and *not* in Andrew's possession. Thus, Andrew was effectively a minority shareholder and would remain so if the Estate's stock was transferred to Bill, but Andrew would become the majority shareholder if the Estate's stock was redeemed by Pennfield.

In 1997, Bill sought to transfer the final 8.49 shares of stock in the Estate to himself, pursuant to R.W.'s will. Andrew, as president of Pennfield, refused to sign the stock certificate, and the attempt to transfer the stock was tabled. In 2000, the Estate made its final tax payment and Bill sought to close the Estate, and again to transfer the final 8.49 shares from the Estate to himself. Andrew again refused to sign the stock certificate. Andrew also refused to call a director's meeting to transfer the stock. On December 28, 2000, Bill, as Pennfield secretary, directed Pennfield's corporate counsel to note, on the corporation's stock register, that the 8.49 shares held by the Estate had been transferred to Bill. On January 23, 2001, Bill notified Andrew that he was calling a special meeting to amend the company bylaws and conduct other business; on the same date, Andrew filed a notice of redemption by Pennfield of the 8.49 shares.

On February 7, 2001, Andrew directed the filing of a petition in the district court on behalf of Pennfield, against Bill in his individual capacity and as personal representative of the Estate, seeking declaratory and injunctive relief and an order requiring redemption of the shares. Pennfield later filed an amended petition naming Andrew as an additional defendant. The district court temporarily enjoined all the parties from taking any action to vote or transfer the disputed shares. Andrew filed an answer and cross-claims, generally alleging breaches of contract and fiduciary duties by Bill. Bill filed an answer in which he alleged that the action on behalf of Pennfield was not authorized by Pennfield's board of directors. Both Andrew and Bill attempted to direct the retention of counsel for Pennfield; the dispute over which attorneys were authorized to represent Pennfield resulted in an interlocutory appeal that we dismissed because it was not

taken from a final, appealable order. See *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

After the appeal was dismissed, the matter went to a bench trial in the district court. Shortly before trial, Bill and his wife, in their capacities as directors of Pennfield, filed a "Complaint in Intervention" seeking to have the action dismissed or, in the alternative, a declaration that "Pennfield does not have a right, obligation, or opportunity to redeem the 8.49 shares of stock currently held by [Bill], individually." The "Complaint in Intervention" was ultimately dismissed without prejudice by the court.

At the conclusion of the trial, the district court entered an order denying Pennfield's and Andrew's requests for relief. The district court found that at the time of R.W.'s death, the 1960 agreement was controlling, and the 1960 agreement required a meeting of shareholders within 30 days of a shareholder's death to establish the book value of the stock. The district court concluded that

> [b]ecause the meeting to determine the book value of the stock was not held within the contractually required time period . . . the proper method for exercising Pennfield's right of redemption—as indicated under the plain language of the [1960] agreement, was not followed and that Pennfield effectively waived its right of redemption. . . . Accordingly, [Bill] has not breached any fiduciary or contractual duties with respect to that agreement.

The district court did not discuss the effect of the 1988 or 1990 agreements with respect to its conclusion that Pennfield had waived the right of redemption under the 1960 agreement. However, the district court did conclude that even if Pennfield had a right of redemption under the 1960 agreement, "the intent of the parties in creating the agreement renders its enforcement in the present case improper." The court found that from "the plain language of the [1960 agreement,]" it was the intent of the parties to the 1960 agreement to keep the corporation's shares in Bill's ownership. The court found that Andrew was never intended to become a majority shareholder and that R.W. intended Bill to have his Pennfield stock. The court found that "fundamental fairness requires that [Bill] maintain ownership of the 8.49 shares." However, the court also found that "Andrew did

not act improperly" in instituting the present action and denied each and every other claim in Bill's and Andrew's pleadings. Andrew appeals the judgment of the district court.

ASSIGNMENTS OF ERROR

Andrew assigns, concisely restated, that the district court erred in holding that (1) the technical failure to have a shareholder's meeting within 30 days of R.W.'s death waived Pennfield's contractual redemption rights and (2) the district court's equitable powers allowed it to ignore the clear language of the parties' contracts because the court had reached a contrary conclusion about the parties' intent concerning Pennfield's stock ownership.

On cross-appeal, Bill assigns that the district court erred (1) in failing to dismiss the petition filed on behalf of Pennfield because the evidence established that the action was initiated by Andrew and not authorized by the board of directors, (2) in failing to hold that Pennfield's and Andrew's claims were barred by the statute of limitations, and (3) in failing to hold that Pennfield's and Andrew's claims were barred by equitable estoppel.

STANDARD OF REVIEW

[1] While the issues presented in this case center on an alleged breach of contract, the relief sought was entirely equitable. To the extent that the meaning of the relevant contractual language is at issue, we are confronted with questions of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. See, *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006); *Hans v. Lucas*, 270 Neb. 421, 703 N.W.2d 880 (2005).

[2] However, given the nature of the relief requested, this action sounds in equity. See *Reichart v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard

and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

Contractual Redemption Rights

The first issue we address is that presented by Andrew's first assignment of error—whether the district court erred in determining that the attempted redemption of the Estate's stock was controlled by the 1960 agreement and that the terms of the 1960 agreement had not been satisfied. We note, initially, that the parties to this case do not dispute that stock transfer restrictions such as those at issue in this case are generally enforceable under Nebraska law. See, Neb. Rev. Stat. § 21-2046 (Reissue 1997); *Elson v. Schmidt*, 140 Neb. 646, 1 N.W.2d 314 (1941). As previously noted, the district court concluded in this case that the 1960 agreement was controlling with respect to stock redemption and that redemption had been waived because a meeting to determine the book value of the stock was not held within 30 days of R.W.'s death, as the 1960 agreement required. The district court erred in its analysis of this issue.

Even if Pennfield could be said to have waived redemption of the Estate's stock by not strictly complying with the terms of the 1960 agreement, the district court erred in not considering the effect and terms of the subsequent stock redemption agreements. Pennfield, Bill, Andrew, and the Estate were all bound by the 1988 agreement, which was expressly intended to "confirm[,] restate, formalize and clarify" the 1948 and 1960 agreements. The 1988 agreement specifically provides for redemption of stock and deference of redemption for tax purposes under circumstances that are effectively identical to the course of action that Pennfield actually pursued. The 1990 agreement expressly confirmed and ratified the 1960 agreement "as restated" in the 1988 agreement.

[3] The terms of a written executory contract may be orally modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration. *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992). Whatever the terms of the 1960 agreement may have been, the 1988 agreement clearly allowed the parties to delay

redemption for federal estate tax purposes. Even if Pennfield had waived redemption under the 1960 agreement, that right was extended under the 1988 agreement and further reinforced by the 1990 agreement. The court erred in concluding otherwise.

Bill argues on appeal that there can be no redemption under the 1988 agreement since there has been no "activating event" since the agreement was signed—because R.W. died in 1987, no shareholder has died since the 1988 agreement was reached. Brief for appellee Bill at 9. But it is plain from the 1988 agreement that it was intended to apply to the shares that were, at that time, held by R.W.'s estate. This is also evidenced by the fact that the 1990 agreement specifically invoked the 1948, 1960, and 1988 agreements as the basis for Pennfield's 1990 purchase of stock from the Estate.

Bill further argues that the parties had abandoned the 1960 agreement through their conduct. This argument is without merit for the reasons explained above. The 1960 agreement was confirmed and restated by the 1988 agreement, and Bill offers no argument that the 1988 agreement was ever abandoned. Bill also points out that the 1988 agreement permits Pennfield to waive the right to redeem the stock, if the stock will pass by will or testamentary disposition, to an employee of Pennfield who had endorsed the 1988 agreement. However, the record reflects that while a waiver of Pennfield's right to redeem was prepared, none has been adopted. Whether Pennfield can waive redemption under the 1988 agreement is not an issue in this appeal, given the record before us.

Andrew's second assignment of error takes issue with the district court's further conclusion that even if Pennfield had a right of redemption under the 1960 agreement, it would be "improper" to enforce the agreement in the present case, because of what the court determined to be the intent of the parties to that agreement. The court also erred in this regard.

First, the court correctly concluded that the 1960 agreement was unambiguous, and none of the parties challenge this finding on appeal. Thus, as the court noted, the intent of the agreement should be determined from the plain language of the document. But the court concluded, from the plain language, that the 1960 agreement evidenced an intent to keep the corporation's shares

within the Winstrom family "and, specifically, with [Bill]." There is little support in the 1960 agreement for the conclusion that Bill was to be the favored owner of Pennfield stock. Rather, the 1960 agreement took place when R.W. owned 30 shares of stock, and Bill and Dean each owned 20 shares. The 1960 agreement evinces an intent to keep ownership of the stock among R.W., Dean, and Bill, but does not indicate any preference for Bill. In fact, while the 1960 agreement addresses who were to be the stockholders, it in no way addresses who was to own the majority of stock.

Moreover, the court's analysis again fails to consider the provisions of the 1988 and 1990 agreements, which clearly anticipated that parties other than Bill would come into possession of Pennfield stock. In 1988, all the outstanding Pennfield stock was in the possession of Bill or the Estate. The 1988 agreement was signed by Bill as the then president of Pennfield, Bill in his capacity as a shareholder, and Bill as the personal representative of the Estate. In other words, Bill functionally entered into the 1988 agreement with himself. But the 1988 agreement expressly permitted, notwithstanding the redemption provision, inter vivos transfers from one stockholder to another stockholder who was signatory to the agreement—which Andrew became, in 1990, when he endorsed the 1988 agreement and Pennfield sold Andrew some of the stock it had redeemed from the Estate. The 1988 agreement makes little sense unless it was contemplated that Pennfield stock would be owned by someone other than Bill.

[4] The court also supported its conclusion with the observation that Andrew was never intended to become the majority shareholder. But that observation, whether or not it is correct, is not based upon the plain language of the relevant, unambiguous agreements. Those agreements permit the redemption of stock from the Estate under the circumstances presented here, even if Bill did not expect them to have the effect of making him a minority shareholder; Andrew's desire to become majority shareholder is not an unlawful object. See *Baum v. Baum Holding Co.*, 158 Neb. 197, 62 N.W.2d 864 (1954). Although a party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

The district court also found, in essence, that Pennfield's right of redemption under the 1960 agreement was subordinate to what the court determined to be R.W.'s intent, evidenced by his will, that Bill have his stock. We first note that if the court's reasoning were correct, the parties would have acted improperly in 1990, when Pennfield purchased 16.24 shares of stock from the Estate and sold 15.89 shares of that stock to Andrew.

[5] But more important, while R.W. devised his stock to Bill, R.W. was also certainly aware that the stock was subject to the 1960 agreement. The general rule is that while restrictions on the transfer of shares might not be applied to testamentary dispositions in the absence of express terms that refer to such transfers, express share transfer restriction agreements will be enforced. See, e.g., *Sorlie v. Ness*, 323 N.W.2d 841 (N.D. 1982); *Vogel v. Melish*, 31 Ill. 2d 620, 203 N.E.2d 411 (1964); *Taylor's Administrator v. Taylor*, 301 S.W.2d 579 (Ky. 1957); *Kerr v. Porvenir Corp.*, 119 N.M. 262, 889 P.2d 870 (N.M. App. 1994); *Avrett and Ledbetter Roofing and Heating Co. v. Phillips*, 85 N.C. App. 248, 354 S.E.2d 321 (1987); *In re Est. of Riggs*, 36 Colo. App. 302, 540 P.2d 361 (1975); *In re Estate of Martin*, 15 Ariz. App. 569, 490 P.2d 14 (1971). Cf., *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983) (holding that right to purchase stock under stock restriction agreements descended to heirs of third-party beneficiaries of agreements); *F.H.T., Inc. v. Feuerhelm*, 211 Neb. 860, 320 N.W.2d 772 (1982) (concluding, without discussion of issue, that buyout stock transfer provision expressly referring to probate transfers was enforceable). See, also, *F.B.I. Farms, Inc. v. Moore*, 798 N.E.2d 440 (Ind. 2003); *Boston Safe Dep. & Tr. Co. v. North Attleborough Chapt. American Red Cross*, 330 Mass. 114, 111 N.E.2d 447 (1953); *Dixie Pipe Sales, Inc. v. Perry*, 834 S.W.2d 491 (Tex. App. 1992) (holding general restrictions on stock transfer extend to testamentary disposition). See, generally, 12 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 5460 (perm. ed., rev. vol. 2004 & Cum. Supp. 2005).

The 1960 agreement quite specifically provides for redemption of stock in the event of the death of a shareholder, and the 1988 agreement provides even more expressly for redemption of stock that is subject to testamentary disposition. They are

enforceable here against Bill and the Estate, especially given that R.W. and Bill signed the 1960 agreement, and Bill and the Estate signed the 1988 agreement. R.W.'s will evinces an intent to leave his stock to Bill, but both R.W. and Bill also signed an agreement limiting R.W.'s power to devise his stock, and Bill (as both an individual and personal representative of the Estate) signed subsequent agreements disposing of the stock that R.W. meant Bill to have, and reaffirming the restrictions placed upon transfer of the remaining shares.

[6] Finally, Bill argues that he already completed transfer of the disputed shares, since, acting as secretary of Pennfield, he directed that the transfer be recorded on Pennfield's stock ledger. But the fact that Bill was in a position to note a transfer of stock in the corporate records cannot defeat an otherwise effective right to redeem the stock under a valid stock repurchase agreement. A transfer in violation of restrictions on the transfer of corporate stock is voidable in equity. See, e.g., *Groves v. Prickett*, 420 F.2d 1119 (9th Cir. 1970) (applying California law), *F.B.I. Farms, Inc., supra*. See, generally, 12 Fletcher et al., *supra*, § 5453. In other words, Bill's technical completion of the stock transfer does not provide a defense to a claim that the transfer occurred in violation of the relevant stock transfer restriction agreements.

Andrew's assignments of error have merit. The plain language of the stock transfer restriction agreements does not support the construction placed upon them by the district court, and the district court erred in concluding that the terms of R.W.'s will could supersede the specific restrictions on stock transfer due to the death of a shareholder.

Cross-Appeal

[7] Since the trial court's reasoning was erroneous, we turn to the alternative bases for affirming the judgment set forth in Bill's cross-appeal. An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005); *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002); *McDonald v. DeCamp Legal Servs.*,

260 Neb. 729, 619 N.W.2d 583 (2000). Here, the court concluded that "Andrew did not act improperly in instituting the present action" and denied the parties' remaining claims, but we consider the issues raised by the cross-appeal that present a basis for affirming the court's judgment on other grounds.

Initiation of Suit

Bill's first assignment of error on cross-appeal is that the court erred in not dismissing Pennfield's petition because it was not authorized by Pennfield's board of directors. Andrew admitted that he initiated Pennfield's petition in this action without direction or authority from Pennfield's board of directors. Andrew contends that this court addressed and rejected Bill's argument that the case should be dismissed with our disposition of the prior appeal in this case, *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

Andrew's argument is without merit. In *Pennfield Oil Co., supra*, a law firm, selected by the board of directors to represent Pennfield, attempted to appeal from the denial of its motion seeking leave to appear on behalf of Pennfield and disqualification of the counsel which had been representing Pennfield on Andrew's authority. However, we concluded that the district court had not entered a final, appealable order. See *id*. "[W]e [had] no jurisdiction over the appeal and [were] unable to reach its merits" and dismissed the appeal. *Id*. at 300, 673 N.W.2d at 567. The only issue we decided in *Pennfield Oil Co.* was whether the district court had entered a final, appealable order. Contrary to Andrew's argument, we did not decide, expressly or impliedly, whether the district court should have dismissed the action because Pennfield's board of directors had not authorized its filing.

[8,9] Nonetheless, we conclude that the district court did not err in reaching the merits of this action. We initially note that although the board of directors of a corporation, under ordinary circumstances, controls an action brought by the corporation, that control is not unconstrained. See *System Meat Co. v. Stewart*, 175 Neb. 387, 122 N.W.2d 1 (1963). A court of equity can and should interfere in the event of usurpation, fraud, gross negligence, or transgression of statutory limitations. See *id*. In particular, a board of directors of a corporation has no right to dismiss an action through collusion with the defendant. *Id*. Here, the

defendant—Bill—was also in effective control of the board of directors. Andrew's cross-claim alleged that Bill was in breach of his fiduciary duties.

But more significantly, regardless of how the action was initiated, the district court had jurisdiction to proceed, because Andrew, as a party to the agreements, also had standing to pursue their enforcement. In *F.H.T., Inc. v. Feuerhelm*, 211 Neb. 860, 320 N.W.2d 772 (1982), we permitted a corporation and its minority shareholder to maintain an action against the majority shareholder to compel enforcement of a redemption clause signed by the shareholders. We explained the policy underlying transfer restriction agreements, stating:

> In [close] corporations, stock restrictions are devices often employed to insure that the management and control of the business remains with the same group of investors or with people well known to them. Such restrictions may be embodied in the articles of the corporation, in the bylaws, or in shareholder agreements, and generally provide that upon the withdrawal or death of a stockholder, his shares will be sold or transferred only to the remaining stockholders or to the corporation, or at least will be offered to them before being sold to any outsider. Such agreements make it possible for shareholders to choose future associates and prevent unwanted outsiders from entering the business if their integrity or business acumen is in doubt.

Id. at 865, 320 N.W.2d at 776. We also explained that

> " '[t]here seems to be no reason in principle why they (the stockholders of a corporation) should not be permitted to retain the control of the corporation in which they have embarked their fortunes among themselves, or such of them as stand by the vessel, where no question of a *bona fide* purchaser without notice is involved. In this court, where the intent of the parties is the thing sought to be enforced, every effort should be made to hold men to agreements into which they have voluntarily entered, where the same are not obnoxious to any law or policy, and upon the strength of which others have changed their position or circumstances, or parted with a valuable consideration. . . .' "

Id. at 866, 320 N.W.2d at 776.

In *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983), we implemented that policy by permitting nonsignatories of a stock transfer restriction to maintain an action to enforce the restrictions, on the theory that they were third-party beneficiaries of the restrictions. "Beneficiaries of a contract may recover thereon, though not named as parties, when it appears by express stipulation or by reasonable intendment that rights and interests of such beneficiaries were contemplated and being provided for thereon." *Id*. at 557, 335 N.W.2d at 526.

[10] The essence of these authorities is that "[t]he intended beneficiaries of a share transfer restriction are entitled to enforce the restriction." 12 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 5460.70 at 169 (perm. ed., rev. vol. 2004 & Cum. Supp. 2005). In other words, the shareholders are all bound by the restriction and thus have standing to enforce the agreement against one another.

In the present case, Andrew brought claims against Bill in his individual capacity, seeking the same relief as Pennfield's petition. Bill and his wife filed a petition in intervention which sought, in part, a declaration that Pennfield had no right or obligation to redeem stock from the estate. The issues presented by the various pleadings were essentially the same: whether Bill's transfer of stock to himself from the Estate violated the stock transfer restriction agreements or whether Pennfield (in the absence of a valid waiver) was required to redeem the stock pursuant to the agreements. Regardless of whether the action was initiated properly, Andrew's cross-claims, and Bill and his wife's petition in intervention, effectively raised the same issues, so the court had before it all the parties to a legal dispute that was ripe for disposition. The court did not err in refusing to dismiss the action because Pennfield's board of directors did not authorize the initiation of the action.

Statute of Limitations

Bill also argues that Pennfield's and Andrew's claims should have been dismissed as barred by the statute of limitations. Bill's argument is that Andrew was aware in 1992 that Bill did not intend to redeem any more stock from the Estate and that this was when Andrew's cause of action accrued. Bill argues that Andrew was, in 1992, aware of sufficient facts for a cause of

action to accrue pursuant to the "rule regarding discovery." Brief for appellee Bill on cross-appeal at 44. See, e.g., *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996).

This argument is without merit for two reasons. First, as noted above, the 1990 agreement specifically confirmed the 1988 agreement and tolled the statute of limitations "until either party hereto shall notify the other that such statute shall again commence to run." There is no evidence in the record that such a notification was made.

[11-13] Furthermore, it is apparent that the discovery rule is not relevant to this case. "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress. *Id*. But a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit. *Cavanaugh v. City of Omaha*, 254 Neb. 897, 580 N.W.2d 541 (1998). A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned to him or her. *Id*. In point of fact, the 1988 and 1990 agreements could not be breached until the estate tax was paid and Bill attempted to transfer the stock in the absence of a valid waiver of Pennfield's contractual right to redeem the stock. While Andrew may have been aware that in 1992, Bill did not intend to redeem any more stock, Andrew was also aware that pursuant to the 1988 agreement, Bill could postpone redemption until the balance of the deferred estate tax was paid. Simply stated, no breach of contract had yet occurred in 1992, so what Andrew might have known or suspected is beside the point.

[14,15] While Bill references the "rule regarding discovery," the theory actually being advanced is that of anticipatory breach, since no actual breach of the agreement had yet occurred. The anticipatory breach of a contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evidencing an intention to refuse performance in the future. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). But anticipatory breach requires an unequivocal repudiation of the contract. See *id*. Here, the evidence does not suggest a repudiation of the agreements

sufficiently unequivocal to constitute an anticipatory breach, particularly because, had Pennfield validly waived redemption, Bill's intent to keep the stock could have been accomplished within the bounds of the agreements.

In short, the district court did not err in rejecting Bill's statute of limitations argument.

Equitable Estoppel

Finally, Bill contends that Pennfield and Andrew are equitably estopped from seeking redemption of the stock, because Bill would not have given stock to Andrew if Bill had known that the stock held by the Estate would eventually be redeemed, instead of being transferred to Bill. Because Bill cites no authority in support of this argument, it is unclear on what theory he believes Andrew should be estopped.

[16-18] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *In re Estate of Bauer*, 270 Neb. 91, 700 N.W.2d 572 (2005). Recovery on a theory of promissory estoppel, on the other hand, is based upon the principle that injustice can be avoided only by enforcement of a promise. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006). Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *Id.*

But neither theory is applicable here. In this case, while Bill asserts that Pennfield and Andrew did not timely assert the right

to redemption, he does not allege that Andrew or Pennfield made any promises not to redeem the stock, or otherwise behaved in a way that would be intended or expected to lead Bill to believe that Pennfield would not assert the right of redemption. Bill argues only that Andrew did not reveal an intent to seek redemption of the Estate's stock at the time that Bill gave stock to Andrew. Even if Bill would have acted differently at the time had Andrew informed him of such an intent, in the absence of an affirmative act on Andrew's part reasonably expected to induce action or forbearance on Bill's part, Bill has not proved that Andrew is estopped. Bill's final assignment of error on cross-appeal is without merit.

Relief

We have concluded that the court's reasoning for dismissing Pennfield's and Andrew's claims was erroneous, but that the court did not err in rejecting the alternative grounds for dismissing the claims that have been raised by Bill's cross-appeal. The remaining issue, then, is the relief to which Pennfield and Andrew are entitled. Pennfield's petition, and Andrew's cross-claim, sought a variety of declaratory and equitable relief. Generally, they sought a declaration of the parties' rights under the stock transfer restriction agreements, a finding that Bill and the Estate were in breach of the agreements, and injunctive relief directing the Estate to surrender the stock for redemption.

[19-22] Contracts for acquisition of shares of a closely held family corporation, which stock is not obtainable in the open market, are proper subjects for specific performance. *Brown v. Knox*, 219 Neb. 189, 361 N.W.2d 540 (1985). But specific performance is not generally demandable as a matter of absolute legal right; it is addressed to the legal discretion of the court and will not be granted where enforcement of the contract would be unjust. See *Langemeier v. Urwiler Oil & Fertilizer*, 265 Neb. 827, 660 N.W.2d 487 (2003). In decreeing specific performance, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the agreed-upon time. See *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 419 N.W.2d 143 (1988). The party seeking specific performance must show that it has substantially complied with the terms of the contract, including proof that it is ready,

able, and willing to perform its obligations under the contract. *Satellite Dev. Co. v. Bernt*, 229 Neb. 778, 429 N.W.2d 334 (1988).

Here, we are not persuaded that on the record before us, Pennfield and Andrew are equitably entitled to a decree ordering the Estate to surrender the stock for redemption. The 1960 agreement provided that if stock was to be redeemed, Pennfield would buy the stock "at the book value of the stock, determined by a stockholders' meeting within thirty days of the date of demise." Although the 1988 agreement changed the time at which redemption would occur, and explained in more detail what was meant by "book value," there is no indication in the 1988 agreement that it was intended to supplant the requirement, from the 1960 agreement, that the shareholders make the determination of book value at a shareholders' meeting prior to redemption.

[23] The record before us indicates that such a meeting has not taken place. Moreover, the record suggests that Andrew was personally responsible for preventing the board of directors from meeting before Andrew directed Pennfield to demand redemption of the shares. Thus, the record indicates that the redemption was not authorized by the board of directors, nor was the board of directors permitted to consider whether redemption should be waived pursuant to the waiver provision of the 1988 agreement. As a practical matter, a meeting of the board of directors or stockholders could not have taken place, given the district court's temporary injunction preventing the Estate's shares from being voted. Generally, the purpose of a temporary injunction is to protect the subject matter of litigation and preserve the status quo of the parties until a determination of the case on the merits. See, *State ex rel. Beck v. Associates Discount Corp.*, 161 Neb. 410, 73 N.W.2d 673 (1955); *State v. Baker*, 62 Neb. 840, 88 N.W. 124 (1901). Here, while the district court's concern was understandable, the temporary injunction may have had the unintended effect of materially altering the respective positions of the parties.

Based on the reasoning set forth in previous sections of this opinion, we find that Pennfield and Andrew are entitled to declaratory relief, establishing that Bill and the Estate are subject to a valid demand for redemption of the stock pursuant to the stock transfer restriction agreements. But the record does not affirmatively show that Pennfield took all the steps necessary to

redeem the shares, and it appears that the district court's temporary injunction may have prevented Pennfield's shareholders and board of directors from exercising their duties with respect to the redemption agreements. Thus, we conclude on this record, it would be unjust to decree specific performance of the stock transfer redemption agreements.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court, and remand the cause with directions to grant Pennfield and Andrew declaratory relief that is consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

NANCY CASTILLO, APPELLANT, V. MEGAN K. YOUNG AND MARLYS L. SEARS, APPELLEES.

720 N.W.2d 40

Filed August 18, 2006. No. S-04-1354.

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: Damages.** The right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act includes the right to recover for an aggravation of the preexisting disease.
3. **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.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
5. **New Trial: Damages.** When no liability issues remain to be litigated, the cause is remanded for a new trial on the issue of damages only.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Stanley D. Cohen, of Law Office of Stan Cohen, for appellant.

Stephen L. Ahl and Melanie J. Whittamore-Mantzios, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee Megan K. Young.

Timothy E. Clarke, Tracy L. Stoehr, and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Marlys L. Sears.

Hendry, C.J., Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ., and Hannon, Judge, Retired.

Hannon, Judge, Retired.

NATURE OF CASE

Nancy Castillo was injured as a result of a three-car accident. The defendant Megan K. Young's vehicle skidded out of control and hit Castillo's vehicle head on in Castillo's lane of traffic, and the defendant Marlys L. Sears' vehicle then struck Castillo's vehicle from the rear. Castillo sued both drivers for negligence. A jury awarded Castillo a verdict of $13,058.67 against Young only. Castillo appeals.

We note that Young has not filed a cross-appeal, and we find no plain error with regard to the issue of liability. Therefore, we affirm that portion of the trial court's judgment. We also note that Castillo has abandoned her claim against Sears. The controlling issue presented by this appeal is whether the trial court erred in failing to give a requested jury instruction on damages for personal injuries. The instruction related to what is frequently referred to as an "eggshell-skull plaintiff." We conclude the trial court erred, and we reverse, and remand for a new trial on the issue of damages.

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. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

FACTS

We summarize only those facts that relate to the nature and extent of Castillo's personal injury and damages, and we review

the evidence concerning damages in the light most favorable to Castillo. See *id*.

On December 20, 2000, at approximately 7:30 a.m., Young's vehicle, which was traveling north, crossed the centerline of North 56th Street in Lincoln, Nebraska, and struck Castillo's vehicle head on as she was driving southbound. Castillo's vehicle was equipped with seatbelts, but she was not wearing hers that day. Sears was driving south behind Castillo, and her vehicle came into contact with the rear of Castillo's vehicle when it was stopped by the collision with Young's vehicle.

Castillo stated that as Young's vehicle slid toward her, she saw Young's face, and that Young appeared "terrified." Castillo testified that she closed her eyes at the point of impact and that she heard a crash in the front of her vehicle and another in the back. She was then "jolted awake" and found that her vehicle's airbag had deployed. She had to exit the vehicle through the front passenger door. Photographs show severe damage to the left front and left rear of her vehicle.

After the accident, Castillo's chest was extremely painful and the left side of her jaw became painful. She was taken to the hospital, but released. The next day, her entire upper body was "really painful" and she believed she had broken her jaw again. (Castillo had suffered a broken jaw about 17 years earlier.) On December 22, 2000, she saw her family physician, who prescribed muscle relaxants and referred her to a dentist. The dentist made Castillo a splint, which she was to wear 24 hours a day. Two weeks later, she was given one splint to wear during the day and another to wear at night.

During this period, Castillo reported she had headaches and extreme pain at the base of her skull. She said she felt like her whole back, jaw, and neck were "on fire." She had difficulty opening her mouth and chewing certain foods, including steak, bagels, and apples. She continued treatment with the dentist for about 8 months but quit seeing him because he asked for payment of $110 per month, which Castillo said she could not afford.

In April 2002, Castillo was referred to Daniel Tylka, a doctor of dental medicine, who prescribed another splint and referred her for physical therapy. Tylka, who treated only disorders of the temporomandibular joint and related craniofacial pain problems,

testified that Castillo said her primary complaint was preauricular pain, or pain in front of the ear. She said that it had started about a week after the accident and that it was worse on the right than the left. She said that it was a continuous dull ache and that the pain would occasionally reach 7 or 8 on a scale of 1 to 10. She reported that she began to feel neck pain in January 2001. Her headaches started about a week after the accident, and she described them as dull, achy sensations that occurred two to three times each week. Castillo reported to Tylka that she had fractured her jaw in 1983 but that she had full resolution of that problem prior to the December 2000 accident. Tylka's examination showed that Castillo had full normal lateral movement of her jaw. He found that her jaw was slightly deflected to the right. Tylka diagnosed Castillo as having an articular disk disorder of the left temporomandibular joint. On the right, there was a disk displacement without reduction. She also suffered from myofascial pain involving the jaw and neck muscles.

After an MRI, Tylka determined that Castillo had disk displacement disorders of both temporomandibular joints, and he gave a 5-percent impairment rating to the jaw. Tylka testified:

> [T]here are patients — it's like a truck. If you rear end a truck that's full of bricks, you're probably going to hurt your truck — you're not — you're going to hurt yourself, not the truck. If you rear end a truck full of eggs, you're more likely to do damage than if you rear end a truck full of bricks.
>
> Unfortunately I think in [Castillo's] case, they rear-ended her being full of eggs. She was fragile. . . . Any time you've had injury to a joint that would cause fracture of that bone, there has to be consequence to the system, whether there [are] symptoms provoked at that time or not.

Tylka said he would never know whether Castillo's disk displacement "was a result of that accident or was just there to start with." He stated there was a high probability that Castillo had some disk displacement or problem in the temporomandibular joint prior to the December 2000 automobile accident. However, he said the "symptomatology that she was experiencing was a direct result of the motor vehicle accident."

By May 7, 2002, Castillo reported to Tylka that she was at least 50 percent better. By May 31, Castillo reported that she was

doing much better and was able to laugh and talk without pain. At that time, her neck was her biggest complaint. By June 4, Castillo had reported to Tylka an overall improvement of 70 percent. Tylka last saw Castillo on September 16. By the time Castillo was released by Tylka, she stated that her jaw pain had improved significantly.

Before Tylka moved to Oklahoma and released Castillo from his care, he referred Castillo to Dr. Kathryn Hajj, a physiatrist. Hajj testified that she had evaluated Castillo on July 19, 2002. Castillo reported that she was being treated for temporomandibular joint disorder, or pain in the jaw, and that the pain was referred to her upper back and neck areas. She also had pain in the front of her chest, with numbness and tingling in her right upper extremity that radiated into her right hand, and she had headaches. Castillo told Hajj about the previous broken jaw. Upon examination, Hajj found that Castillo had full range of motion in all directions, no sensory deficits, good strength in her extremities, and a normal gait but that she had deep muscle spasms in her upper back. Hajj diagnosed Castillo as suffering from mild myofascial pain syndrome or muscle pain, and Hajj stated that such pain can be referred to other areas of the body. Hajj believed Castillo had reached maximum medical improvement, and she gave Castillo an 8-percent whole person impairment rating as a result of the accident.

Dr. Michael Huffman, a family practitioner, testified that on March 13, 2003, he saw Castillo for the first time after the accident. She complained of posterior neck and jaw pain and told him she had the pain since she was involved in a motor vehicle accident. He diagnosed her as having cervical neck and temporomandibular joint strain. She visited Huffman again on April 29, and he found her to be in the same condition. Castillo had already seen an oral surgeon and obtained a mouth splint, which she continued to use, and she was continuing neck exercises, physical therapy, and muscle relaxants for the neck pain. On a third visit on October 1, Huffman determined that Castillo had underlying fibromyalgia, which he described as a common but poorly understood pain problem when a person experiences chronic pain in the soft tissues, which are primarily ligaments, tendons, and muscles. Huffman said:

> We don't know why these [ligaments, tendons, and muscles] hurt following these types of injuries. But we know that a person's pain perception in these tissues is greatly enhanced, it does not take much pain to create a lot of discomfort. And when it becomes long term, it's commonly referred to as fibromyalgia.

Huffman said Castillo's injuries were not necessarily permanent and that eventually she should heal. Huffman said he would not disagree with Hajj's 8-percent impairment rating due to myofascial pain or Tylka's 5-percent impairment rating of the jaw. Huffman said he could relate the fibromyalgia to the motor vehicle accident to a reasonable degree of medical certainty, but he did not know whether Castillo had fibromyalgia prior to the accident because he had not seen her between 1999 and 2003.

The record showed that Castillo broke her jaw in 1983 or 1984, at which time, the jaw was wired shut. However, Castillo testified that she had fully recovered and had noticed no problems with her neck or shoulders until after the collision with Young. At the time of trial, Castillo said the pain in her jaw would rate a 2 on a scale of 1 to 10, with 10 being the most severe pain. She testified to difficulties completing her usual office work, home chores, and family activities. However, on cross-examination, Castillo said that she was physically able to complete her job duties and that she was able to do most of the activities she could do before the accident. She said she tried to continue the physical therapy as prescribed, which included biting on a tongue depressor eight times per day for 20 seconds each time. She testified that as a result of the accident, she lost about $135 in salary and her car was totaled.

Castillo alleged that she sustained the following injuries as a result of the collision: thoracic outlet syndrome, "[t]emporomandibular joints bilaterally," upper back and neck pain with a burning sensation in the right shoulder and arm, and headaches. She sought damages for an 8-percent whole person impairment, past and future disability and medical expenses, loss of past working time and future earning capacity, and past and future physical pain, mental suffering, and emotional distress. She alleged that her medical expenses to date totaled $12,814.20. As related below, at the jury instruction conference, Castillo's request for an instruction on damages was refused.

The jury determined that Castillo had met her burden of proof against Young, but not against Sears, and awarded judgment of $13,058.67. Castillo filed a motion for additur, asserting that the jury's verdict included grossly inadequate damages, and a motion for new trial. Both motions were overruled. Castillo appeals.

ASSIGNMENTS OF ERROR

Castillo assigns as error the trial court's failure to submit her proposed jury instruction No. 13 in its entirety. She also asserts that the trial court abused its discretion in overruling her motion for new trial on the basis that the verdict was inadequate as a matter of law and was the result of passion, prejudice, mistake, or some other reason not apparent in the record.

ANALYSIS

Jury Instruction

Castillo's first assignment of error asserts that the trial court erred in failing to give her proposed jury instruction on damages. Instruction No. 13, as given by the court, stated:

> There is evidence that the Plaintiff had broken her jaw in 1983 and experienced a dis[k] displacement in her jaw prior to the December 20, 2000, accident.
>
> The Defendant(s) is liable only for any damages that you find to be proximately caused by the Defendants' negligence relating to the December 20, 2000, accident.
>
> If you cannot separate damages caused by the pre [sic] existing broken jaw from those caused by the accident of December 20, 2000, then the Defendant(s) are liable for all of those damages.

The instruction requested by Castillo stated:

> There is evidence that the Plaintiff had a broken jaw 20 years before the accident on December 20, 2000. The Defendant(s) is (are) liable only for any damages that you find [were] proximately caused by the accident on December 20, 2000.
>
> If you cannot separate damages caused by the pre [sic] existing broken jaw from those caused by the accident of December 20, 2000, then the Defendant(s) is (are) liable for all of those damages.

> The defendant's [sic] may be liable for bodily harm to Nancy Castillo even though the injury is greater than usual due to the physical condition which predisposed Nancy Castillo to the injury. In short, the defendant's [sic] take the plaintiff as they find her.
>
> Authority: Kett[e]ler v. Dan[i]el, 251 Neb. 287 (1996).

During the jury instruction conference, the trial court considered the paragraph that Castillo sought to include in the instruction. The court declined, stating: "It's designed for the person with the unusual physical characteristic, like the eggshell knee, not an aggravation of a pre-existing injury, so I'm not going to give that. I don't think it's applicable in this case. I think this covers the situation better."

[2] The instruction as given by the trial court was a correct statement of the law as far as it goes, but it does not cover the theory of damages concerning a preexisting condition, which was adopted by this court in *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969). In *David v. DeLeon*, 250 Neb. 109, 114, 547 N.W.2d 726, 729 (1996), this court reiterated "the theory of the 'eggshell-skull' plaintiff," which was originally adopted in *McCall v. Weeks, supra*. In *David v. DeLeon*, this court stated:

> Under *McCall*, the right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act includes the right to recover for an aggravation of the preexisting disease. This holding served as authority in this case for the decision of the trial court to issue the entirety of NJI2d Civ. 4.09 as its instruction on damages.

250 Neb. at 114, 547 N.W.2d at 729-30.

When presenting her proposed instruction to the trial court, Castillo relied on *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996), in which the plaintiff was injured in an automobile accident. There was evidence that prior to the accident, the plaintiff had two preexisting conditions, and the trial court gave an instruction similar to the one requested by Castillo. The instruction stated, in summary, that the jury was to grant an award only for damages proximately caused by the accident. If the jury could not separate the damages caused by the preexisting condition from those caused by the accident, then the defendant was

liable for all of the damages, and the defendant could be liable for bodily harm even though the injury was greater due to a physical condition which predisposed the plaintiff to injury. The instruction provided that a defendant takes a plaintiff as the defendant finds him or her.

In *Ketteler v. Daniel, supra*, the evidence showed that the plaintiff had two preexisting conditions which could have been adversely affected by the collision. In addition to a neck, back, and hip condition, she had breast implants that could have ruptured as a result of the collision. There was also evidence that the implants could have ruptured because of their age. The instruction given to the jury referred to only the neck, back, and hip condition and did not refer to the breast implants. That failure was held to be reversible error.

In *David v. DeLeon, supra*, the plaintiff had preexisting knee and spine conditions which degenerated following the collision. The evidence was in conflict as to whether the degeneration was causally related to the collision or whether it was a natural degeneration. The trial court gave an instruction stating that defendants take plaintiffs as they find them. This was held to be correct, and the trial court's judgment was affirmed.

The holdings of these cases clearly establish the rule that if a plaintiff has a preexisting condition and the defendant's conduct resulted in greater damages because of that preexisting condition, the defendant is nonetheless liable for all damages proximately caused by the defendant's conduct. In this appeal, we must determine whether the evidence supports a finding that the collision aggravated Castillo's jaw condition.

Castillo had broken her jaw several years before the December 2000 collision, but she testified she had a complete recovery and had no symptoms for a number of years. Her testimony concerning the pain in her jaw following the collision is summarized above.

Tylka first examined Castillo on April 3, 2002. He testified that Castillo had an "articular dis[k] disorder of the left temporomandibular joint," which he described as "basically a dis[k] displacement with reduction." He found tenderness in many of the muscles and concluded that Castillo had "myofa[s]cial pain involving the upper quadrant, not only the jaw muscles but

a lot of the neck muscles as well" and "tenderness in the insertion of the temporalis muscle, suggesting the possibility of a secondary temporalis tendonitis." He opined that it was likely Castillo had a joint displacement prior to the accident and that the accident "definitely aggravated what [Tylka] believe[d] was a preexisting displacement."

After relating the course of Castillo's treatment, Tylka opined that Castillo had a 5-percent impairment of her jaw because of her condition as of the day of his deposition. He stated that he did not know if the accident was responsible for the entire impairment, but he testified that he definitely thought part of the 5-percent impairment was related to the accident.

Tylka testified that studies have shown that as many as one-third of the population has an undiagnosed disk displacement. He opined that Castillo's accident might not have caused the joint disorder but that it caused the pain associated with the disorder. He testified that he had explained to Castillo that she was not going to return to a time when she did not have pain in the joint and that she should continue to sleep with an orthodontic device and avoid hard or chewy foods.

Tylka testified that there was at least "an aggravation of a preexisting condition." He then explained his opinion by stating that he has given depositions before concerning trauma patients and that "I think I've had attorneys put it in this way." He then provided the analogy about the truck loaded with eggs as opposed to bricks that is quoted above. He further stated: "Whether this — the dis[k] displacement was a result of that accident or was just there to start with, we'll never know. But yes, I believe the symptomatology that she was experiencing was a direct result of the motor vehicle accident." He stated that his opinion was within a reasonable degree of medical certainty. There is evidence in the record which disputes Tylka's opinion, but his testimony, if believed, would support giving the instruction requested by Castillo, who, as the successful party, is entitled to every reasonable inference deducible from the evidence. See *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[3] This court has often noted that 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. *Id*. 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*.

In *Ketteler v. Daniel*, 251 Neb. 287, 298, 556 N.W.2d 623, 630 (1996), when this court concluded that an instruction requested by the plaintiff should have been given, the court stated:

> First, the proffered instruction correctly stated the law. Second, the instruction was warranted by the evidence offered by [the defendant's expert witness], who testified that [the plaintiff] suffered from fibromyalgia prior to the accident, and by [the plaintiff's family physician], who testified by deposition that [the plaintiff] had suffered from back and neck conditions prior to the accident which were aggravated by the accident. Finally, refusal by the trial court to submit the entire proposed instruction was prejudicial to [the plaintiff].

For the same reasons, we conclude Castillo was prejudiced by the trial court's failure to give the proffered instruction in this case. We find that a new trial on the issue of damages is warranted.

Inadequacy of Verdict

[4] Castillo's second assignment of error asserts that the trial court abused its discretion in overruling her motion for new trial on the basis that the verdict was inadequate. Because we are ordering a new trial on the issue of damages, a discussion of the adequacy of the verdict is not necessary. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

CONCLUSION

[5] Because the trial court erred in its jury instruction on damages, Castillo is entitled to a new trial on that issue. The jury determined the liability issue in favor of Castillo and Sears, and Castillo has abandoned her claim against Sears. When no liability

issues remain to be litigated, the cause is remanded for a new trial on the issue of damages only. See *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973).

Therefore, the judgment of the trial court as to liability is affirmed, the judgment as to damages is reversed, and the cause is remanded for a new trial on the issue of damages only.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

WRIGHT, J., not participating.

GILBERT M. AND MARTHA H. HITCHCOCK FOUNDATION, A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES, v. DENMAN KOUNTZE, JR., ET AL., APPELLANTS.

720 N.W.2d 31

Filed August 18, 2006. No. S-04-1385.

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. **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. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
4. **Actions: Corporations: Notice.** The notice requirements in Neb. Rev. Stat. §§ 21-1949 and 21-1977 (Reissue 1997) are intended to recognize the Attorney General as an interested party in actions brought under those statutory sections.
5. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
6. **Actions: Corporations: Notice.** Effective notice to the Attorney General is an essential prerequisite to proceeding in any action involving a public benefit corporation for which such notice is required.
7. **Corporations: Notice: Time: Proof.** Neb. Rev. Stat. § 21-1915 (Reissue 1997) explains how a party can evidence its timely compliance with notice requirements under the Nebraska Nonprofit Corporation Act.
8. **Appeal and Error.** An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded for further proceedings.

David J. Lanphier, of Broom, Johnson, Clarkson & Lanphier, and David A. Domina and Michael C. Stumo, of Domina Law, P.C., for appellants.

Edward D. Hotz and Shawna D. Peterson, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellees.

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

GERRARD, J.

NATURE OF CASE

The appellees, members of the board of trustees (the Board) of the Gilbert M. and Martha H. Hitchcock Foundation (the Foundation), brought a derivative action on behalf of the Foundation against the appellants, also members of the Board, after a series of disagreements among the parties made management of the Foundation effectively impossible. The district court made numerous findings on issues, including the validity of Board meetings held separately by the parties and the requested removal of Board members. The appellants filed a post-trial motion challenging the court's jurisdiction to consider the case absent evidence that the appellees notified the Attorney General as required by statute, which motion the court overruled. Because effective notice to the Attorney General is essential to protecting the public interest in the management of charitable corporations, we conclude that the court erred in exercising jurisdiction without evidence that effective notice was given. We reverse the judgment of the district court.

BACKGROUND

The Foundation was established for charitable, religious, and educational purposes and was principally funded through a bequest in Martha H. Hitchcock's will. Since 1962, the Foundation has donated nearly $16 million to numerous charitable, religious, and educational organizations, including Brownell-Talbot School, Joslyn Art Museum, Omaha Botanical Gardens, Trinity Cathedral, United Way of the Midlands, and Western Heritage Museum. The Foundation is a 501(c)(3) corporation under the Internal Revenue Code and is a public benefit corporation under the Nebraska Nonprofit Corporation Act. See Neb. Rev. Stat.

§ 21-19,177(3) (Reissue 1997). Management of the Foundation is vested in the Board. In January 2002, the Board consisted of Denman Kountze, Jr.; Charles Kountze; and Edward Kountze (collectively the appellants); Neely Kountze; Mary Kountze (Mary); and Tyler Gaines (collectively the Local Trustees); Paul Shirley; and Ron Ruh. Pursuant to the Foundation's bylaws, a majority of the Board constitutes a quorum, provided that such quorum includes Mary Mallory Kountze, Mallory Kountze, or Denman Kountze, Jr. Of the three names specified, Denman was the only one living at the time of trial.

The last valid and undisputed meeting conducted by the Board occurred in January 2002, during which Denman, as president of the Foundation, asked Thomas Burke, the Foundation's secretary, manager, counsel, and registered agent, to resign as secretary of the Foundation. Edward was then elected secretary of the Foundation.

In April 2002, Ruh resigned as trustee of the Foundation. On September 18, 2002, a meeting of the Foundation was commenced at First National Bank. The appellants and the Local Trustees were present, along with Robert Cohen, an attorney with the Kutak Rock law firm, and two First National Bank trust officers. Shirley participated by telephone. During the meeting, the Board agreed to appoint First National Bank as registered agent of the Foundation. In discussing replacements for Ruh on the Board, Charles and Edward suggested Edward's wife and Peter Cunningham as replacements, while Neely suggested John Webster as successor trustee.

Ballots were distributed, and a vote on a replacement took place two times during the meeting. On both occasions, the appellants refused to participate in the vote, claiming that the election was not properly part of the agenda and that the meeting was not a formal meeting at which an election could be conducted. The appellants left the room in protest, but a dispute exists as to whether they were in the room at the time the two votes were conducted. During both votes, the Local Trustees and Shirley voted for Webster to serve on the Board.

In late September 2002, the Nebraska Secretary of State sent a notice of rejection, notifying the Foundation that First National Bank could not serve as registered agent. In December, without

conducting a vote of the Board or informing the Local Trustees, Edward and Denman filed a form changing the registered agent and office of the Foundation to Cohen and the Kutak Rock law firm, respectively. In addition, Denman requested that a $125,000 check on the Foundation's account be issued to Columbia University, without Board approval or authorization. The check was issued by the bank, but payment of the check was promptly stopped by the Local Trustees upon discovery that the check had been issued.

In January 2003, the Local Trustees and Webster (collectively the appellees) distributed notice of an annual meeting for the Foundation at Burke's office on January 14 at 9 a.m. to the trustees of the Foundation, including Denman, Edward, Neely, Gaines, Charles, Mary, and Webster. Shirley had since passed away.

At 8:30 a.m. on January 14, 2003, a meeting commenced at the Kutak Rock law firm, and those present included Charles, Denman, Edward, and David Clark. A court reporter was present to record the meeting. The appellants telephoned Mary and, when she answered, declared a quorum. Despite Mary's questions regarding whether the other trustees were aware of the meeting, Edward called a vote to elect Clark to the Board. Upon hearing this, Mary hung up the telephone. The meeting at the Kutak Rock law firm continued. Charles' term on the Board was renewed, Webster's election to the Board was declared void, Cunningham was elected to the Board, Denman was reelected president and elected treasurer, and Edward was elected vice president and secretary.

Meanwhile, the appellees held their meeting at Burke's office at 9 a.m. on the morning of January 14, 2003, and reelected Charles and Gaines to the Board, reelected Denman as president and Neely as vice president, elected Gaines as secretary, and elected Mary as treasurer. The appellees also amended the quorum requirement to provide that a majority of the trustees constitute a quorum, "provided such quorum includes a current member of the Board of Trustees who is a lineal descendant of Mary Mallory Kountze."

On January 21, 2003, the appellees filed a derivative complaint against the appellants on behalf of the Foundation, making various allegations regarding the events of the previous year

and requesting a declaratory judgment that Webster's election to the Board was valid; that action taken by the appellants at their January 14 meeting was invalid due to deficient notice and lack of a quorum; and that the change of registered agent to Cohen was without the Board's authorization and was, therefore, invalid. In addition, the appellees requested a court-ordered meeting of the Foundation to dispense of the quorum requirement or, alternatively, an order ratifying the appellees' actions at their January 14 meeting. The appellees also requested an injunction preventing the appellants from conducting or attempting to conduct further business of the Foundation. Finally, the appellees asked the court to remove Denman, Edward, and Charles as trustees, for breaching their fiduciary duty to the Foundation, and to award damages.

The appellants denied the allegations of the complaint and affirmatively alleged, in part, that the appellees lacked standing to bring a derivative action. In addition, the appellants asserted a counterclaim making numerous allegations and requesting that the appellees be enjoined from convening any Foundation meeting and that Webster be enjoined from participating in Foundation matters. The appellants also requested a declaratory judgment that Webster's election to the Board was invalid; that the September 2002 meeting of the Foundation was not valid; that Gaines' term on the Board expired on January 14, 2003; and that Neely, Mary, and Gaines were no longer fit to serve as trustees. Further, the appellants requested a declaration that the appellees' January 14 meeting was not a valid meeting. In the alternative, the appellants requested an equitable division of the Foundation assets.

After a bench trial, the district court entered an order determining that the appellees had standing to file the derivative action under Neb. Rev. Stat. § 21-1949 (Reissue 1997). The court noted that the record failed to show any proof of notice to the Attorney General, as required by § 21-1949. However, the court concluded that such lack of notice was not a jurisdictional defect.

The court further concluded that the September 2002 meeting of the Foundation was valid. However, the court determined that Webster was not validly elected to the Board because there was no vacancy to be filled. The court explained that the bylaws of the Foundation provide for seven trustees and that even though

the Foundation had operated for many years with eight trustees, such acquiescence did not amend the bylaws to increase the size of the Board.

The court went on to find that the January 2003 annual meeting attempted by the appellees at Burke's office was not valid because, without Denman in attendance, a quorum was not present. Similarly, the court found that the appellants' attempted annual meeting held the same day at the Kutak Rock law firm was not valid.

The court removed Edward as trustee but declined to remove Denman, Charles, or any of the Local Trustees from the Board. The court found no actionable civil conspiracy on the part of the Local Trustees. The court also determined that the appointment of Cohen as registered agent was void and ordered the bylaws to be amended to remove the requirement that one of three Kountze family members be present in order to establish a quorum.

Subsequently, the parties each filed posttrial motions. The appellants filed a motion to alter or amend or, alternatively, for new trial, arguing in part that the court erred in exercising jurisdiction after finding that the appellants failed to give notice of their action to the Attorney General. The appellees filed a motion to amend the court's findings and judgment, asking the court to find that notice was provided to the Attorney General as required by § 21-1949. In addition, the appellees moved the court to reopen the record to receive evidence of their notice of the action. In their motion, the appellees claimed that they properly gave notice to the Attorney General, but due to an oversight, neglected to offer a copy of the notice to the court at trial. The court overruled all of the motions.

ASSIGNMENTS OF ERROR

The appellants present 19 assignments of error on appeal, which may be summarized, restated, and renumbered as follows: The district court erred in (1) exercising jurisdiction despite the appellees' failure to notify the Attorney General; (2) ordering a meeting of the Foundation in March 2003, dispensing with the quorum requirement for that meeting, and enjoining the Foundation's scheduled January 2004 annual meeting; (3) finding that a valid and formal meeting of the Foundation occurred on September 18, 2002; (4) finding that a trustee can be elected

at a meeting other than the annual meeting of the Board; (5) finding that the designation of a registered agent for the Foundation requires Board action; (6) determining that the appellants' January 2003 meeting was "deceitful and in bad faith" while the appellees' January 2003 meeting was "not valid"; (7) finding that the appellees were motivated by a desire to maintain the smooth operation of the Foundation while the appellants were selfish, not altruistic, and were eleemosynary; (8) ordering that Edward be removed from the Board; (9) ordering that the quorum provision be removed from the bylaws; (10) finding no error in the Local Trustees' correspondence with Burke; (11) failing to find that the Local Trustees' attempt to hold a special meeting was not fraudulent and dishonest; (12) failing to order the removal of Gaines, Neely, and Mary from the Board; (13) overruling the appellants' motion for recusal and/or mistrial; and (14) excluding the testimony of the appellees' expert witness.

STANDARD OF REVIEW

[1] 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).

ANALYSIS

The first issue we address is the appellants' argument that the district court erred in hearing this case because the appellees failed to provide notice to the Attorney General, as required by statute.

Within the Nebraska Nonprofit Corporation Act, see Neb. Rev. Stat. §§ 21-1901 to 21-19,177 (Reissue 1997 & Cum. Supp. 2004), § 21-1949 provides for an action to be brought on behalf of a corporation and states, in part:

> (f) The complainants shall notify the Attorney General within ten days after commencing any proceeding under this section if the proceeding involves a public benefit corporation or assets held in charitable trust by a mutual benefit corporation.

Further, § 21-1977 states:

> (a) The district court . . . may remove any director of the corporation from office in a proceeding commenced either

> by the corporation, its members holding at least ten percent of the voting power of any class, or the Attorney General in the case of a public benefit corporation . . . .
>
> . . . .
>
> (d) If a public benefit corporation or its members commence a proceeding under subsection (a) of this section, they shall give the Attorney General written notice of the proceeding.

The appellants argue that the appellees failed to demonstrate at trial that they notified the Attorney General of their action against the appellants as required by statute. The appellees argue that failure to notify the Attorney General is not jurisdictional. They also assert that at the hearing on their motion asking the court to amend its findings and judgment, the court was provided with proof that notice was actually provided to the Attorney General. We first consider whether an action under §§ 21-1949 and 21-1977 can proceed without notice to the Attorney General.

[2,3] 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). When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

Comments to the Revised Model Nonprofit Corporation Act, upon which the Nebraska act is based, indicate that the notice requirements at issue here provide the Attorney General an opportunity to learn of and evaluate the dispute and the option to join or intervene in the action. Rev. Model Nonprofit Corp. Act §§ 6.30 and 8.10 (ABA 1988). Public benefit corporations are domestic corporations which are formed as public benefit corporations pursuant to §§ 21-1920 to 21-1926 or are required to be public benefit corporations pursuant to § 21-19,177. § 21-1914(26). Such corporations, which usually do not have participants with a sufficient economic interest to ensure oversight, can only be made accountable for their use of assets if

there are broad powers of regulation in a state officer. Thus, statutory authority has been given to the Attorney General to act in the public good in enforcing the requirements applicable to nonprofit corporations, particularly public benefit corporations. In other words, the Attorney General has standing to protect the public interest. See *Summers v. Cherokee Children & Family Serv.*, 112 S.W.3d 486 (Tenn. App. 2002).

In the case of a charitable trust, the Attorney General has long been recognized as having the right to maintain an action for enforcement of the trust or to prevent a misuse of the property. *In re Estate of Grblny*, 147 Neb. 117, 22 N.W.2d 488 (1946), *overruled in part on other grounds, Anoka-Butte Lumber Co. v. Malerbi*, 180 Neb. 256, 142 N.W.2d 314 (1966). See *Wood v. Lincoln General Hospital Assn.*, 205 Neb. 576, 288 N.W.2d 735 (1980) (notice given to Attorney General as attorney for public charities in action commenced by trustee of charitable trust). Further, we have stated that the Attorney General is in any case a proper party in a litigation involving a charitable trust, whether he or she appears as plaintiff or as defendant. *In re Estate of Grblny, supra*.

[4] In that same vein, the notice requirements in §§ 21-1949 and 21-1977 are intended to recognize the Attorney General as an interested party in actions brought under those statutory sections. The privileges provided by law to public benefit corporations, and other charitable institutions, carry a corresponding obligation to be accountable to the public for the actions such institutions undertake. The public, and particularly charitable donors, are entitled to assurance that their interests are represented in actions where a public benefit corporation is concerned. To that end, the Attorney General is notified in order to represent those interests if necessary. § 21-1918(b)(2). The facts of the present case illustrate *why* the Attorney General has been granted statutory authority to oversee such corporations on behalf of the public good.

In other circumstances in which parties to an action failed to notify an interested party, the action could not proceed without notifying such parties. See, *In re Conservatorship of Holle*, 254 Neb. 380, 576 N.W.2d 473 (1998); *Gentsch, Inc. v. Burnett*, 173 Neb. 820, 115 N.W.2d 446 (1962). We find the same result to be

warranted here. As a matter of basic fairness, a court should not enter a decree affecting the rights of an interested party without providing that party the opportunity to appear and be heard. See *id*. In the case of actions involving public benefit corporations, the statutes recognize the interest of the public. For that public interest to be vindicated, it is necessary for the Attorney General to be notified so that he or she can determine if intervention is warranted. The statute requires that the Attorney General be given notice of claims such as those made by the appellees in the instant case, and that requirement would be meaningless if the action could proceed without notice having been given. There would be no consequence for a party's failure to meet the statutory notice requirement.

[5,6] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Salts v. Lancaster Cty.*, 269 Neb. 948, 697 N.W.2d 289 (2005). If the statutory notice requirement is to be meaningful, and the statutory purpose of permitting the Attorney General to protect the public interest is to be accomplished, then the only reasonable conclusion to be drawn from the statute is that effective notice to the Attorney General is an essential prerequisite to proceeding in any action involving a public benefit corporation for which such notice is required.

The appellees also argue that at the hearing on their motion to alter or amend the judgment, they presented sufficient evidence of such notice. The district court, however, concluded that the evidence of notice was insufficient. Section 21-1915 provides:

> Written notice . . . is effective at the earliest of the following:
>
> (1) When received;
>
> (2) Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed correctly addressed and with first-class postage affixed;
>
> (3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee; or
>
> (4) Thirty days after its deposit in the United States mail, as evidenced by the postmark, if mailed correctly addressed

and with other than first class, registered or certified postage affixed.

[7] Because timely notice is essential for the Attorney General to effectively represent the public interest in these proceedings, § 21-1915 explains how a party can evidence its timely compliance with statutory notice requirements.

[8] The intent of the statutory scheme is clear, both in requiring notice and in prescribing when and how notice can be proven effective. The notice requirement of the statutes would be meaningless if a failure to give notice had no consequences, and it would be equally meaningless if the party with the burden of giving notice was not required to prove, at trial, that notice had been effectively given. But in this case, there was no evidence presented at trial establishing any form of notice, much less any of the forms of notice specified by § 21-1915. Even at the hearing on their posttrial motions, the appellees presented only an affidavit from counsel averring that a copy of the complaint had been sent to the Attorney General at the time of filing. The appellants countered with affidavits tending to suggest that the Attorney General had not been made aware of the action until a few days before trial. Furthermore, the district court specifically rejected the appellees' argument that evidence of notice was provided, and denied the appellees' motion to reopen the record so that such evidence could be admitted. An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). Here, the district court specifically rejected the arguments upon which the appellees are relying, yet the appellees did not perfect a cross-appeal to preserve any complaint with respect to the district court's reasoning.

In short, it was the appellees' burden, as plaintiffs, to notify the Attorney General in a timely fashion and to provide evidence at trial that notice had been given. Instead, no evidence of notice was admitted at trial, and the record contains only conflicting affidavits belatedly submitted in support of posttrial motions. The appellees have not cross-appealed with respect to the district court's understandable conclusion that the evidence of notice to

the Attorney General was not sufficient, and the appellants correctly contend that in the absence of such evidence, the appellees were not entitled to relief.

Thus, we conclude that the district court erred in proceeding to trial without sufficient evidence that the Attorney General was notified of this action and had an adequate opportunity to intervene on behalf of the public. The stakes of this proceeding are simply too high for the district court, or this court, to decide issues on the merits in the absence of proof that the Attorney General's office had the opportunity to discharge its duty to protect the public interest.

Having so determined, we do not consider the appellants' remaining assignments of error. The remaining issues raised on appeal all relate to determinations that the district court should not have made without evidence that the Attorney General had been given effective notice of the action, and the opportunity to intervene, before the district court made its determinations as to the merits of the dispute.

CONCLUSION

The multiple allegations of fraud, dishonesty, and self-dealing in this case, involving a multimillion-dollar charitable foundation of significant social and community importance, emphasize the need for the Attorney General to have a meaningful opportunity to intervene in the proceedings. This is not a mere technicality. Rather, as the Legislature has directed by statute, and common sense indicates in any event, an effective notice to the Attorney General is essential for the Attorney General to have the opportunity to protect the public interest. Thus, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

MICHAEL R. JOHNSON, APPELLANT, V. RICHARD W. JOHNSON, JR., ET AL., APPELLEES.

720 N.W.2d 20

Filed August 18, 2006. No. S-04-1396.

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. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
3. **Corporations: States.** The internal affairs doctrine is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise, a corporation could be faced with conflicting demands.
4. ____: ____. Neb. Rev. Stat. § 21-20,172 (Reissue 1997) was intended to preserve the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states.
5. **Corporations: Jurisdiction.** The internal affairs doctrine was developed on the premise that in order to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions.
6. **Corporations.** By providing certainty and predictability, the internal affairs doctrine protects the justified expectations of the parties with interests in the corporation.
7. **Corporations: Jurisdiction.** The internal affairs doctrine is a choice-of-law principle, and not a bar to jurisdiction.
8. **Corporations: Jurisdiction: States.** Whether or not a dispute concerning the internal affairs of a foreign corporation should be heard in the courts of Nebraska is not controlled by the internal affairs doctrine, but by the same principles of personal jurisdiction and forum non conveniens that would be applicable to any other suit involving an out-of-state defendant.
9. **Corporations: Jurisdiction.** A court will exercise jurisdiction over an action involving the internal affairs of a corporation unless it is an inappropriate or an inconvenient forum for the trial of the action.
10. **Corporations: Jurisdiction: Equity: Receivers.** Equity has jurisdiction to appoint a receiver for the instate assets of a foreign corporation.
11. **Corporations: States: Parties.** The local law of the state of incorporation applies to internal affairs, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which case, the local law of the other state will be applied.

12. **Corporations: States.** Where "internal affairs" are concerned—the relations among the corporation, its shareholders, directors, officers, or agents—the local law of the state of incorporation will be applied unless application of the local law of some other state is required by reason of the overriding interest of that other state in the issue to be decided.
13. ____: ____. The factors applicable to a choice of law where the internal affairs of a foreign corporation are concerned include (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

James M. Bausch, Terry R. Wittler, Shawn D. Renner, and Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Gerald P. Laughlin, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., and Steven E. Achelpohl for appellees.

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

GERRARD, J.

The question presented in this case is whether the substantive law of Nebraska or Delaware applies to a complaint alleging oppression of a shareholder of a Delaware corporation, the sole asset of which is all the stock of a Nebraska corporation. Given the allegations made in this case, we conclude that Delaware law controls whether the plaintiff has stated a cause of action, and therefore, we affirm the judgment of the district court dismissing the plaintiff's complaint.

FACTUAL AND PROCEDURAL BACKGROUND

[1,2] 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. *State ex rel. Jacob v.*

Bohn, 271 Neb. 424, 711 N.W.2d 884 (2006). Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005). Because the district court in this case granted the defendants' rule 12(b)(6) motions to dismiss, this statement of facts is taken from the facts alleged in the plaintiff's operative amended complaint.

Alleged Facts

The plaintiff, Michael R. Johnson, is a shareholder of Western Securities, a Delaware corporation. Michael is an employee of Modern Equipment Company, Inc. (Modern Equipment), a Nebraska corporation. The principal place of business for both Western Securities and Modern Equipment is Omaha, Nebraska. Western Securities owns all the stock of Modern Equipment, but no other property.

Richard W. "Dick" Johnson incorporated and was originally the sole shareholder and director of Western Securities. Dick is the father of Michael and Richard W. Johnson, Jr. (Richard), one of the defendants. In 1975, Western Securities acquired Modern Equipment, and Dick became the sole director of Modern Equipment as well.

In 1990, Michael moved to Omaha and began working full time for Modern Equipment. He worked full time until 1992, when he began to work both full and part time while he completed a college degree. He completed his degree in 1996 and became a vice president of Modern Equipment, responsible for quality management. Michael's duties later expanded to include corporate development. He received regular salary increases and excellent performance reviews on an annual basis.

In 1998, Dick transferred shares of stock in Western Securities to his five children: Michael, Richard, William Johnson, Nancy Johnson Holtan, and Thomas Johnson. After the transfers, Dick owned 75 percent of Western Securities stock, Richard 10 percent, Michael 6 percent, William 3.5 percent, Nancy 3.5 percent, and Thomas 2 percent. Dick's stated intent was that Richard would succeed Dick as president and chief executive officer of Modern Equipment and that Michael would in turn succeed Richard. Dick promised Michael and Richard that Dick's Western

Securities stock would be devised to them in equal shares. After October 3, 2000, Western Securities and Modern Equipment each had three-member boards of directors composed of Michael, Richard, and Dick.

Dick became ill in March 2001 and resigned as president of Modern Equipment in October. Richard was elected by Dick, Richard, and Michael to succeed Dick as president. Dick died on November 6, and his will provided that Michael and Richard were each to receive one-half of Dick's shares of Western Securities stock. Richard was appointed personal representative of Dick's estate.

After Dick's death, Richard appointed Modern Equipment's vice president of manufacturing to fill the vacancies on the boards of directors of Western Securities and Modern Equipment, without notice to, meeting of, or the knowledge or consent of the other shareholders. On August 28, 2002, Richard fired Michael and barred him from the premises of Modern Equipment. Since then, Michael has been denied any participation in the operation of Modern Equipment and has not shared in its earnings.

Modern Equipment's before-tax profits have declined from $374,745 in the fiscal year ending August 31, 2001, to $5,367 in the following fiscal year. Richard's 2002 salary was $187,000, which was a 22-percent raise from the previous year. Western Securities has never paid dividends, and between Dick's death and February 28, 2003, no shareholders' meetings for Western Securities or Modern Equipment were held.

On February 28, 2003, Michael notified counsel for Western Securities and Modern Equipment of Richard's conduct. Shortly thereafter, Michael was notified that meetings of the shareholders and boards of directors of Western Securities and Modern Equipment would be held on April 15. At those meetings, Richard, in his capacity as personal representative of Dick's estate, voted all the shares of stock then still held in the estate to ratify his prior conduct. Dick's Western Securities stock was finally distributed by his estate in 2004, after which time, Richard held 48.083 percent of the stock, Michael held 44.083 percent, William and Nancy held 3.5 percent each, and Thomas held five-sixths of 1 percent.

Procedural History

Michael filed suit in the district court on May 22, 2003, against Richard, Western Securities, and Modern Equipment (collectively the defendants). According to Michael, Richard had oppressed Michael and misapplied the corporate assets of Western Securities and Modern Equipment by depriving him of his legitimate expectation of full-time employment; depriving him of his right to meaningfully participate in the operation, management, and control of Modern Equipment; operating Modern Equipment for his own benefit to the detriment of Michael; eliminating financial benefits to which Michael had a reasonable expectancy; removing Michael from his employment and denying him the opportunity to serve as president; and failing to keep him fully and fairly informed of the operation of Modern Equipment. Michael alleged that these practices were oppressive because they violated the reasonable expectations of Michael as established by the intentions of Dick and years of past practice, and were also in breach of the fiduciary duties owed to Michael.

Michael prayed that the court require an accounting from Richard and require him to return to Modern Equipment any amounts received by him in excess of the proportionate share of earnings and profits, as well as any amounts attributable to a misapplication or misappropriation of company assets. Michael prayed that the court require Modern Equipment to pay Michael the funds to which he would have been entitled had he not been excluded from employment and participation in Modern Equipment's earnings and profits.

Michael also prayed that the court enter an order requiring Western Securities to cease carrying on business in Nebraska, appointing a receiver to take charge of the corporate assets of Western Securities and Modern Equipment and supervise the sale of those assets, and distributing the proceeds of the sale of Western Securities and Modern Equipment to Michael and the other shareholders of Western Securities. In the alternative, Michael prayed that the court enter an order finding Western Securities to be the corporate alter ego of Modern Equipment and/or imposing a constructive trust on the shares of Modern Equipment for the benefit of Michael, dissolving Modern Equipment, appointing a receiver to supervise the sale of Modern

Equipment's assets, and distributing the proceeds of the sale directly to Western Securities' shareholders in proportion to their ownership interests. Alternatively, Michael prayed for an order finding Western Securities to be the alter ego of Modern Equipment and directing Western Securities or its remaining shareholders to redeem Michael's interests for fair market value.

Richard, Western Securities, and Modern Equipment filed motions to dismiss Michael's complaint. The defendants claimed that the court lacked jurisdiction to dissolve Western Securities, as a Delaware corporation, or to order Western Securities to redeem Michael's interest. Alternatively, the defendants claimed neither dissolution nor a court-ordered buyout was allowed as a matter of law and that Michael lacked standing to seek dissolution of Modern Equipment.

The court granted the defendants' motions. The court reasoned that it could not dissolve or wind up the affairs of Western Securities because it was a Delaware corporation. Even assuming that it had jurisdiction over Western Securities, however, the court further concluded that the case dealt with the internal affairs of the corporation and that under the applicable choice-of-law principles, the need for uniformity regarding internal affairs dictated that Delaware law control the case. Because Delaware law did not permit the dissolution of Western Securities or appointment of a receiver under the facts alleged, the court dismissed Michael's complaint.

ASSIGNMENTS OF ERROR

Michael assigns that the district court erred (1) in concluding that Delaware law applied to the facts of this case and in granting the defendants' motions to dismiss on that basis, thus (a) holding that the internal affairs doctrine prohibited the application of Nebraska law in this case, (b) holding that considerations of uniformity and predictability prohibited the application of Nebraska law in this case, and (c) concluding that Nebraska public policy does not mandate the application of Nebraska law in this case; (2) in concluding that Michael sought dissolution of a foreign corporation and in concluding that the inclusion of a proposed remedy relating to the appointment of a receiver and the winding up of Western Securities' business in Nebraska required dismissal; and (3) in refusing to address the viability of

Michael's remaining proposed remedies and in thereby concluding that the court could not fashion a remedy for Michael in the exercise of its equitable powers.

STANDARD OF REVIEW

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. *State ex rel. Jacob v. Bohn*, 271 Neb. 424, 711 N.W.2d 884 (2006).

ANALYSIS

It is important to note at the outset that the parties frame the issues in this case in different ways. The defendants contend, first, that the Nebraska courts do not have jurisdiction to grant Michael relief in this dispute because Michael effectively seeks judicial dissolution of a foreign corporation. The defendants further contend that even assuming jurisdiction, Delaware law governs this dispute, affording no remedy to Michael under the facts alleged, so Michael has still failed to state a claim upon which relief can be granted.

Michael does not contest the legal proposition that a court cannot order the dissolution of a foreign corporation. Rather, Michael contends that he does not seek the dissolution of Western Enterprises. Nor does Michael take issue with the district court's conclusion that under Delaware law, he is without a remedy. We have no reason to revisit that conclusion; we are not asked to decide that issue. Rather, Michael contends that Nebraska law should be applied to fashion a remedy for him.

[3,4] We begin our analysis of these contentions with an examination of the internal affairs doctrine. The internal affairs doctrine is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise, a corporation could be faced with conflicting demands. *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). The internal affairs doctrine is codified in Nebraska law pursuant to Neb. Rev. Stat. § 21-20,172 (Reissue 1997), which provides:

> (1) A certificate of authority shall authorize the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the state to revoke the certificate as provided in the Business Corporation Act.
>
> (2) A foreign corporation with a valid certificate of authority shall have the same but no greater rights and shall have the same but no greater privileges as, and except as otherwise provided by the act, shall be subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.
>
> (3) *The act shall not be construed to authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.*

(Emphasis supplied.) Section 21-20,172(3) was intended to preserve "the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states." 4 Model Business Corporation Act Ann. § 15.05(c), official comment at 15-71 (3d ed. 2002). See Restatement (Second) of Conflict of Laws § 302 (1971).

[5,6] The internal affairs doctrine was developed on the premise that in order to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions. By providing certainty and predictability, the internal affairs doctrine protects the justified expectations of the parties with interests in the corporation. *Vantagepoint v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005). See, e.g., *Harrison v. NetCentric Corporation*, 433 Mass. 465, 744 N.E.2d 622 (2001). It has also been held that pursuant to the Due Process Clause, directors and officers of corporations have a significant right to know what law will be applied to their actions and stockholders have a right to know by what standards of accountability they may hold those managing the corporation's business and affairs. *Vantagepoint, supra*. Furthermore, under the Commerce Clause, a state has no interest in regulating the internal affairs of foreign corporations. Therefore, application of the internal affairs doctrine may be mandated by constitutional principles, except in the rare situation when the law of the state of incorporation is

inconsistent with a national policy on foreign or interstate commerce. *Vantagepoint, supra*.

[7-9] But the internal affairs doctrine is a choice-of-law principle, and not a bar to jurisdiction. Therefore, whether or not a dispute concerning the internal affairs of a foreign corporation should be heard in the courts of Nebraska is not controlled by the internal affairs doctrine, but by the same principles of personal jurisdiction and forum non conveniens that would be applicable to any other suit involving an out-of-state defendant. See *Tomran v. Passano*, 159 Md. App. 706, 862 A.2d 453 (2004), *affirmed* 391 Md. 1, 891 A.2d 336 (2006). In other words, the question of what state's law will determine a cause is separate from whether a state's courts have jurisdiction over the cause. A court will exercise jurisdiction over an action involving the internal affairs of a corporation unless it is an inappropriate or an inconvenient forum for the trial of the action. Restatement, *supra*, § 313.

Here, there is no suggestion by the defendants that this is not a convenient place for trial of the action, nor did the defendants file a motion to dismiss based upon forum non conveniens. Instead, the defendants' jurisdictional argument is premised on their claim that Michael's prayer for relief would effectively be a dissolution of the corporation.

[10] However, the defendants' argument is based on their claim that since Western Securities' assets consist of Modern Equipment stock, disposing of those assets would effectively dissolve Western Securities. But while the general rule is that a court of equity cannot appoint a *general* receiver for a foreign corporation, there is an important distinction between the appointment of a general receiver and the appointment of a receiver merely of the corporation's assets and property within the state. See, generally, 17A William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 8555 (perm. ed., rev. vol. 1998 & Cum. Supp. 2005). It is well established, in Nebraska and elsewhere, that equity has jurisdiction to appoint a receiver for the instate assets of a foreign corporation. See, *Starr v. Bankers Union of the World*, 81 Neb. 377, 116 N.W. 61 (1908); 17A Fletcher et al., *supra*. The defendants seem to be implying that if Western Securities had assets in other states, then Nebraska could dispose of the assets that the

corporation has here, but since all of Western Securities' assets are in Nebraska (i.e., shares of a Nebraska corporation), the State of Nebraska actually has *less* power than it would if Western Securities' assets were spread around the world. In fact, a Nebraska court's equitable jurisdiction extends to appointment of a receiver for a foreign corporation's Nebraska assets. See *id*.

Furthermore, Michael's complaint suggested several alternative forms of relief beyond the appointment of a receiver. Among other things, Michael asked for an accounting, an order directing Richard to return money received by him to Modern Equipment, damages in the amount Michael would have received had he not been excluded from Modern Equipment, or an order directing Western Securities to redeem his interest. Thus, we are not persuaded by the defendants' argument that the courts of Nebraska lack jurisdiction over this action. If Michael stated a cause of action for which relief could be granted, a Nebraska court would have the power to grant at least some of the relief sought by Michael's complaint, including the appointment of a receiver. The district court erred in determining otherwise. Therefore, we turn to the dispositive question whether Michael can obtain *any* relief from Nebraska law, or whether Delaware law controls this case and precludes his recovery.

[11,12] Michael does not dispute that his action involves the internal affairs of Western Enterprises and that the internal affairs doctrine is applicable. Rather, Michael contends that under exceptions to that doctrine, Nebraska law should apply here. The Restatement (Second) of Conflict of Laws § 302 (1971) recognizes that the local law of the state of incorporation applies to internal affairs, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which case, the local law of the other state will be applied. Where "internal affairs" are concerned—the relations among the corporation, its shareholders, directors, officers, or agents—the local law of the state of incorporation will be applied unless application of the local law of some other state is required by reason of the overriding interest of that other state in the issue to be decided. See *id*., comments *a*. and *b*. As previously noted, the rule of § 302 has been adopted in Nebraska by statute. See, § 21-20,172(3);

4 Model Business Corporation Act Ann. § 15.05(c) (3d ed. 2002).

[13] The factors applicable to such a choice of law include (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied. Restatement, *supra*, § 6. Accord, *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005); *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002); *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001). See Restatement, *supra*, § 302(1) (explaining that Restatement, *supra*, § 6, is used to determine applicable law).

Michael is focused on Nebraska public policy and Nebraska's relative interest as the location of the alleged events giving rise to the action. But this overlooks the weight of factors that bear against interference with the internal affairs of a foreign corporation. A single rule for each corporation's internal affairs reduces uncertainty and the prospect of inconsistent obligations; it also enables the corporate venturers to adjust the many variables of the corporate life, confident that they can predict the legal effect of these choices. *Nagy v. Riblet Products Corp.*, 79 F.3d 572 (7th Cir. 1996).

> Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 90, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987). As the Restatement explains:

> Application of the local law of the state of incorporation will usually be supported by those choice-of-law factors favoring the needs of the interstate and international systems, certainty, predictability and uniformity of result, protection of the justified expectations of the parties and ease in the application of the law to be applied. Usually, application of this law will also be supported by the factor looking toward implementation of the relevant policies of the state with the dominant interest in the decision of the particular issue.
>
> Uniform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law. To the extent that they think about the matter, these persons would usually expect that their rights and duties with respect to the corporation would be determined by the local law of the state of incorporation. This state is also easy to identify, and thus the value of ease of application is attained when the local law of this state is applied.

Restatement (Second) of Conflict of Laws § 302, comment *e.* at 309 (1971).

Here, Nebraska certainly has an interest in the dispute by virtue of Modern Equipment's location in the state. Nebraska has a declared public policy, pursuant to the Business Corporation Act, see Neb. Rev. Stat. § 21-2001 et seq. (Reissue 1997 & Cum. Supp. 2004), of affording relief upon some of the allegations made by Michael. But Nebraska also has a stated public policy, enacted as part of the same statutory scheme, of not interfering in the internal affairs of foreign corporations, and the conflict of laws principles stated in § 6 of the Restatement generally weigh in favor of applying Delaware law to this dispute. Admittedly, the reasons for applying the local law of the state of incorporation carry less weight when the corporation has little or no contact with the state other than the fact that it was incorporated there. Restatement, *supra*, § 302, comment *g*. But, application of the local law of the state of incorporation also furthers certainty,

predictability, and uniformity of result, ease in the application of the law to be applied, and perhaps most important, protection of the justified expectations of the parties. See *id*. Simply stated, stockholders in a foreign corporation should not be surprised—and under Nebraska statutes have a right to expect—that issues involving the internal affairs of a corporation will be decided pursuant to the law of the state of incorporation. This is simply not the extraordinary case in which the internal affairs doctrine is to be set aside.

Michael also argues that Western Securities and Modern Equipment are alter egos and that Western Securities' corporate veil can be pierced. To the extent that Michael's alter ego theory is intended to address the internal affairs doctrine, however, it is without merit. It is well established that when determining whether to pierce a corporate veil, the local law of the state of incorporation is applied. See *Kellers Systems v. Transport Intern. Pool*, 172 F. Supp. 2d 992 (N.D. Ill. 2001). Stated another way, whether Western Securities and Modern Equipment are alter egos, and the legal effect of such a finding, is determined by Delaware law. While Delaware law permits a corporate veil to be pierced, this is simply a remedy available when a cause of action has been alleged, and as previously noted, Michael does not contest the district court's conclusion that the facts he alleged do not state a cause of action recognized by Delaware law. In other words, even if Delaware law would regard Western Securities and Modern Equipment to be one and the same, Michael has not stated a cause of action against either corporation.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing Michael's complaint is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

Steven Crouse and JoDean Crouse, husband and wife, appellants, v. Pioneer Irrigation District et al., appellees.

719 N.W.2d 722

Filed August 18, 2006. No. S-05-402.

1. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Summary Judgment: 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).
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 it is entitled to judgment as a matter of law.
5. **Waters: Property.** The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all landowners within the district upon fair and equitable terms and conditions.
6. **Mandamus: Public Officers and Employees.** Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.
7. **Mandamus.** A duty or act is ministerial when there is no room for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law.

Appeal from the District Court for Dundy County: John J. Battershell, Judge. Affirmed.

Donald G. Blankenau and Jaron J. Bromm, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellants.

Stanley C. Goodwin, of Goodwin Law Office, for appellees.

Leroy W. Orton, of Orton Law Office, for amicus curiae Nebraska State Irrigation Association.

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

STEPHAN, J.

Steven Crouse and JoDean Crouse brought this action for mandamus to require Pioneer Irrigation District (District) and its individual directors to exclude 200 acres of the Crouses' farmland from the District and to refund taxes which the Crouses paid to the District on that land. Following an evidentiary hearing, the district court for Dundy County sustained a motion to dismiss filed by the District and its directors. The Crouses filed this timely appeal, which we removed 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). Finding no error, we affirm the judgment of the district court.

I. BACKGROUND

On or about January 1, 1994, the Crouses purchased 545 acres of land in Dundy County, Nebraska, from the Farmers Home Administration (FmHA). Of the land purchased, 301 acres were located within the District in Dundy County. At the time of the Crouses' purchase, the District held water appropriation D-1025, which was a permit to divert water from the North Fork of the Republican River at a specific point in Yuma County, Colorado.

On February 10, 1995, the then Department of Water Resources (Department) gave notice of an adjudication hearing concerning portions of water appropriation D-1025. The Department held a prehearing conference on February 22 for the purpose of reviewing Department records with members of the District board and irrigators appropriating water under D-1025. At the adjudication hearing, the Department considered whether some of the water rights granted by D-1025, including rights attached to 200 unirrigated acres of the Crouses' land, should be canceled under the provisions of Neb. Rev. Stat. § 46-229.04(2) (Reissue 1993), which provided in relevant part:

> If it is determined that such water has not been put to beneficial use or has ceased to be used for such purpose for more than ten consecutive years, the water right shall be declared canceled and annulled, except that . . . sufficient cause for

> nonuse shall be deemed to exist . . . if the landowner used the available water supply on only part of the land under the water appropriation because of an inadequate water supply.

For the sake of completeness, we note that § 46-229.04 has since been amended in ways not applicable to this action. See Neb. Rev. Stat. § 46-229 (Reissue 2004).

Steven Crouse appeared at the Department adjudication hearing and asked that the water rights for the 200 acres remain with the property. Evidence established that from 1985 to 1994, the 200 acres were owned by FmHA following repossession. A representative of FmHA testified that during the time the property was owned by FmHA, it was " 'prevented from being irrigated by government regulations.' " Steven Crouse testified that after he purchased the land, he chose not to use district water for the 200 acres at issue because he felt that there would be too much waste in transporting water from the canal to his property. He further testified that he planted crops which would not need a lot of water. On April 9, 1997, the Department issued an order canceling the Crouses' right to irrigate the 200 acres based upon its finding that the land had not been irrigated within the previous 10 years and that therefore, the nonuse provision set forth in § 46-229.04(2) applied. Notice of the Department's order was sent to the Crouses. The record does not reflect whether they appealed the decision of the Department pursuant to their rights under Neb. Rev. Stat. § 46-229.05 (Reissue 1998).

On or about May 26, 2004, the Crouses filed a petition with the board of directors of the District requesting that the 200 acres at issue be excluded from the District pursuant to Neb. Rev. Stat. §§ 46-174 to 46-184 (Reissue 2004), and further requesting that all taxes paid to the District on such property be refunded pursuant to § 46-184. The Crouses based their request on the District's failure to provide water for irrigation of the 200 acres and upon an anticipated inability of the District to be able to do so in the future because of the loss of water rights. The board of directors held a meeting on the Crouses' petition on or about July 22. No landowners objected to the petition, but the board did not reach a decision on that date.

Meanwhile, pursuant to legislation enacted in 2004, the Nebraska Department of Natural Resources (DNR) provided

notice to the public of its final determination that the Upper Republican Natural Resources District (Upper Republican NRD) was fully appropriated in its entirety and that it had thus placed an "immediate stay on the issuance of any new natural-flow, storage, or storage-use appropriations in the whole of the [Upper Republican] NRD." DNR also imposed stays, effective July 26, 2004, on the issuance of water well construction permits, the construction of certain new water wells, the use of existing water wells to increase the number of acres historically irrigated, and on "any increase, through use of an existing surface water right, of the number of acres historically irrigated." There is nothing in the record to indicate that the Crouses petitioned DNR for reevaluation of the order. See Neb. Rev. Stat. § 46-713(2) (Reissue 2004).

The board of directors held a meeting in September 2004 to consider the Crouses' petition for exclusion from the District, but no action could be taken, as there was not a quorum present. There were no meetings of the District board in October or November.

On December 7, 2004, the Crouses commenced this action against the District and the individuals composing its board of directors, seeking a peremptory writ of mandamus. They alleged that the District had a "clear duty" to exclude the 200 acres and to refund taxes of approximately $41,436 which the Crouses had paid to the District from 1994 to 2004. The District and its directors filed a motion to dismiss on the ground that the Crouses failed to state a cause of action upon which relief could be granted. Thereafter, the Crouses filed a motion for peremptory writ of mandamus and memorandum in support.

The district court conducted an evidentiary hearing on both motions. The parties offered identical evidence, and it was received without objection. Following argument and briefing, the district court entered an order granting the District's motion to dismiss without leave to amend. The court reasoned that the 1997 DNR order canceling the water rights to the Crouses' 200 acres, and the Crouses' failure to appeal that order, "effectively prevent[s the] District from delivering water to the [Crouses] on the lands that they are attempting to remove from the . . . District." The court concluded that the July 2004 DNR declaration that

the water in the Upper Republican NRD was fully appropriated had no effect on whether the Crouses' land was irrigable because the land became nonirrigable upon cancellation of the Crouses' water rights in 1997. Addressing the Crouses' claim that their land could not be irrigated due to natural causes, the court concluded that this court has interpreted that phrase to mean land, which, "because of the character of the land itself," cannot be irrigated. The court concluded that under our case law, a temporary drought or a fully appropriated water right could not be a natural cause that would prevent real estate from being irrigable.

II. ASSIGNMENTS OF ERROR

The Crouses assign three errors which can be restated as two: The district court erred (1) in determining that they were not entitled to a writ of mandamus and (2) in finding that insufficient water supply is not a natural cause of nonirrigable lands for purposes of exclusion under § 46-176.

III. STANDARD OF REVIEW

[1,2] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002); *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002); Neb. Rev. Stat. §§ 25-2156 to 25-2169 (Reissue 1995 & Cum. Supp. 2004). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006); *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 703 N.W.2d 887 (2005).

IV. ANALYSIS

[3,4] As noted, both the motion for peremptory writ of mandamus and the motion to dismiss were submitted to the district court at the same time, and the same evidence was offered and

received on both motions. 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). *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006); *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). Because all parties rely on the same evidentiary record, we treat the facts as uncontroverted and focus our appellate review on whether the district court erred in holding that the District and its directors were entitled to judgment as a matter of law.

1. Exclusion of Lands From Irrigation District

(a) Statutory Procedure

[5] Neb. Rev. Stat. §§ 46-101 to 46-128 (Reissue 2004) provides for the organization and governance of irrigation districts in Nebraska. The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all landowners within the district upon fair and equitable terms and conditions. *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 286 N.W.2d 426 (1979); *State, ex rel. Clarke, v. Gering Irrigation District*, 109 Neb. 642, 192 N.W. 212 (1923). An irrigation district formed pursuant to the enabling statutes has certain corporate powers, including authority to levy assessments and taxes against land within its boundaries. See, Neb. Rev. Stat. §§ 46-129, 46-130, and 46-131 to 46-144 (Reissue 2004); *State, ex rel Clarke, v. Gering Irrigation District, supra*.

There is a specific statutory procedure by which a landowner may request exclusion of lands from an irrigation district. See §§ 46-173 through 46-184.

> The owner or owners in fee of one or more tracts of land which constitute a portion of an irrigation district may file

> with the board of directors of the district a petition praying that such tracts and any other tracts contiguous thereto may be excluded and taken from the district.

§ 46-174. Upon the filing and service of a petition to exclude lands, the district must publish notice of the filing in order to permit persons wishing to object to any change in boundaries to file written objection. § 46-175. The notice must include the time and place of the board meeting at which the petition will be considered. §§ 46-174 and 46-175. The failure of any person interested in the district to show cause in writing why the tract or tracts of land mentioned in the petition should not be excluded from the district is deemed and taken as an assent by him to the exclusion. § 46-176.

Generally, the board of directors has discretionary authority to order or deny a petition for exclusion based on the best interests of the District. § 46-177. However, § 46-176 expressly denies the board jurisdiction to hold or include any land "which cannot from any natural cause be irrigated thereby." Where the subject land "cannot from any natural cause be irrigated," the District is without jurisdiction to include and tax it, and it must be detached without regard to the best interests of the district. See *Smith v. Frenchman-Cambridge Irrigation Dist.*, 155 Neb. 270, 51 N.W.2d 376 (1952).

(b) Application

[6,7] By initially petitioning the District for exclusion of their property, the Crouses invoked the District's broad discretionary powers to consider exclusion of their land. However, by seeking a peremptory writ of mandamus, the Crouses have significantly narrowed their remedy. Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary. *State ex rel. City of Alma v. Furnas Cty. Farms*, 257 Neb. 189, 595 N.W.2d 551 (1999); *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997). The burden is on the Crouses to prove clearly and convincingly that the act they seek to compel is purely ministerial and that they are therefore entitled to the action. See *Krolikowski v. Nesbitt*, 257 Neb. 421, 598 N.W.2d 45 (1999). A duty or act is ministerial when there is "'"'no room

for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law.' ''' . . ." *Pratt v. Nebraska Bd. of Parole*, 252 Neb. at 911, 567 N.W.2d at 187.

(i) Effect of Cancellation of Water Rights

The Crouses argue that they have a clear right to have their land excluded from the District because the District has denied their requests for water. They base their argument on *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 286 N.W.2d 426 (1979), in which we affirmed a peremptory writ of mandamus requiring an irrigation district to deliver water to the highest point on a landowner's land so as to allow all of his property within the district to be irrigated. We rejected a defense that the landowner had lost his water rights for the tracts in question, noting that the Department had original and exclusive jurisdiction to adjudicate water rights pertaining to irrigation and that there was no evidence that the Department had ever suspended or canceled any of the landowner's water rights. We concluded that the irrigation district had no power to cancel or terminate the landowner's water rights and that it could not suspend delivery of water except for nonpayment of taxes and assessments, as provided by statute and the bylaws of the district.

Based upon *State ex rel. Blome*, the Crouses argue that if the District cannot meet its obligation to provide water to their property, it has a clear duty to exclude the property from the District. However, this case is distinguishable from *State ex rel. Blome* because of the 1997 cancellation of the Crouses' water rights by the Department pursuant to § 46-229.04(2). The cancellation was based in part upon evidence that the Crouses chose not to use water available from the District for irrigation when they acquired the property from FmHA. The District has not refused to provide water as in *State ex rel. Blome*, but, rather, is legally prevented from doing so because of the cancellation of water rights due at least in part to the Crouses' own voluntary decision not to exercise their rights. Thus, *State ex rel. Blome* provides no support for the Crouses' argument that the District has a clear duty to either provide water or exclude their land from its boundaries.

(ii) § 46-176

As noted above, land which "cannot from any natural cause be irrigated" cannot lawfully be included in an irrigation district and taxed. § 46-176; *Smith v. Frenchman-Cambridge Irrigation Dist.*, 155 Neb. 270, 51 N.W.2d 376 (1952). See, *Birdwood Irrigation District v. Brodbeck*, 148 Neb. 824, 29 N.W.2d 621 (1947); *Andrews v. Lillian Irrigation District*, 66 Neb. 458, 97 N.W. 336 (1903) (on rehearing). Whether such land should be included in an irrigation district and taxed " 'does not depend on what is for the best interest of the district, nor on the consent of those holding bonds issued by the district, because the statute is mandatory that it should not be thus held and taxed.' " *Smith v. Frenchman-Cambridge Irrigation Dist.*, 155 Neb. at 277, 51 N.W.2d at 381, quoting *Andrews v. Lillian Irrigation District, supra*. On the other hand, if the land is irrigable or is nonirrigable for reasons other than natural causes, then the exclusive remedy for detaching lands after an irrigation district has been duly organized is found at §§ 46-174 to 46-184, and the decision regarding whether or not to exclude the land from the District is discretionary under § 46-177. See, *Sowerwine v. Central Irrigation District*, 85 Neb. 687, 124 N.W. 118 (1909); *Andrews v. Lillian Irrigation District, supra*. Thus, in order to have a clear legal right to exclusion of their lands from the District, the Crouses must establish that the land cannot from any natural cause be irrigated. § 46-176.

The Crouses contend that the land was made nonirrigable from a natural cause by the determination of DNR in 2004 that the Upper Republican NRD is "fully appropriated," which they regard as a finding that natural conditions do not provide a supply of water sufficient to meet the demand. They contend that because of the stay on the issuance of any new surface water appropriations and the lack of any unappropriated water in the basin, the absence of water is a natural cause which precludes the District from irrigating their land, thereby creating a clear duty to exclude the land from the District under § 46-176.

In determining whether particular agricultural land must be excluded from an irrigation district pursuant to § 46-176, our cases look to the intrinsic characteristics of the land itself, not to external factors. In *Andrews v. Lillian Irrigation District*, 66

Neb. at 467-68, 97 N.W. at 338, this court construed the language currently set forth in § 46-176 as follows:

> Evidently the legislature meant to exclude from the irrigation district, and from taxation in support thereof, lands that were not susceptible of irrigation. If, because of the natural conformation of the surface, lands within the irrigation district lay so high as to render it impossible to conduct water thereon by means of irrigation ditches for the irrigation of the land, it would hardly be contended that such lands were not, within the meaning of the section of the statute to which attention has been directed, land "which can not from any natural cause be irrigated thereby," and therefore could not lawfully be held in such district, and taxed to support the system.

However, if land "is such as can be watered," it may be included in an irrigation district. *Wight v. McGuigan*, 94 Neb. 358, 362, 143 N.W. 232, 234 (1913).

In *Smith v. Frenchman-Cambridge Irrigation District, supra*, this court addressed the question of whether certain land should be excluded from an irrigation district under § 46-176. The land was described as "very rough and rolling," with

> innumerable slopes and grades and none that continue much over 150 feet in any direction. There are ditches, depressions, hills, and mounds. The topsoil is from two inches thick on the higher parts to two feet on the better parts of the land. . . . The subsoil is fine river sand down to shale.

155 Neb. at 275-76, 51 N.W.2d at 380. We found the record "convincing that this land cannot from natural causes be irrigated" by the district and ordered that it be excluded and prior taxes be canceled. *Id.* at 276, 51 N.W.2d at 380.

In *Sowerwine v. Central Irrigation District*, 85 Neb. 687, 124 N.W. 118 (1909), this court also examined the intrinsic characteristics of the land in question to determine whether it should be excluded from an irrigation district under the statutory language currently codified in § 46-176. The evidence established that during approximately 3 months of the year, a slough running through the land was "practically full of water" and another portion of the land was "more or less wet and spongy," with standing water in some places. *Id.* at 692, 124 N.W. at 119.

During the rest of the year, however, the slough was "practically dry" and the remaining land was dry. *Id*. We held that in order to defeat the jurisdiction of the board to hold lands in an irrigation district, it must be "clearly shown, and in like manner found by the court, that the lands embraced within the district are, in fact, nonirrigable." 85 Neb. at 693-94, 124 N.W. at 120. We further held that if, under the facts, there is any doubt on the subject, such doubt must be resolved in favor of the jurisdiction of the board, and the parties left to the remedy provided by statute. We concluded that from the facts summarized above, it could not be determined as a matter of law that the land was nonirrigable and that thus, exclusion was within the discretionary authority of the board.

In the case at bar, there has been no claim or showing that the intrinsic characteristics of the land in question are such that it "cannot from any natural cause be irrigated" within the meaning of § 46-176. We agree with the district court that the 2004 DNR determination is not a factor which may be considered in this analysis. Accordingly, the Crouses have not established a clear duty to exclude the land from the irrigation district which would be enforceable by mandamus. Their sole remedy is to petition for exclusion under the provisions of §§ 46-174 to 46-184, as they have apparently done.

2. Refund of Irrigation Taxes

The Crouses also contend that § 46-184 entitles them to a refund of taxes which they have paid to the district on the 200 acres in question. The statute upon which they rely provides in part: "In case of the exclusion of any lands under the provisions of sections 46-173 to 46-183, there shall be refunded to any and all persons who have paid any assessment or assessments to such district, or any land so excluded, any sum or sums so paid." Because we conclude that the Crouses have no clear right enforceable by mandamus to have their property excluded from the District, it follows that they have no right in this action to a refund of taxes under § 46-184.

In reaching this conclusion, we do not address the merits of any refund claim under § 46-184 which may be asserted in the event that the board of directors of the District were at some

point to exercise its discretionary power under § 46-177 to exclude lands. We further note that § 46-141 affords a separate procedure whereby a landowner who pays irrigation district assessments under protest may claim a refund upon a showing of one of three grounds stated in the statute. See *Morrow v. Farmers Irrigation District*, 117 Neb. 424, 220 N.W. 680 (1928). This case presents no issue regarding a refund claim under § 46-141.

V. CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ERICK FERNANDO VELA, APPELLANT.

721 N.W.2d 631

Filed September 8, 2006. No. S-06-595.

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

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, and Mark Albin for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

PER CURIAM.

The defendant, Erick Fernando Vela, took the above-captioned appeal from an order of the Madison County District Court overruling his "Amended Verified Motion to Preclude Imposition of Death Sentence Because of Mental Retardation." On our own motion, we entered an order to show cause, by simultaneous briefing, why the appeal should not be dismissed for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001). Those briefs have now been filed, and for the reasons stated

below, we conclude that the court's order was not a final, appealable order and dismiss the appeal.

The defendant was charged by information in the district court with five counts of murder in the first degree and five counts of use of a deadly weapon to commit a felony. The information also contained the notice of aggravation necessary for the prosecution to seek the death penalty. See Neb. Rev. Stat. § 29-1603 (Cum. Supp. 2004). The defendant had previously been charged by information with one count of robbery, one count of burglary, and another count of use of a deadly weapon to commit a felony. Pursuant to guilty pleas, the defendant was convicted of all 13 charges against him. A jury trial was had on aggravating circumstances, and the jury found that all the alleged aggravating circumstances were proved beyond a reasonable doubt for each of the five murders.

Neb. Rev. Stat. § 28-105.01 (Cum. Supp. 2004) provides, in relevant part:

> (2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation.
>
> (3) As used in subsection (2) of this section, mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.
>
> (4) If (a) a jury renders a verdict finding the existence of one or more aggravating circumstances . . . the court shall hold a hearing prior to any sentencing determination proceeding . . . upon a verified motion of the defense requesting a ruling that the penalty of death be precluded under subsection (2) of this section. If the court finds, by a preponderance of the evidence, that the defendant is a person with mental retardation, the death sentence shall not be imposed. A ruling by the court that the evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under subsection (2) of this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing determination proceeding

> . . . or to argue that such evidence should be given mitigating significance.

The defendant filed a verified motion to preclude imposition of the death sentence because of mental retardation. See, § 28-105.01(2); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (execution of mentally retarded criminal is cruel and unusual punishment prohibited by Eighth Amendment). An evidentiary hearing was held, and the district court found that the defendant had not proved that he was mentally retarded within the meaning of § 28-105.01(3) or *Atkins, supra*. The district court overruled the defendant's motion to preclude imposition of the death sentence, and the defendant filed a notice of appeal.

It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001). For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken. See *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

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. *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006). In a criminal case, the judgment is the sentence. *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995). The trial court must pronounce sentence before a criminal conviction is a final judgment. See *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). It is apparent from the record in this case that the defendant has not been sentenced. Consequently, this court's jurisdiction, if any, is premised on the existence of a final, appealable order.

The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860

(2005). Because the order from which the defendant is attempting to appeal in this case neither in effect determined the action and prevented a judgment nor was made on summary application after a judgment was rendered, the issue is whether the order appealed from both affected a substantial right and was made during a special proceeding.

We first address whether the order affected a substantial right. A substantial right is an essential legal right, not a mere technical right. *In re Guardianship of Sophia M., supra*. 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. *Id*.

In criminal proceedings, orders affecting substantial rights include the denial of a motion to discharge based upon speedy trial grounds, and the denial of a plea in bar made on double jeopardy grounds. See, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997) (speedy trial); *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996) (double jeopardy). But rulings on several other comparable motions in criminal cases are not final, appealable orders, because they do not affect a substantial right. See, e.g., *Loyd, supra* (overruling of motion based on statute of limitations); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005) (denial of motion to discharge violation of probation); *State v. Lauck*, 261 Neb. 145, 621 N.W.2d 515 (2001) (overruling of plea in abatement claiming that alleged facts did not constitute crime); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000) (overruling of motion to quash claiming that alleged facts did not constitute crime); *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999) (overruling of plea in abatement claiming violation of due process because of preindictment delay); *State v. Cisneros*, 14 Neb. App. 112, 704 N.W.2d 550 (2005) (overruling of motion to withdraw no contest pleas).

The distinction among these cases is in the nature of the allegedly substantial right at issue. A substantial right can be affected by an order if the right is irrevocably lost by operation of the order, while a substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment. In *Jacques*, for instance, we explained that the denial

of a motion to discharge made on speedy trial grounds affected the subject matter of the litigation because denial of such a motion effectively denied a defendant's speedy trial rights. *Id.*, citing *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). Similarly, if a criminal defendant is to avoid exposure to double jeopardy, his or her double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs. *Sinsel, supra*, citing *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

But in *Lauck, supra*, we held that a substantial right of the defendant had not been affected, because the defendant could still present all the defenses that he could have presented before the overruling of his plea in abatement. He could still argue that he was not guilty of the crime charged, make a motion to dismiss, or present affirmative defenses, and if convicted, he could raise on direct appeal the issue initially presented by his plea in abatement. See *id*. See, also, *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). Similarly, in *Meese, supra*, we explained that whether a substantial right was affected depended on whether the defendant's right to a fair trial could be vindicated in an appeal from the final judgment, or whether the right could be protected only if the defendant was allowed to appeal directly from the denial of her pretrial motion. See, also, *Pruett, supra*; *Cisneros, supra*.

The right at issue in the instant case is both statutory and constitutional. See, § 28-105.01(2); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). However, both the statutory mandate and constitutional rule are based on the determination that "mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes," but "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 526 U.S. at 306. See, also, Introducer's Statement of Intent, L.B. 1266, Judiciary Committee, 95th Leg., 2d Sess. (Feb. 13, 1998). As the introducing senator explained on the floor of the Legislature, in introducing the bill that would become § 28-105.01(2),

> clearly we already prohibit the death penalty for persons under the age of 18. That's currently the law. One of the thoughts is at that youthful age the maturity makes it difficult to have the judgment to know fully what you're doing. Is it any more difficult for that situation than it is for an individual who has an IQ below 70, thus being mentally retarded? And the feeling is obviously not. The mental capacity as individuals makes it very difficult for them to understand the rightness and wrongness of what they do, the consequences of their actions. It is already a mitigating circumstance that can be used in the sentencing process. But the thought tha[t] somebody who is mentally retarded with that sort of limitation of the mental capacity should be subject to the most severe punishment, that being the death penalty, is something that is objectionable to those of us who support this measure.

Floor Debate, 95th Leg., 2d Sess. 15769 (Apr. 6, 1998).

Section 28-105.01(2) and the Eighth Amendment prohibit the execution of mentally retarded persons because of what the U.S. Supreme Court describes as a "widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty." *Atkins*, 536 U.S. at 317. The purpose of the statutory and constitutional prohibition is to ensure that "the offender gets his 'just deserts' " and that the punishment imposed is commensurate with the culpability of the offender. 536 U.S. at 319. In other words, the right protected by § 28-105.01 and the Eighth Amendment is the right not to be *executed*—rather than the right not to be *sentenced*—where the culpability of the defendant is insufficient to justify the death penalty. Stated more simply, it is the right not to be subjected to punishment that is excessive when compared to the defendant's culpability.

This right is not lost by virtue of proceeding to final judgment prior to appellate review, and can be effectively vindicated in an appeal after judgment. Appellate review of the court's finding pursuant to § 28-105.01(4) is not foreclosed, and any prejudice resulting from an erroneous ruling can be mitigated by a timely appeal after sentencing. See, *State v. Lauck*, 261 Neb.

145, 621 N.W.2d 515 (2001); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000); *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999); *State v. Cisneros*, 14 Neb. App. 112, 704 N.W.2d 550 (2005).

Furthermore, impairment of the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law, as a result of mental defect, remains a statutory mitigating circumstance in a capital sentencing proceeding. Neb. Rev. Stat. § 29-2523(2)(g) (Cum. Supp. 2004). A ruling by the court that the death penalty is not precluded by § 28-105.01(2) does not restrict the defendant's opportunity to introduce evidence of diminished intelligence as it is relevant to § 29-2523(2)(g). See § 28-105.01(4). Thus, the defendant can still defend himself by presenting evidence that his culpability is mitigated by his mental capacity. Compare, *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *Lauck, supra*.

In short, the order overruling the defendant's motion to preclude imposition of a death sentence does not diminish a claim or defense available to the defendant at the sentencing hearing, and any prejudice resulting from the erroneous imposition of a death sentence can be protected in an appeal from final judgment. Thus, the court's order overruling the defendant's motion did not affect a substantial right.

Furthermore, the hearing on mental retardation provided by § 28-105.01(4) is not a special proceeding. Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding." *Loyd, supra.* A special proceeding is, by definition, not part of an action. *Id*. An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not. *Id*. A hearing on mental retardation pursuant to § 28-105.01(4) is a part of the action, not a special proceeding.

Special proceedings, in criminal cases, include motions to discharge made on speedy trial grounds and pleas in bar made on double jeopardy grounds. See, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990). A proceeding may be special, even if

the proceeding is connected with a pending action. *Jacques, supra*. An application to enforce the constitutional right to avoid double jeopardy, for instance, is a special proceeding because it "is not made as a step in determining the merits of any issue in the criminal prosecution itself." *Milenkovich*, 236 Neb. at 48, 458 N.W.2d at 751. Similarly, a motion to discharge on speedy trial grounds is a special proceeding because it does not prosecute alleged rights between parties or end in final judgment. *Jacques, supra*. " ' "[I]t is not an integral part of or a step in the action[,] or as it is sometimes referred to in such a situation[,] part of the 'main case.' " ' " *Id*. at 254, 570 N.W.2d at 336. " ' "None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of the statute." ' " *Id*. at 253-54, 570 N.W.2d at 336.

But a § 28-105.01(4) hearing on mental retardation, while expressly provided by statute, takes place in the context of a specialized sentencing proceeding for capital cases, the purpose of which is to guide the sentencing panel in the rational imposition of the death sentence. See Neb. Rev. Stat. § 29-2519(1) (Cum. Supp. 2004). As previously noted, in a criminal case, the judgment is the sentence. *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995). The hearing provided by § 28-105.01(4) is simply one step in the process of determining whether the death sentence should be imposed. Generally, when imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006). As explained above, mentality is particularly pertinent in capital sentencing because of the categorical determination that mental retardation mitigates the defendant's culpability. See *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

Thus, the issue of mental retardation is necessarily part of the merits of the sentencing proceeding. As such, a hearing pursuant

to § 28-105.01(4) is part of the process used to decide the merits of the action and determine the judgment that should be imposed. In short, a motion pursuant to § 28-105.01(4) addresses moral culpability, and thus the merits of the State's case against the defendant; a hearing and order overruling such a motion is part of the action, not a special proceeding. See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

Because it neither affected a substantial right nor was made in a special proceeding, the court's order overruling the defendant's motion to preclude imposition of the death sentence because of mental retardation was not a final, appealable order. 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 of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006). When an appellate court is without jurisdiction to act, the appeal must be dismissed. *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006).

The court, on its own motion, hereby dismisses the above-captioned appeal. See rule 7A(2).

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. GREG LEMON, APPELLEE AND CROSS-APPELLANT, V. THE HONORABLE JOHN A. GALE, NEBRASKA SECRETARY OF STATE, APPELLANT AND CROSS-APPELLEE.

721 N.W.2d 347

Filed September 15, 2006. No. S-06-909.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **Constitutional Law.** Constitutional interpretation is a question of law.
3. **Supreme Court: Appeal and Error.** On questions of law, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
4. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.
5. ____. In adopting the Nebraska Constitution, the people have imposed upon themselves limitations on their ability to amend this fundamental law.
6. **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.

7. **Constitutional Law: Intent.** The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense. It is permissible to consider the historical facts in determining the meaning of the language of the Nebraska Constitution. It is also appropriate and helpful to consider, with the historical background, the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply.
8. **Constitutional Law.** It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.
9. **Legislature: Initiative and Referendum.** The Legislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual.
10. **Constitutional Law: Initiative and Referendum.** The power of initiative must be liberally construed to promote the democratic process.
11. **Courts: Initiative and Referendum.** The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.
12. **Constitutional Law: Initiative and Referendum.** The resubmission clause is found in the same section of the state Constitution in which the people reserved to themselves the power of the initiative, Neb. Const. art. III, § 2. It serves to define the scope of the initiative power.
13. **Constitutional Law: Courts: Initiative and Referendum.** The people's reserved power of the initiative and their self-imposed limitation on the power through the resubmission clause are of equal constitutional significance. Just as the courts must respect and give effect to the power the people have reserved to themselves to amend the constitution or enact legislation through initiative measures, the courts are obliged to give meaningful effect to their self-imposed limitations on that power, such as that represented by the resubmission clause.
14. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions.
15. **Constitutional Law: Initiative and Referendum.** The right to a state initiative process is not a right guaranteed by the U.S. Constitution, but is a right created by state law.
16. ____: ____. States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process. But if a state has conferred the right of initiative and referendum, it is obligated to do so in a manner consistent with its constitution.
17. **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 Lancaster County: KAREN FLOWERS, Judge. Affirmed in part, and in part reversed and vacated, and cause remanded with directions.

Jon Bruning, Attorney General, L. Jay Bartel, and Dale A. Comer for appellant.

Alan E. Peterson, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and W. Scott Davis and Jacob P. Wobig, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge, and HANNON, Judge, Retired.

PER CURIAM.

Nebraska Secretary of State John A. Gale refused to place two initiative measures on the ballot for the November 7, 2006, general election, finding that the measures were so similar to three initiative measures submitted at the 2004 election that they contravened the resubmission clause in article III, § 2, of the Nebraska Constitution. Appellee Greg Lemon brought this action in the district court for Lancaster County pursuant to Neb. Rev. Stat. § 32-1412 (Reissue 2004), seeking a writ of mandamus to require Gale to place both measures on the ballot at the 2006 general election. The district court held that one of the measures, referred to as the "K-12 Initiative," was barred by the resubmission clause, but the other, referred to as the "3 Casinos Initiative," was not. The court entered an order requiring Gale to proceed with signature verification on the 3 Casinos Initiative and to forward it to the Attorney General for ballot title preparation. We expedited Gale's timely appeal, and Lemon cross-appealed. We conclude that a justiciable issue is presented and hold that the resubmission clause bars both initiative measures from being placed on the ballot for the November 7, 2006, general election and enter orders accordingly.

I. BACKGROUND

Lemon, a resident of and registered voter in Lancaster County, Nebraska, is the president of the Committee for Better Schools and More Jobs in Nebraska, Inc., a Nebraska nonprofit corporation serving as a ballot committee. Prior to July 7, 2006, the committee submitted to Gale three initiatives for consideration by the people of Nebraska at the general election to be held on November 7. One initiative, the 3 Casinos Initiative, proposes to amend article III, § 24, of the Nebraska Constitution to permit one casino in each of Nebraska's three congressional

districts. Each casino would be authorized, regulated, and licensed by the State. The second initiative, the K-12 Initiative, would statutorily earmark the use of tax proceeds from constitutionally authorized casino gambling by providing that a preponderance of the proceeds be used to support K-12 education in Nebraska. The third initiative was subsequently withdrawn and is not at issue in this action.

The committee contends that it has obtained sufficient valid signatures from registered voters, sufficiently distributed by county, to qualify each of the two initiative measures for consideration by the people at the November 7, 2006, election. On July 12, Gale refused to commence the verification process of the signatures on the initiative petitions and refused to place the initiative measures on the November 7 ballot. Gale determined that the 2006 initiatives were so similar to three initiatives presented to voters at the November 2004 election that they violated the resubmission clause found in the Nebraska Constitution, which clause provides: "The same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years." Neb. Const. art. III, § 2. The three initiatives submitted to the voters in 2004 were numbered 417, 419, and 420. Only Initiative 419 was approved by the voters.

Initiative 417 proposed to amend article III, § 24, of the Nebraska Constitution, which generally prohibits the Legislature from authorizing games of chance which are not specifically permitted in the constitution, by adding the following language:

> (5) This section shall not apply to laws enacted by the people by initiative measures by which the people may, contemporaneously with the adoption of this subsection or at any time thereafter, provide for the authorization, operation, regulation, and taxation of all forms of games of chance.

Initiative 419 dealt with taxation of games of chance conducted at casinos and other locations. Initiative 420 proposed a statute to (1) authorize all games of chance at casinos in metropolitan class cities within 2 miles of the Nebraska border; (2) authorize the use of electronic, mechanical, or other gaming devices at "strategic premises" where at least 250 such devices were

operated, as well as at racetracks; and (3) authorize the use of "[l]imited gaming devices" at casinos, "strategic premises," racetracks, and establishments selling alcoholic liquor for consumption on the premises. Initiative 420 also sought to establish the numbers of such casinos and gaming devices to be operated at various locations and to create a commission to regulate gaming. Initiatives 417 and 420 were defeated by the voters at the 2004 election, but Initiative 419 was approved. See Nebraska Blue Book 2004-05 at 1020-23. See, also, Neb. Rev. Stat. §§ 9-901 to 9-904 (Supp. 2005).

Lemon subsequently filed a petition for writ of mandamus in the district court for Lancaster County pursuant to § 32-1412. The operative petition sought a writ ordering Gale to verify the signatures on the 2006 initiative petitions, to obtain ballot language from the Attorney General, and to place the initiative measures on the November 7, 2006, ballot. On August 17, the district court entered an order granting in part and denying in part the relief sought by Lemon. The court concluded that Gale improperly interpreted the resubmission clause to require a comparison of the "fundamental essence" of the 2004 and 2006 initiative measures, reasoning that this interpretation of the clause failed to give effect to the plain and ordinary meaning of the constitutional language and ignored the "same measure" portion of the clause. The district court reasoned that the language of the resubmission clause instead required a consideration of whether the 2006 initiatives were "substantially the same" as the 2004 measures after examining the important and significant aspects of the measures, including their purposes, objects, and effect. Based on this rationale, the district court concluded that the 3 Casinos Initiative was not the same measure presented to the voters in 2004 and thus ordered Gale to proceed with signature verification and to obtain a ballot title from the Attorney General. The court concluded, however, that the K-12 Initiative was the same measure as Initiative 419 enacted by the electorate in 2004 and refused to order Gale to take any action on it. The court did not reach the First Amendment issues raised by Lemon. Gale perfected this appeal. We moved the appeal to our docket on our own motion and set an expedited briefing and oral argument schedule. See, Neb. Rev. Stat.

§ 24-1106(3) (Reissue 1995); § 32-1412. Lemon subsequently filed a cross-appeal.

II. ASSIGNMENTS OF ERROR

Gale assigns, restated and consolidated, that the district court erred in failing to find that the 3 Casinos Initiative was legally insufficient and unconstitutional on its face because it violated the resubmission clause of article III, § 2, of the Nebraska Constitution.

On cross-appeal, Lemon assigns, restated and consolidated, that the district court erred in (1) finding that the K-12 Initiative violated the resubmission clause; (2) failing to find that the resubmission clause, as applied in this case to the K-12 Initiative, violated state and federal First Amendment free speech and free political association rights; and (3) denying costs and attorney fees.

III. STANDARD OF REVIEW

[1-3] A jurisdictional question which does not involve a factual dispute is a matter of law. *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003). Constitutional interpretation is a question of law. *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006); *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006). On questions of law, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. See *id*.

IV. ANALYSIS

1. Justiciability

In our order setting an expedited briefing schedule, we directed the parties to brief the issue of whether this appeal presents a justiciable controversy that is ripe for determination. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001); *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). We must initially decide whether we can reach the constitutional challenge to the proposed ballot measures prior to the election at which voters will be asked to approve or reject them.

Two prior decisions of this court bear on this question. *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996), involved a challenge to an initiative measure which would have amended the Nebraska Constitution to limit the number of terms in office which could be served by specific state and federal officeholders in Nebraska. One day prior to the election at which the measure was to be submitted to the voters, the district court dismissed the action, in part based on its conclusion that the constitutionality of the proposed amendments was not justiciable unless and until the initiative measure was adopted. The measure remained on the ballot and was adopted by a majority of the electorate. The plaintiffs then filed a motion for new trial, asserting that the results of the election established justiciability, but the motion was denied. On appeal, this court held that the district court was correct in declining to rule on the constitutionality of the measure prior to the election, noting that "[t]o the degree that appellants sought a declaration that [the measure], if adopted, would enact amendments which violated the U.S. or the Nebraska Constitution, appellants were seeking an advisory opinion." *Duggan*, 249 Neb. at 424, 544 N.W.2d at 77. However, we held that the question became justiciable when the measure was adopted by the voters and the challengers filed a motion for new trial seeking declaratory relief.

Loontjer v. Robinson, 266 Neb. 902, 670 N.W.2d 301 (2003), was an appeal from an order enjoining the placement of an initiative measure on the ballot, based upon the determination of the district court that it violated the single subject rule of Neb. Const. art. III, § 2. The district court had rejected a contention that the initiative petition was defective because it failed to include a sworn statement listing the names and addresses of its sponsors in violation of Neb. Rev. Stat. § 32-1405(1) (Reissue 1998), finding that there had been substantial compliance with the statutory requirement. This determination was assigned as error on cross-appeal. *Loontjer* held that the sworn statement issue was justiciable because § 32-1412(2) (Reissue 1998) permitted a court to hear and decide a challenge to the legal sufficiency of an initiative petition prior to an election and that "[q]uestions dealing with statutory provisions concerning the form of a petition and the technical requirements of the sponsors affect the

legal sufficiency of an initiative." *Loontjer*, 266 Neb. at 908-09, 670 N.W.2d at 307. Based upon a determination that the failure to comply with the sworn statement requirement rendered the initiative legally insufficient, we, in *Loontjer*, affirmed the district court's award of injunctive relief without reaching the constitutional issue of whether the measure complied with the single subject rule.

Chief Justice Hendry concurred in the *Loontjer* result, reasoning that the single subject issue was justiciable and that the district court was correct in its conclusion that the initiative violated the single subject requirement. In a separate concurrence, two justices similarly reasoned that the "determination of whether the measure contains more than one subject is a justiciable issue." *Id.* at 925, 670 N.W.2d at 317 (Wright, J., concurring; Gerrard, J., joins). This concurrence distinguished the holding with respect to preelection justiciability in *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996), noting that *Duggan* involved an attempt "to litigate the substantive constitutionality of the measure before it was adopted," whereas the single subject rule contained in Neb. Const. art. III, § 2, was a "procedural requirement" affecting the legal sufficiency of the measure. *Loontjer*, 266 Neb. at 920, 925, 670 N.W.2d at 314, 317 (Wright, J., concurring; Gerrard, J., joins).

The parties agree and we conclude that the constitutional issue presented in this case is justiciable. We are not asked to decide whether the measures, if adopted, would violate one or more substantive provisions of the state or federal Constitution. Rather, the issue is whether each measure complies with the requirement of our state Constitution that it not be the same, "either in form or in essential substance," as another measure submitted to the voters within a preceding 3-year period. Neb. Const. art. III, § 2. The question is whether the measure is legally sufficient to be submitted to the voters. See *Loontjer, supra*. In addition to determining the validity and sufficiency of signatures on a filed initiative petition, the Secretary of State is required in the first instance to "determine if constitutional and statutory requirements have been met" before placing the measure on the ballot. Neb. Rev. Stat. § 32-1409(3) (Reissue 2004). This determination is subject to judicial review, by which

a court may order the Secretary of State to place a measure on the ballot if it finds the measure to be legally sufficient, or enjoin the placement of the measure on the ballot if it is found to be legally insufficient. § 32-1412(2). This is the process by which the constitutional issue has reached us, and we now decide it.

2. Resubmission Clause

[4] A constitution represents the supreme written will of the people regarding the framework for their government. *Duggan, supra*. The people have the power to amend the Nebraska Constitution by the initiative process pursuant to article III, § 2, which provides in part: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature."

[5] In adopting the Nebraska Constitution, however, the people have imposed upon themselves limitations on their ability to amend this fundamental law. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). The dispositive issue in this action is the application of the limitation on the initiative power found in article III, § 2, which provides that "[t]he same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years." By its terms, the resubmission clause does not prevent resubmission or reconsideration by the voters, but merely postpones for 3 years reconsideration of the "same measure." Although this provision has been a part of our state Constitution since 1912, this court has not previously construed or applied it to a specific initiative measure. In construing the provision, we are guided by familiar general principles.

[6-8] 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. *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006); *DeCamp v. State*, 256 Neb. 892, 594 N.W.2d 571 (1999). The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text

suggests that they are used in a technical sense. See *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000). It is permissible to consider the historical facts in determining the meaning of the language of the Nebraska Constitution. *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). It is also appropriate and helpful to consider, with the historical background, the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply. *Id*. It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose. *Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992).

[9-11] The Legislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003). The power of initiative must be liberally construed to promote the democratic process. *Id*. The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter. *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999); *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984).

[12,13] The resubmission clause is found in the same section of the state Constitution in which the people reserved to themselves the power of the initiative. Neb. Const. art. III, § 2. It serves to define the scope of the initiative power. We ascertain the purpose of the resubmission clause from its language. The people in their constitution reserved the power to reconsider a previously submitted initiative measure, but not more frequently than once in 3 years. The people's reserved power of the initiative and their self-imposed limitation on the power through the resubmission clause are of equal constitutional significance. Just as we must "respect and . . . give effect to the power the people have reserved to themselves" to amend the constitution or enact legislation through initiative measures, we are obliged to give meaningful effect to their "self-imposed limitations" on that power, such as that represented by the resubmission clause. See *Duggan v. Beermann*, 249 Neb. 411, 421-22, 544 N.W.2d

68, 75 (1996). Accord *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

The parties agree and we conclude that the 2006 initiative measures are not the same in form as the 2004 measures. This case thus requires us to determine whether the two initiative measures submitted for inclusion on the 2006 general election ballot are the "same . . . in essential substance" as initiative measures which appeared on the ballot in 2004. All of the measures in question pertain to gaming. However, the parties have differing views on the appropriate test to determine whether a proposed 2006 measure is the same "in essential substance" as a measure submitted in 2004. Lemon takes a narrow view, arguing that the language of the resubmission clause "is designed to prevent the same initiative measure from being resubmitted using synonyms or mere rewording of language." Brief for appellee at 11. Gale has employed a broader comparison, arguing that the resubmission clause "precludes the submission of measures which share the same fundamental nature or essence more than once every three years." Brief for appellant at 24. The district court concluded that "the resubmission clause prevents the submission of a measure that is substantially the same as a measure submitted in the previous three years. This requires one to consider the important and significant aspects of the measure, including its purpose, object and effect."

If we were to apply the "substantially the same" standard utilized by the district court, Nebraska's resubmission clause would become similar to that of the New Jersey Constitution, which provides that if a proposed constitutional amendment is not approved by voters, "neither such proposed amendment nor one to effect the same or substantially the same change in the Constitution shall be submitted to the people before the third general election." N.J. Const., art. IX, ¶ 7. Applying New Jersey's constitutional language, a New Jersey court held that a proposed constitutional amendment pertaining to casino gambling was not "substantially the same" as a proposed amendment which had been defeated by voters 2 years earlier. *Young v. Byrne*, 144 N.J. Super. 10, 364 A.2d 47 (1976). The court noted that the first proposed amendment provided for state ownership and operation of casinos, while the second permitted private ownership; the first

amendment would have permitted casinos throughout the state, while the second limited casino locations to Atlantic City, New Jersey; and the two measures differed with respect to the treatment of gambling revenues. *Id.*

Applying the principle that each and every clause within a constitution has been inserted for a useful purpose, we do not interpret the phrase "same . . . in essential substance" in the Nebraska Constitution to mean "substantially the same." The latter phrase invites the type of discrete comparison employed by both the New Jersey court in *Young* and the district court in this case to determine if specific provisions in one measure differ from those of the other. Instead, we interpret the phrase "essential substance" in the Nebraska Constitution to require a broader, conceptual analysis and comparison of the fundamental theme and purpose of each initiative measure to determine if they are the "same" for purposes of the resubmission clause.

(a) 3 Casinos Initiative

Both the 3 Casinos Initiative and Initiative 417, rejected by the voters in 2004, propose an amendment to article III, § 24, of the Nebraska Constitution, which concerns gaming and begins with a general prohibition:

> (1) Except as provided in this section, the Legislature shall not authorize any game of chance or any lottery or gift enterprise when the consideration for a chance to participate involves the payment of money for the purchase of property, services, or a chance or admission ticket or requires an expenditure of substantial effort or time.

Paragraphs (2) and (3) of article III, § 24, provide that the Legislature may authorize a state lottery and certain other lotteries. Paragraph (4) of article III, § 24, permits the Legislature to authorize wagering on the results of parimutuel horseracing and certain bingo games conducted by nonprofit associations. There is no exception for other games of chance, including those conducted at a casino, and such gaming is therefore prohibited under article III, § 24(1).

If it had been approved by the voters in 2004, Initiative 417 would have added a provision to article III, § 24, consisting of the following language:

> (5) This section shall not apply to laws enacted by the people by initiative measures by which the people may, contemporaneously with the adoption of this subsection or at any time thereafter, provide for the authorization, operation, regulation, and taxation of all forms of games of chance.

As was the case with Initiative 417, the 3 Casinos Initiative would also add a provision to article III, § 24, consisting of the following language:

> (5) Nothing in this section shall be construed to prohibit state-authorized, state-regulated and state-licensed casino gambling. The casino gambling that is authorized is as follows:
>
> (a) To the extent not prohibited by the laws of the United States, any traditional form of casino gambling and any additional form permitted by laws, rules and regulations established by the State of Nebraska;
>
> (b) There shall be no more than one casino gambling establishment in each congressional district that existed on January 1, 2006, for a maximum of three casino gambling establishments; and
>
> (c) This subsection shall not be construed to extend to political subdivisions the power to authorize, regulate, or license casino gambling or be construed as a prohibition of any form of any game of chance, lottery, or gift enterprise authorized under or pursuant to this Constitution.

The 3 Casinos Initiative would explicitly remove the present constitutional prohibition of casino gambling by authorizing three casinos in the state. Although it does not specifically mention casinos, Initiative 417 would also have removed the constitutional barrier to their operation by providing that article III, § 24, would not apply to laws enacted by initiative which authorized the "operation, regulation, and taxation of all forms of games of chance." The consequence of this proposed amendment is apparent from Initiative 420, also rejected by voters in 2004, which would have enacted a statute providing for the operation of games of chance at various locations, including casinos located in a city of the metropolitan class. We conclude that the essential substance of the 3 Casinos Initiative submitted for 2006 and Initiative 417 submitted to the electorate in 2004

is the same: amending the constitution to authorize enactments permitting the operation of games of chance. We therefore determine that the district court erred in ruling that inclusion of the 3 Casinos Initiative on the 2006 general election ballot would not violate the resubmission clause and in ordering Gale to proceed with signature verification and to submit the measure to the Attorney General for ballot title preparation. We find merit in Gale's appeal from this ruling.

(b) K-12 Initiative

Neither party questions the conclusion of the district court that the K-12 Initiative must be compared to Initiative 419, now enacted into law, because "[t]he resubmission clause does not distinguish between measures rejected and those that are approved." We agree with this reasoning.

The K-12 Initiative proposed for the 2006 general election ballot would enact a statute which directs or "earmarks" the use of tax proceeds derived from constitutionally permitted, state-authorized casino gambling. After providing funds to a state agency to control and regulate gaming; contributions to the Compulsive Gamblers Assistance Fund, see Neb. Rev. Stat. § 71-817 (Supp. 2005); and funds for live horserace purse offerings, the K-12 Initiative requires a minimum of 95 percent of all remaining tax receipts to be used to provide financial assistance in the manner determined by the Legislature for elementary and secondary education.

Initiative 419 was a statutory initiative measure approved by a majority of the electorate in the 2004 general election. See Nebraska Blue Book 2004-05 at 1022. Its provisions are codified at §§ 9-901 to 9-904. Section 9-902 provides:

> There shall be an annual gaming tax imposed by the State of Nebraska on gross gaming revenue generated at permitted locations by authorized operators from the operation of all games of chance, except for games of chance authorized under Chapter 2 or Chapter 9, as follows:
>
> (1) With respect to the operation of all games of chance operated by an authorized operator at a permitted location, a gaming tax equal to thirty-six percent of the first fifteen million dollars of the gross gaming revenue thereof and

twenty percent of the gross gaming revenue thereof in excess of fifteen million dollars;

(2) Of the gaming tax so imposed on gaming revenue at a casino, seventy-five percent thereof shall be payable to the General Fund and twenty-five percent thereof shall be payable to the community which authorized such games of chance at such casino; and

(3) Of the gaming tax so imposed on gaming revenue at any other permitted location, twenty-five percent thereof shall be payable to the General Fund and seventy-five percent thereof shall be payable to the community, or the communities, pro rata, which authorized such games of chance at such permitted location.

Section 9-903 provides for an annual gaming license fee to be paid by authorized operators of games of chance, and § 9-904 provides that gaming taxes and fees "shall be in lieu of all other taxes, fees, franchise payments, occupation taxes or excise taxes levied or imposed by the State of Nebraska, but shall not be in lieu of such other fees, income taxes, sales taxes, or property taxes levied or imposed against the public generally."

The statutes which resulted from the voters' approval of Initiative 419 in 2004 deal with the collection and distribution of revenue which would have been derived from the "community authorized" gaming contemplated by failed Initiatives 417 and 420. We recognize that the K-12 Initiative differs from the 2004 initiatives in that it would create a method of distributing revenue from the "state authorized" gaming operations which would result from approval of the 3 Casinos Initiative, as distinguished from "community authorized" operations. Initiative 419 and the K-12 Initiative also differ with respect to the specific manner in which gaming revenue would be distributed. While we acknowledge these differences, we conclude that they do not go to the essential substance of the measures under comparison. The fundamental theme and purpose of each measure is the distribution of new gaming revenues which would result if the current constitutional prohibition of games of chance were amended to permit casinos to operate in this state. We therefore conclude that Initiative 419 and the K-12 Initiative are the same in essential substance, and we agree with the district court that

the resubmission clause bars submission of the K-12 Initiative at the 2006 general election.

3. Free Speech and Political Association Claims

[14] Lemon contends on cross-appeal that in interpreting the resubmission clause, this court must consider the First Amendment concepts of "overbroad administrative discretion" and "balancing the actual burdens on speech and association against proven interests of government." Brief for appellee on cross-appeal at 47-48. He contends that "[o]nly a narrowly tailored and necessary remedy is available to the government under this test." Brief for appellee on cross-appeal at 48. Although the district court did not reach this issue, we do so here because of Lemon's claim that any interpretation of the resubmission clause which would prevent the two initiative measures from being placed on the ballot in 2006 would violate his rights of free speech and political association guaranteed by the First Amendment to the U.S. Constitution and article I, § 5, of the Nebraska Constitution. The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions. *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006); *State v. Rabourn*, 269 Neb. 499, 693 N.W.2d 291 (2005).

[15,16] "[T]he right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right created by state law." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). See, also, *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993). " 'States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process.' " *Pony Lake Sch. Dist.*, 271 Neb. at 190, 710 N.W.2d at 624, quoting *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 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.' " *Pony Lake Sch. Dist.*, 271 Neb. at 190, 710 N.W.2d at 624, citing and quoting *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

Buckley held that Colorado's requirements that circulators be registered voters and wear identification badges violated free

speech principles. *Meyer* held that a prohibition against paid circulators violated First Amendment protections of free speech. Unlike *Buckley* and *Meyer*, this case does not involve statutes or procedures affecting the exercise of the initiative power conferred by a state constitution. As we have noted, the resubmission clause is a self-imposed limitation on the constitutionally reserved power of initiative which defines its scope. In that sense, it is analogous to constitutional requirements regarding the number of signatures required to place an initiative measure on the ballot.

In holding that our resolution of that issue in *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994), did not violate the free speech rights of petition organizers, the Court of Appeals for the Eighth Circuit noted that the organizers "can claim no constitutionally-protected right to place issues before the Nebraska electorate; any opportunity to do so must be subject to compliance with state constitutional requirements." *Dobrovolny*, 126 F.3d at 1113. See, also, *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996). In a memorandum and order affirmed by the court of appeals in *Dobrovolny*, the U.S. District Court for the District of Nebraska noted "an important categorical difference between granting and defining the right to an initiative process in the state constitution and statutory procedures enacted to implement the right so defined by the state constitution." *Dobrovolny v. Moore*, 936 F. Supp. 1536, 1541 (D. Neb. 1996), *affirmed* 126 F.3d 1111 (8th Cir. 1997). The federal district court concluded that our opinion in *Duggan* did not "interpret a regulation or statute that would limit the right to the initiative procedure," but, rather, "ascertained what the right itself meant and what the will of the people was" in enacting the constitutional amendment interpreted. *Id.* at 1542.

The resubmission clause as interpreted herein is a limitation on the initiative process itself, but does not restrict speech or expression because it does not regulate the process of advocacy itself by dictating who can speak or how they must go about speaking. See *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006). We conclude that its application does not impair any rights to free speech under the federal or state Constitution. Nor are we persuaded that the application of

the resubmission clause presents a ballot access issue implicating a First Amendment right to political association.

In this regard, Lemon relies on *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), in which the U.S. Supreme Court applied a flexible balancing test in determining that a state statute which required an independent candidate for the office of President of the United States to make certain filings in March in order to appear on the November 1980 ballot placed an unconstitutional burden on voting and associational rights of his supporters. Lemon argues that the same test should be applied here. However, because the question whether an initiative measure should appear on the ballot is determined solely by a state's constitution, we conclude that *Anderson* is inapplicable. See, *Initiative and Referendum Institute, supra*; *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997); *Biddulph, supra*; *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993). Accordingly, we reject Lemon's assignments of error on cross-appeal relating to First Amendment issues.

4. Costs and Attorney Fees

[17] Lemon assigns in his cross-appeal that the district court erred in denying him costs and attorney fees. This assignment of error is not argued in his 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. *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006); *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006). We do not reach the issue in this appeal.

V. CONCLUSION

We affirm that portion of the judgment of the district court concluding that the resubmission clause contained in article III, § 2, precludes placement of the K-12 Initiative on the ballot for the 2006 general election because it is the same in essential substance as Initiative 419 submitted in 2004. However, based on our determination that the 3 Casinos Initiative is the same in essential substance as Initiative 417 submitted in 2004, we reverse the determination made by the district court that the 3 Casino Initiative did not violate the resubmission clause and vacate that portion of its order requiring Gale to proceed with

signature verification on the 3 Casinos Initiative and further directing him to forward that initiative measure to the Attorney General for ballot title preparation. We find merit in Gale's appeal and no merit in Lemon's cross-appeal. We remand the cause to the district court with directions to dismiss Lemon's verified complaint for writ of mandamus.

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

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

STATE OF NEBRASKA, APPELLEE, V.
JAY E. BRUNA, APPELLANT.
721 N.W.2d 362

Filed September 22, 2006. No. S-05-529.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and CASSEL, Judges, on appeal thereto from the District Court for Sarpy County, JAMES T. GLEASON, Judge. Judgment of Court of Appeals affirmed.

Lawrence G. Whelan for appellant.

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

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

PER CURIAM.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *State v. Bruna*, 14 Neb. App. 408, 710 N.W.2d 329 (2006), is correct and accordingly affirm the decision of the Court of Appeals.

AFFIRMED.

HENDRY, C.J., not participating.

In re Interest of Fedalina G., a child under 18 years of age. State of Nebraska, appellee, v. Edwin M., appellant.

721 N.W.2d 638

Filed September 22, 2006. No. S-06-235.

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. **Fees: Appeal and Error.** Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004) generally provides that an appeal may be taken by filing a notice of appeal and depositing the required docket fee with the clerk of the district court.
3. **Affidavits: Fees: Appeal and Error.** A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal.
4. **Jurisdiction: Affidavits: Appeal and Error.** An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty.
5. **Affidavits.** An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.
6. ____. A document subscribed and sworn to before a person not authorized by law to administer oaths is not an affidavit and is void as such.
7. **Public Officers and Employees.** The power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued.
8. **Affidavits: Public Officers and Employees: States.** An affidavit may be used in support of a motion in a court of this state if the affidavit is made and authenticated, out of state, before a person authorized to administer oaths in the place where the affidavit is made.

Petition for further review from the Nebraska Court of Appeals, Inbody, Chief Judge, and Irwin and Carlson, Judges, on appeal thereto from the County Court for Cheyenne County, Thomas H. Dorwart, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Donald J.B. Miller, of Matzke, Mattoon & Miller, for appellant.

Douglas D. Palik, Special Cheyenne County Attorney, for appellee.

Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Gerrard, J.

Edwin M., the appellant, seeks further review of the decision of the Nebraska Court of Appeals dismissing his appeal, from the

termination of his parental rights, on jurisdictional grounds. The issue in this appeal is whether the appellant's poverty affidavit, notarized by a notary public of the State of Utah, was properly submitted in support of the appellant's application to proceed in forma pauperis in a Nebraska court.

BACKGROUND

The appellant's parental rights to his daughter, Fedalina G., were terminated in an order filed by the trial court on January 30, 2006. The appellant filed a timely notice of appeal and motion to proceed in forma pauperis in the trial court, accompanied by a poverty affidavit. The poverty affidavit was sworn and signed by the appellant in Salt Lake County, Utah, and notarized by a notary public commissioned by the State of Utah. The trial court granted the appellant's motion to proceed in forma pauperis.

On April 18, 2006, the Court of Appeals issued an order, on its own motion, to show cause why the appeal should not be dismissed for lack of jurisdiction because of a defective poverty affidavit. Specifically, the order stated as follows:

> The court has reviewed the file sua sponte. The court notes that the poverty affidavit, filed in lieu of the statutory docket fee, was notarized in Utah by a Utah notary public. A document subscribed and sworn to before a person not authorized by law to administer oaths is not an affidavit and is void as such. *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995). The power of a notary to perform notarial functions is limited to the jurisdiction in which the commission is issued. *Id*.
>
> Appellant is given 14 days from the date of this Order to Show Cause to show why this cause should not be dismissed for lack of jurisdiction.

On May 1, 2006, the appellant filed a response alleging that he was a resident of the State of Utah and physically located in Utah at the time he executed the poverty affidavit. The appellant also filed an affidavit from the notary public who had authenticated his poverty affidavit, averring that the appellant had personally appeared before the notary public in Salt Lake City, sworn under oath that the information in the poverty affidavit was true, and signed the poverty affidavit. Finally, the

appellant filed a copy of the notary public's certificate of notarial commission, indicating that the notary public had been duly commissioned as a notary public for the State of Utah on November 28, 2005, and that the commission would not expire until November 26, 2009.

On May 18, 2006, the Court of Appeals summarily dismissed the appeal, citing *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995). See *In re Interest of Fedalina G.*, 14 Neb. App. lxvii (No. A-06-235, May 18, 2006). The appellant filed a timely petition for further review, which we granted.

ASSIGNMENT OF ERROR

The appellant assigns, consolidated and restated, that the Court of Appeals erred in dismissing his appeal.

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. *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

ANALYSIS

[2-4] Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004) generally provides that an appeal may be taken by filing a notice of appeal and depositing the required docket fee with the clerk of the district court. See *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004), *cert. denied* 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744 (2005). A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal. *Glass, supra*. See, generally, Neb. Rev. Stat. ch. 25, art. 23 (Reissue 1995 & Cum. Supp. 2004). An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). In the instant case, the Court of Appeals concluded that no poverty affidavit had been filed, since the appellant's purported poverty affidavit had not been notarized in accord with what the Court of Appeals believed Nebraska law to require.

[5-7] However, the Court of Appeals' reliance on *Haase, supra*, was misplaced. In *Haase*, a criminal defendant filed a notice of

appeal from an order of the district court refusing to modify his sentence, along with a motion to proceed in forma pauperis and a purported poverty affidavit. The purported affidavit represented that it was signed before a deputy Hall County public defender, but it bore no notarial seal. Upon an order to show cause, a motion was filed for an extension of time to file another affidavit, asserting that the seal had been inadvertently omitted. We issued another order, inquiring whether at the time the purported affidavit was signed, the deputy Hall County public defender was a duly qualified notary public in the State of Nebraska. It was revealed that the public defender was an Iowa notary, but not a Nebraska notary. We stated:

> In connection with the means by which evidence may be taken, Neb. Rev. Stat. § 25-1240 (Reissue 1989), the Legislature has defined an affidavit as a "written declaration under oath, made without notice to the adverse party," Neb. Rev. Stat. § 25-1241 (Reissue 1989). For the purposes of more general use, we define an affidavit as a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. . . .
>
> Obviously, a document subscribed and sworn to before a person not authorized by law to administer oaths is not an affidavit and is void as such. . . .
>
> Just as manifestly, the power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued. . . . Thus, it is clear that the original document filed as a poverty affidavit in this case was no such thing.

State v. Haase, 247 Neb. 817, 819-20, 530 N.W.2d 617, 618-19 (1995). Because the purported poverty affidavit was a nullity, we dismissed the appeal for lack of jurisdiction. See *id*.

However, the dispositive fact in *Haase* was not that the appellant tried to file a document notarized by an out-of-state notary, but that the document was purportedly notarized *in Nebraska* by a person who was not authorized to do so *in this state*. Our opinion in *Haase* indicates, and an examination of the transcript from that case confirms, that the document in question

was signed and sworn in Hall County, Nebraska, but not notarized by a Nebraska notary public.

The issue in *Haase* was not the notarization of an affidavit by an out-of-state notary; rather, it was the purported notarization of an affidavit in Nebraska before a person who was not authorized to do so in Nebraska. We held in *Haase* that the power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued—i.e., an Iowa notary may not, by virtue of that commission, perform notarial functions outside the State of Iowa. Thus, in *Haase*, the purported affidavit was a nullity because the Iowa notary was not authorized to administer an oath in Nebraska, and the appeal was correctly dismissed.

That holding is inapplicable when an affidavit is authenticated in another state by a duly commissioned notary of that state. In *Browne v. Palmer*, 66 Neb. 287, 92 N.W. 315 (1902), we held that an affidavit taken before a notary of a sister state or foreign government is properly received in support of a motion in the courts of this state. We relied upon the antecedent to Neb. Rev. Stat. § 25-1245 (Reissue 1995), which provided in part, then as now, that "[a]n affidavit may be made in and out of this state before any person authorized to take depositions, and must be authenticated in the same way." See Comp. Stat. § 5945 (1901). Comp. Stat. § 5949 (1901) provided that "[d]epositions may be taken out of the state by a . . . notary public . . . ." We concluded that taken together, "[a] reading of these two sections makes it evident that an affidavit taken before a notary public either in or out of the state of Nebraska may be used in support of a motion or other procedure in court where necessary." *Browne*, 66 Neb. at 290-91, 92 N.W. at 316.

The statutory framework upon which *Browne* was based remains effectively the same today. As noted, § 25-1245 provides that an affidavit may be made out of state before any person authorized to take depositions, and must be authenticated in the same way. Neb. Ct. R. of Discovery 28(b) (rev. 2000) provides that depositions may be taken in other states "before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending."

[8] Taken together, § 25-1245 and rule 28(b) provide that an affidavit may be used in support of a motion in a court of this state if the affidavit is made and authenticated, out of state, before a person authorized to administer oaths in the place where the affidavit is made. See *Browne, supra*. Generally, a notary public is authorized to administer oaths. See, generally, Michael L. Closen, *The Public Official Role of the Notary*, 31 J. Marshall L. Rev. 651 (1998). As pertinent to this case, a notary public of the State of Utah is authorized to administer oaths in Utah. See Utah Code Ann. § 46-1-6(4) (Supp. 2006). Because the affidavit in this case was duly authenticated in Utah by a person authorized to administer oaths in the State of Utah, it may be submitted in support of a motion made in a Nebraska court. See *Browne, supra*. The Court of Appeals erred in concluding otherwise.

At oral argument, the State contended for the first time that the appellant's poverty affidavit was defective because the acknowledgment recited that the affidavit was "subscribed and sworn" to before the notary, and not "acknowledged." The State seems to be contending that because of this form, there is no evidence, on the face of the affidavit, that the person who made the affidavit was actually the appellant, and thus, the affidavit is insufficient. This argument is without merit.

"An affidavit is a written declaration under oath, made without notice to the adverse party." Neb. Rev. Stat. § 25-1241 (Reissue 1995). Under both Nebraska and Utah law, the certificate of the notary, also known as a jurat, confirms that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit. See, *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); Utah Code Ann. § 46-1-2(5) (Supp. 2006). The form of the jurat on the appellant's affidavit in this case was sufficient to meet the requirements of both Utah and Nebraska law. See, *id.*; *Moore v. Peterson*, 218 Neb. 615, 358 N.W.2d 193 (1984); *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969).

CONCLUSION

The Court of Appeals erred in dismissing the appellant's appeal on the basis that his poverty affidavit was authenticated

by a Utah notary, and that decision must be reversed. Generally, upon granting further review which results in the reversal of a decision of the Court of Appeals, we may consider some or all of the assignments of error the Court of Appeals did not reach. See *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). However, in this case, the Court of Appeals dismissed the appeal before the appellant's brief was filed, so there are no issues beyond jurisdiction to consider. Given those circumstances, we conclude that briefing and argument on the merits of this appeal should proceed in the Court of Appeals, with the briefing schedule to be set after the issuance of this court's mandate.

The judgment of the Court of Appeals dismissing this appeal is reversed, and the cause is remanded to the Court of Appeals for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

CAROLYN BRONSEN, APPELLANT, V. DAWES COUNTY, NEBRASKA, A NEBRASKA POLITICAL SUBDIVISION, AND FUR TRADE DAYS, INC., A NEBRASKA CORPORATION, APPELLEES.

722 N.W.2d 17

Filed September 29, 2006. No. S-04-237.

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. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Statutes: Judicial Construction: Legislature: Appeal and Error.** The lack of a legislative amendment to a statute following a judicial construction of the statute cannot preclude an appellate court from concluding that its earlier construction of the statute was incorrect.
5. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
6. **Recreation Liability Act: Immunity: Case Overruled.** The limited immunity afforded to owners of land by the Recreation Liability Act, Neb. Rev. Stat. §§ 37-729

to 37-730 (Reissue 2004), was intended to apply only to private landowners who make their property available to the public for recreational purposes, and not to governmental entities. The following cases holding that the Recreation Liability Act applies to governmental entities are hereby overruled: *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); and *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987). To the limited extent the following cases can be read as implicitly holding that the Recreation Liability Act applies to governmental entities, they are also overruled: *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005); *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 592 N.W.2d 155 (1999); *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and CARLSON and MOORE, Judges, on appeal thereto from the District Court for Dawes County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

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

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellee Dawes County.

Neleigh N. Korth and Tim W. Thompson, of Kelley, Scristmier & Byrne, P.C., for appellee Fur Trade Days.

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

HENDRY, C.J.

NATURE OF CASE

Appellant, Carolyn Bronsen, sustained personal injuries when she stepped into a hole or depression in the Dawes County, Nebraska, courthouse lawn. Bronsen was attending a historical celebration organized by Fur Trade Days, Inc. (FTD), a Nebraska not-for-profit organization. After complying with the notification requirements of Nebraska's Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Cum. Supp. 2002), Bronsen filed a negligence action against Dawes County and FTD.

In response to defendants' motions for summary judgment, the district court found that under Nebraska's Recreation Liability Act (RLA), Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2004), Bronsen was using the courthouse lawn for a recreational purpose and that both Dawes County and FTD were owners under the RLA. Having determined that the RLA applied, the district court concluded that Dawes County and FTD were not liable for Bronsen's injuries because their conduct did not rise to the level of willful or malicious failure to act, a required showing for landowner liability under the RLA. The Nebraska Court of Appeals affirmed. *Bronsen v. Dawes County*, 14 Neb. App. 82, 704 N.W.2d 273 (2005). We granted Bronsen's petition for further review.

BACKGROUND

The relevant facts taken from the Court of Appeals' opinion are set forth below:

> Bronsen's injuries occurred during the Fur Trade Days celebration in Chadron[, Nebraska] in July 2002. The celebration is arranged by FTD [and] takes place in Chadron each year on the second weekend of July. . . . Events and activities are held on the Dawes County courthouse lawn . . . . Fur Trade Days also includes a parade, softball games throughout the weekend, and many other activities.
>
> The summary judgment record shows that at the time of Fur Trade Days in 2002, Bronsen, a resident of Utah, was visiting her parents in Chadron. Bronsen had not attended Fur Trade Days or visited the courthouse lawn prior to the July 2002 celebration. On July 13, Bronsen and her family watched the parade, walked through the flea market, and purchased buffalo burgers and beverages for lunch. Bronsen and her family sat at a picnic table on the courthouse lawn to eat their lunch, after which they planned to view the "[Native American] powwow." After lunch, Bronsen and her father went across the street to get bowls of homemade ice cream for the family to eat. Bronsen and her family visited while they ate the ice cream. As she walked across the courthouse lawn prior to her accident, Bronsen was able to feel that the lawn was uneven. Bronsen was also aware that her father had stepped in a hole in the courthouse lawn before the family first arrived at the picnic table. When

Bronsen and her family were done eating, Bronsen picked up some paper plates and bowls that had blown off the picnic table, intending to throw them away in a nearby trash can. On her way to the trash can, Bronsen stepped into a hole or uneven area and fell, breaking her ankle. Since the accident, Bronsen has had several surgeries to repair the break. At the time of her deposition in November 2003, Bronsen still had pain in her ankle. . . .

. . . .

Bronsen filed her operative complaint on May 12, 2003, setting forth a negligence claim against both the County and FTD. Specifically, Bronsen alleged that on July 13, 2002, she suffered personal injuries when she fell after stepping in a hole in the courthouse lawn while attending Fur Trade Days. Bronsen alleged that her fall was proximately caused by the negligence of the County in that it failed to (1) inspect the courthouse lawn for dangerous conditions, (2) maintain the lawn in a manner suitable for pedestrian traffic, (3) repair holes as they appeared in the lawn, (4) warn pedestrians of the existence of the hole, or (5) restrict traffic in the area of the hole so as to prevent pedestrians from falling there. Bronsen alleged that her fall was also proximately caused by the negligence of FTD as the occupier of the courthouse lawn on July 13. Bronsen alleged that FTD was negligent in the same respects as was the County. Bronsen further alleged that her injuries required treatment from health care providers, that she incurred medical expenses exceeding $1,000, and that she would continue to incur future medical expenses. Bronsen also sought recovery for disability, pain and suffering, and lost income, both past and future. Finally, Bronsen alleged that she had filed a tort claim on October 21 with the Dawes County clerk pursuant to Nebraska's [PSTCA], that more than 6 months had passed without response, and that she had withdrawn her claim on April 23, 2003. Bronsen sought judgment for her special damages in an amount to be proved at trial and for such general damages as were allowable by law.

In its answer, the County denied that any defect existed in the lawn at the county courthouse other than the inherent

uneven condition of the lawn itself due to the natural settling and rising of the soil. The County admitted that Bronsen fell on the lawn of the courthouse but alleged that Bronsen's fall was proximately caused by her own negligence. The County also contended that Bronsen's injuries "may not have been as she has alleged" and that Bronsen may have failed to mitigate her damages. The County alleged that it may be immune from liability because the premises were being used for recreational purposes as defined by § 37-729. . . . FTD filed an answer and subsequently an amended answer, making similar allegations and denials to those made by the County.

The County and FTD filed motions for summary judgment, which were heard by the district court on December 22, 2003. In addition to the evidence set forth above, the record at the summary judgment hearing included deposition testimony [and affidavit evidence from a number of witnesses].

. . . .

The district court entered an order on February 4, 2004, granting both motions for summary judgment. The court found that it was clear Bronsen "was using [the courthouse lawn] for picnicking, viewing historical events or recreations (pow wow) or otherwise using the land for purposes of the user" and that those uses would qualify as recreational purposes under § 37-729(3). The court found that the facts adduced showed that FTD qualified as an owner as defined by § 37-729(2), in that it was an occupant or person in control of the premises. The court found that the evidence showed that Bronsen was allowed to use the courthouse lawn without charge. The court stated that FTD was thus immune from liability unless there was a willful or malicious failure on its part. The court found that FTD had no knowledge of the hole and did not create the hole and that thus, there was no willful or malicious action on the part of FTD.

The district court concluded that the County's actions would also place it within the protection of the RLA. The court stated that in order to establish liability on the part

> of the County, Bronsen was likewise required to show that its actions would amount to a willful or malicious failure. . . . The court concluded that there was no willful or malicious action on the part of the County.
>
> The district court found no genuine issue as to any material fact and concluded that the County and FTD were entitled to judgment as a matter of law. Accordingly, the court granted the motions for summary judgment.

Bronsen v. Dawes County, 14 Neb. App. 82, 84-89, 704 N.W.2d 273, 277-80 (2005).

ASSIGNMENTS OF ERROR

Bronsen assigns, restated, that the Court of Appeals erred in concluding that Dawes County, which was sued under the PSTCA, was immune from suit by application of the RLA. Bronsen also assigns that the Court of Appeals erred in affirming the district court's conclusion that her conduct fell within the definition of "picnicking," a recreational use of property under the RLA. Bronsen does not assign as error the district court's determination that FTD was an owner under the RLA.

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. *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006).

[2,3] Statutory interpretation presents a question of law. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Estate of Mousel*, 271 Neb. 628, 715 N.W.2d 490 (2006).

ANALYSIS

Meaning of "Owner of Land" Under RLA

Bronsen argues, simply stated, that the RLA should not be applied to governmental entities. Bronsen specifically requests this court to reexamine its decision in *Watson v. City of Omaha*,

209 Neb. 835, 312 N.W.2d 256 (1981). In *Watson*, this court held that the limited immunity from liability afforded to owners of land under the RLA applies to governmental entities as well as private landowners. On three occasions since *Watson*, this court has explicitly reaffirmed its determination that the RLA's protection applies to governmental entities. *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984). The *Watson* rule, however, was not unanimously embraced by this court. See, *Thies, supra* (White, J., dissenting); *Bailey, supra* (Grant, J., dissenting; White and Shanahan, JJ., join); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984) (Shanahan, J., dissenting; White and Grant, JJ., join); *Watson, supra* (White, J., dissenting; McCown, J., joins). Beginning with *Watson*, a recurring issue presented to this court by RLA cases is whether the Legislature intended the RLA's protection to apply to governmental entities. We begin with a synopsis of the RLA.

The Legislature's stated purpose in enacting the RLA "is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." § 37-730. Accordingly, under the RLA, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." § 37-731. This protection applies to landowners who directly or indirectly invite others to use their land for a recreational purpose so long as the owner does not charge a fee for the use of the land. § 37-732. The protection also applies to landowners who lease their property to the state for recreational purposes. § 37-733. Landowners are not, however, protected from liability "for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." § 37-734(1). In considering willful and malicious conduct under the RLA, this court has stated:

> In order for an action to be willful or wanton, the evidence must show that [a landowner] acted with actual knowledge that a danger existed and that [the landowner] intentionally failed to act to prevent the harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.

Garreans, 216 Neb. at 493, 345 N.W.2d at 314. Thus, if the RLA applies, landowners are protected from all but intentional or recklessly indifferent acts committed against persons entering onto their land.

After Bronsen filed her brief with the Court of Appeals on June 8, 2004, this court issued its opinion in *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005) (holding that football spectating is not "recreational purpose" within RLA's protection). As in earlier dissents, the *Iodence* concurrence concluded that this court in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), had incorrectly extended the RLA's protection to governmental entities. *Iodence, supra* (Hendry, C.J., concurring; Gerrard and McCormack, JJ., join). In deciding Bronsen's appeal, the Court of Appeals recognized the *Iodence* concurrence's "reservations about the continued application of *Watson*," but concluded that "[e]ven if this court were inclined to agree with the arguments raised by Bronsen," it was bound by the *Watson* rule as that decision had not been overturned. *Bronsen v. Dawes County*, 14 Neb. App. 82, 94, 704 N.W.2d 273, 283 (2005). In her petition for further review, Bronsen urges this court to adopt the rationale of the *Iodence* concurrence.

The main conflict related to applying the RLA to governmental entities stems from the RLA's definition of "owner" in § 37-729(2): "Owner includes tenant, lessee, occupant, or person in control of the premises." Subsection (2) does not explicitly define "owner" to include only private landowners; neither does the model act upon which the RLA was based. However, for the reasons stated in the *Iodence* concurrence, which we reiterate in part below, we now conclude that the RLA's protection was never intended to apply to governmental entities.

First, the Legislature's expressed purpose in granting limited immunity to landowners—to encourage them to make their land available to the public for recreational purposes—is historically not applicable to publicly owned recreational or park property. A governmental entity's primary purpose in owning such land is to make it available for public use. It needs no incentive to perform this traditional function. See, *Conway v. Town of Wilton*, 238 Conn. 653, 671-72, 680 A.2d 242, 252 (1996) ("[b]ecause [municipalities] are in the business of providing parks, pools, ball fields, etcetera, the legislature had less incentive to dangle the carrot of immunity to encourage municipalities to do what they historically have always done"); *City of Pensacola v. Stamm*, 448 So. 2d 39 (Fla. App. 1984) (concluding that recreational use statute is not intended to apply to governmental entities already charged with responsibility of acquiring and maintaining recreational property for general welfare of citizens). See, also, *National League of Cities v. Usery*, 426 U.S. 833, 851, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976) (listing police protection, fire prevention, and parks and recreation as examples of typical activities performed by state and local governments "in discharging their dual functions of administering the public law and furnishing public services"), *overruled on other grounds, Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (rejecting traditional function test for determining whether state and local government activities are immune from federal regulation). Compare Neb. Rev. Stat. § 2-3229 (Reissue 1997) (providing purposes of natural resource districts, including "development and management of recreational and park facilities"). Any governmental incentive was particularly unnecessary in 1965 when,

as discussed *infra*, governmental entities already enjoyed sovereign immunity.

Second, the term "owner of land" under § 37-729(2) cannot be consistently construed to include governmental entities. Under § 37-733,

> [a]n owner [of land] who leases land to the state for recreational purposes shall not by giving such lease (1) extend any assurance to any person using the land that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of a person who enters upon the leased land.

A landowner's leasing of land to the state under § 37-733 includes the leasing of land to political subdivisions. See *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 652, 592 N.W.2d 155, 160 (1999) ("[i]f the landowner charges for the use of the land, then the landowner is not protected by the [RLA] unless the land is leased to the state or a subdivision thereof"). But, if "owner of land" under § 37-729(2) includes governmental entities, then § 37-733 must be read to authorize a governmental entity to lease land to itself and, by doing so, avoid liability for ordinary negligence. This reading is nonsensical, supporting our conclusion that the Legislature did not intend for an "owner of land" to include governmental entities. See, *In re Petition of SID No. 1*, 270 Neb. 856, 867, 708 N.W.2d 809, 819 (2006) ("[i]t is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language"); *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 352, 701 N.W.2d 379, 384 (2005) ("[s]tatutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision"). See, also, *Conway v. Town of Wilton*, 238 Conn. 653, 665, 680 A.2d 242, 249 (1996) (concluding that lease provisions of recreational use statute, based on model act, created latent ambiguity by suggesting that "the legislature did not intend public and private 'owners' to be treated identically under the statute").

Third, as noted by the dissent in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), the Legislature had no

reason to believe that governmental entities were in need of liability protection under the RLA when it was enacted in 1965 because, at that time, governmental entities were already immune from liability under the common-law doctrine of sovereign immunity. It was not until 1968, 3 years after the passage of the RLA, that this court partially abrogated the doctrine as a defense against tort liability arising out of governmental operations, specifically the ownership, use, and operation of motor vehicles. *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968) (holding that because doctrine was originally common-law rule, this court may modify it in absence of legislative action to contrary). See, also, *Stadler v. Curtis Gas, Inc.*, 182 Neb. 6, 151 N.W.2d 915 (1967) (discussing lack of immunity for governmental propriety activities). It was not until 1969, 4 years after the passage of the RLA, that the Legislature waived sovereign immunity for the State of Nebraska and its political subdivisions pursuant to the State Tort Claims Act, see Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003), and the PSTCA. Simply stated, in 1965, sovereign immunity was an extant defense to tort liability related to the recreational use of public land. Therefore, the Legislature could not have intended to include governmental entities as landowners in need of liability protection under the RLA.

Fourth, construing "owners of land" to include governmental entities allows those entities to treat claimants differently depending upon whether their injuries were incurred during recreational or nonrecreational activities. *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005) (Hendry, C.J., concurring; Gerrard and McCormack, JJ., join). For claims related to nonrecreational activities on public property, a governmental entity's duty would be determined under the PSTCA or the State Tort Claims Act, while claims related to recreational activities would be determined under the RLA. This court has previously dealt with the difficulty presented by a plaintiff's subjective intent in using public property in *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998).

In *Veskerna*, this court held that the RLA could not exempt a city from its duty to maintain a public street based on the subjective intent of a member of the public when the city allegedly

failed to close the street to traffic during an automobile show event. Thus, when public property is primarily intended for a nonrecreational purpose, "[m]erely changing the use to which public lands are put cannot change the liability of the owner to members of the public who use the property." *Id.* at 544, 578 N.W.2d at 28. This court reasoned that the Legislature could not have intended to create separate classes of plaintiffs based upon the individual subjective intent of the plaintiffs in using public property. *Id.*

This case presents a similar issue, except that here the public property was, arguably at least, available for both recreational and nonrecreational purposes. The following hypothetical illustrates the unreasonableness of allowing a claimant's fortuitous purpose in using public property to become an outcome-determinative factor in deciding whether to apply the liability standard of the PSTCA or the RLA.

In the 1970's, the Nebraska State Capitol Building was listed on the National Register of Historic Places, and the Nebraska State Capitol landscape was added in 1999. Given that the Capitol is a historical site, assume the following: As frequently occurs in late spring, groups of children from across the State of Nebraska arrive in schoolbuses to tour and visit the State Capitol. After exiting their buses and entering the Capitol through the east vestibule, a piece of the Capitol's facade breaks loose, striking and seriously injuring two of the children. The same piece of facade also strikes and seriously injures an individual coming to the Capitol with the intent of testifying at a legislative hearing. As to the children who came to the Capitol for a recreational purpose, see § 37-729(3) (defining recreational purpose to include "visiting, viewing, or enjoying historical . . . sites"), the State's liability to them would be limited to its "willful or malicious failure to guard or warn against a dangerous condition." § 37-734. See, also, *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984). As to the individual coming to the Capitol to testify at a legislative hearing, whose purpose would clearly not be recreational under the RLA, the State's liability would be determined under the rubric of ordinary negligence, i.e., the duty to conform to the legal standard of reasonable conduct in light of the apparent risk. See, e.g., *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

If the RLA were interpreted to apply to public property serving dual purposes, it takes little effort to envision numerous circumstances in which substantially different liability standards would apply to the same incident or injury depending upon the claimant's reason for using the property. See, e.g., *Hovland v. City of Grand Forks*, 563 N.W.2d 384 (N.D. 1997) (noting that if recreational use statute were interpreted to include governmental entities as owners, outcome would be different for bicyclist using bike trail to go to work versus skater using trail for recreation). As in *Veskerna v. City of West Point*, 254 Neb. 540, 543, 578 N.W.2d 25, 27 (1998), "we cannot presume that the Legislature intended to create separate classes of plaintiffs based upon the individual subjective intent of [such] plaintiffs in using the property."

Fifth, as noted in the concurrence in *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005), interpreting the PSTCA as incorporating the RLA's limited immunity is essentially a revocation of the state's general waiver of immunity in the PSTCA. Dawes County argues that because § 13-908 provides that a governmental entity's liability is the same as an individual's liability, it is entitled to the same limited immunity that would be afforded to a private landowner under the RLA.

In relevant part, § 13-908 provides: "Except as otherwise provided in the [PSTCA], in all suits brought under the act the political subdivisions shall be liable in the same manner and to the same extent as a private individual under the circumstances . . . ." See, also, § 81-2,215 (providing same language in waiver section of State Tort Claims Act). We recognize that courts have applied recreational use immunity to governmental entities through similar language in a tort claims act. See, e.g., *DiMella v. Gray Lines of Boston, Inc.*, 836 F.2d 718 (1st Cir. 1988); *Johnson v. New London*, 36 Ohio St. 3d 60, 521 N.E.2d 793 (1988). However, this case amply illustrates how the concept of "derivative immunity" in this circumstance conflicts with Nebraska's PSTCA because it involves a claim that clearly falls within the state's waiver of immunity under the PSTCA.

The PSTCA was enacted to "abolish the long existing doctrine of sovereign or governmental immunity which has prevented recovery from Nebraska's [political subdivisions] for the

torts of [the political subdivision's] officers, agents, and employees." Introducer's Statement of Purpose, L.B. 155, Committee on Judiciary, 80th Leg., 1st Sess. (February 3, 1969). This court has recognized that the quoted language in § 13-908 sets forth a general waiver of immunity subject to specified exemptions 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) (contrasting PSTCA's general waiver of immunity, subject to limited exceptions, with statute conferring general grant of immunity, subject to specified exceptions). One of the PSTCA's exemptions limits claims against a political subdivision for its

> failure to make an inspection or making an inadequate or negligent inspection of any property *other than property owned by or leased to such political subdivision* to determine whether the property . . . contains a hazard to public health or safety unless the political subdivision had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety.

(Emphasis supplied.) § 13-910(3). See, also, § 81-8,219(7) (providing same exemption under State Tort Claims Act).

In this exemption, the Legislature clearly contemplated claims involving the failure of governmental entities to conduct inspections of property it does not own or lease. See, e.g., Neb. Rev. Stat. §§ 14-102(31) to (33) (Cum. Supp. 2004), 48-418.10 and 48-722 (Reissue 2004), and 71-1,147.64 and 71-1559 (Reissue 2003). In those circumstances, a claim is precluded unless the claimant can prove that the governmental entity's failure to inspect, or properly inspect, amounted to a reckless disregard for public safety or occurred despite its knowledge of a hazard to the public. This heightened liability standard is comparable to what a plaintiff must meet in order to hold a landowner liable under the RLA. If the Legislature had intended to impose this higher liability standard in claims against governmental entities for their failure to inspect property they owned or leased, it would not have specifically excluded such property from § 13-910(3). By excluding public property in this fashion and reading the statute as a whole, the Legislature has shown

an intent to be liable for ordinary negligence with respect to publicly owned or leased property. Our past interpretation of the RLA is simply inconsistent with the Legislature's intent in § 13-910(3) to include liability for "negligent inspection" of publicly owned property within its general waiver of immunity.

Finally, applying the RLA to governmental entities ignores the purpose of the RLA, which was to provide an incentive to *private* landowners to open their *private* land to the public for recreational purposes. As noted in the concurrence in *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005), the RLA's intended application to only private landowners is clearly shown by its legislative history. See, *Conway v. Town of Wilton*, 238 Conn. 653, 680 A.2d 242 (1996) (overruling prior decision holding that "owner" included municipalities and concluding that definition of "owner," which was identical to model act, was ambiguous when court considered legislative history and public policy underlying statute); *Monteville v. Terrebonne Par. Con. Gov't*, 567 So. 2d 1097 (La. 1990) (noting that state legislature had adopted model act almost without change, including definition of owner; concluding that act applied only to private owners); *Stamper v. Kanawha County Bd. of Educ.*, 191 W. Va. 297, 298 n.4, 445 S.E.2d 238, 239 n.4 (1994) (concluding that state legislation fashioned after model act was intended to benefit private landowners despite legislature's slight modification to specify that owner " 'shall include, but not be limited to, tenant, lessee, occupant or person in control of the premises' "). See, also, *Hovland v. City of Grand Forks*, 563 N.W.2d 384 (N.D. 1997).

The model act, which the Legislature adopted almost verbatim, contains an introductory commentary specifically providing that the act is " 'designed to encourage availability of *private* lands . . . .' " (Emphasis in original.) *Iodence*, 270 Neb. at 72, 700 N.W.2d at 570 (setting out introductory commentary in its entirety), quoting 24 Council of State Governments, Suggested State Legislation 150 (1965). This purpose precludes applying the RLA's immunity to governmental entities through § 13-908. Even if governmental entities are entitled to be treated the same as private individuals by virtue of the PSTCA, they cannot own *private* land. Governmental entities own only *public* land.

In arguing that *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), was correctly decided, FTD contends that (1) the Legislature has acquiesced in this court's holdings that the RLA's protection applies to governmental entities and (2) the doctrine of stare decisis is entitled to great weight.

[4] It is true that ordinarily, where a statute has been judicially construed and that construction has not evoked an amendment from the Legislature, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. *State v. Neiss*, 260 Neb. 691, 701, 619 N.W.2d 222, 229 (2000). However, this proposition of statutory construction cannot preclude an appellate court from concluding that its earlier construction of a statute is incorrect. The proposition is normally applied when an appellate court has concluded that its earlier construction is accurate. If the proposition were applied as a rule in every case involving statutory construction, no judicial construction of a statute could be overruled in the absence of legislative action.

[5] Similarly, the doctrine of stare decisis was never intended to indefinitely perpetuate erroneous decisions. See *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004). The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *Id.* The doctrine is not absolute because no court is infallible. *Stonehill College v. Com'n Against Discrim.*, 441 Mass. 549, 808 N.E.2d 205 (2004).

For the reasons stated above, we conclude that our decision in *Watson, supra*, was manifestly wrong, and it is overruled. Therefore, the district court's judgment granting summary judgment to Dawes County must be reversed.

Meaning of "Picnicking" Under RLA

As noted, the district court also concluded that FTD qualified as an owner as defined by § 37-729(2) in that it was an occupant or person in control of the premises. Bronsen does not dispute this classification. She assigns, however, that her conduct did not fall into the category of "picnicking," a protected recreational purpose under § 37-729(3). We have reviewed the district

court's findings and the Court of Appeals' analysis of those facts. Viewing the evidence in the light most favorable to Bronsen, and giving her the benefit of all reasonable inferences, we cannot say the Court of Appeals erred in affirming the district court's finding that Bronsen was picnicking. This assignment of error is without merit.

CONCLUSION

[6] We conclude that the limited immunity afforded to owners of land by the RLA was intended to apply only to private landowners who make their property available to the public for recreational purposes, and not to governmental entities. Accordingly, we overrule our prior holdings in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); and *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987). To the limited extent the following cases can be read as implicitly holding that the RLA applies to governmental entities, they are also overruled: *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005); *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 592 N.W.2d 155 (1999); *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

Thus, we conclude that the Court of Appeals' decision must be reversed with respect to Dawes County and the cause remanded with directions to the Court of Appeals to remand the cause to the district court for further proceedings consistent with this opinion.

With respect to FTD, the Court of Appeals' determination that the district court did not err in granting its motion for summary judgment is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Robert H. Beach, respondent.

722 N.W.2d 30

Filed September 29, 2006. Nos. S-04-1399, S-05-1116.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____: ____. When neither party files written exceptions to the referee's report, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
3. **Disciplinary Proceedings.** Under Neb. Ct. R. of Discipline 4 (rev. 2004), the Nebraska Supreme Court may impose one or more of the following sanctions: (1) disbarment, (2) suspension, (3) probation in lieu of or subsequent to suspension, (4) censure and reprimand, or (5) temporary suspension.
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 and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
5. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
6. ____. To determine 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 disciplinary proceeding.
7. **Attorneys at Law.** Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability and adversely reflects on one's fitness to practice law.
8. **Disciplinary Proceedings.** An attorney's conduct which includes progressively abusive language, demeanor, and threats violates disciplinary rules that prohibit engaging in conduct prejudicial to the administration of justice and engaging in conduct that adversely reflects on one's fitness to practice law.
9. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.

Original actions. Judgment of disbarment.

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

No appearance for respondent.

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

PER CURIAM.

These two attorney disciplinary actions involve separate formal charges filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent Robert H. Beach. In each case, a hearing was held before a referee and neither party filed exceptions to the referee's report. We granted the relator's motion for judgment in each case and ordered briefing and oral argument on the limited issue of sanctions. The cases were briefed and argued separately. We now consider the issue of what discipline should be imposed.

FACTS

BACKGROUND

Respondent was admitted to the practice of law in the State of Nebraska on June 22, 1964. In previous disciplinary proceedings, he received two private reprimands for misconduct similar in nature to that which is the subject of these cases. The first private reprimand was issued on February 24, 1991, and the second on March 26, 1996.

CASE NO. S-04-1399: FORMAL CHARGES

Formal charges were filed on December 13, 2004. Respondent filed an answer admitting some allegations, denying others, and requesting dismissal of the formal charges. A referee appointed by this court conducted a hearing on April 12, 2005, and filed a report on May 26. We summarize the findings and recommendations of the referee.

At all relevant times, respondent was engaged in private practice in Omaha, Nebraska. In March 2004, respondent met J.N., who was a waitress at a truckstop near her home in Brownville, Nebraska. J.N. was 21 years old and married. In March or April, J.N. hired respondent to represent her in a felony probation revocation case in Nemaha County, Nebraska. Thereafter, respondent sent three letters to the Nemaha County Attorney regarding the case. Respondent also requested that the county attorney initiate mental health proceedings against J.N., but the county attorney took no action in this regard. On August 12, respondent sent a fourth letter to the county attorney, stating in part:

> My client lives a block from the Brownville bridge and we will all feel rotten if she jumps. She informed her stupid

> husband a year ago that she was leaving him and he proceeded to get drunk and jumped off the bridge into the Mo. River. Unfortunately for [J.N.] and county authorities he survived.

Respondent sent this letter without the knowledge or consent of his client.

On August 18, 2004, also without the knowledge or consent of J.N., respondent sent a letter to J.N.'s husband in which he wrote: "I believe [J.N.] at long last realizes what a useless piece of shit you are and her worst enemy. . . . Try the Brownville Bridge again - - face first." On August 25, without any request from his client, respondent sent her a divorce petition with directions to sign it. In his transmittal letter, he stated in part:

> Deep in your heart, you know that [your husband] is bad for you and always has been. You also know that for you to have a good life this sub human has to go. . . . He is scum and always will be. Honey, you can have a future. Let's make it a good future. [The judge assigned to the probation revocation case] will know you are sincere if you dump your hubby.

Respondent's representation of J.N. was terminated on August 26.

Respondent received notice on August 28, 2004, that a grievance had been filed with the relator regarding his August 12 and 18 letters. Respondent then sent a letter to J.N. stating: "Your dip shit husband did, in fact, file a grievance with the Counsel for Discipline. . . . Not a big deal - just an inconv[en]ience."

While J.N. was on probation and ordered not to consume alcohol, respondent accompanied her to bars and purchased alcoholic beverages for her. Respondent testified that he was paternalistic and fond of J.N., whom he referred to as his "black sheep daughter." He believed that her husband was bad for her and that breaking the relationship would be good for her well-being and would impress the judge in her probation revocation case. He also believed that J.N. was a danger to herself and should be placed in protective custody.

The referee found that respondent had violated Canon 1, DR 1-102(A)(5) and (6), and his oath of office as an attorney. Noting that respondent had twice previously been sanctioned for

similar conduct, the referee recommended a public reprimand and a 6-month suspension of respondent's license.

Temporary Suspension

On June 17, 2005, the chairperson of the Committee on Inquiry of the Second Disciplinary District filed an application pursuant to Neb. Ct. R. of Discipline 12 (rev. 2002), requesting this court to temporarily suspend respondent from the practice of law. The application was supported by the affidavit of Kent L. Frobish, Assistant Counsel for Discipline. Frobish averred that after receiving a copy of the referee's report summarized above, respondent sent letters to the president of the Nebraska State Bar Association, an attorney representing J.N., and the Counsel for Discipline which violated Canon 4, DR 4-101B(1), and DR 1-102(A)(5), and adversely reflected on his fitness to practice law in violation of DR 1-102(A)(6). Copies of the letters were attached to the affidavit.

This court entered an order requiring respondent to show cause why his license to practice law should not be temporarily suspended based upon the allegations set forth in the application. In his response, respondent stated that he had "done nothing that will cause serious damage to the public or to the legal profession." Finding this response inadequate, we entered an order on July 13, 2005, temporarily suspending respondent's license to practice law in this state until further order of the court.

Case No. S-05-1116: Formal Charges

Formal charges were filed on September 19, 2005, alleging essentially the same facts set forth in the application for temporary suspension. Respondent filed an answer admitting some factual allegations, denying others, and asserting affirmative defenses, including an allegation that his statements reflected "strongly held personal opinions, and were made after suffering a stroke which occurred within weeks of receiving [the referee's report and recommendations] in S-04-1399." A second referee appointed by this court conducted a hearing on January 10, 2006, at which hearing respondent did not appear personally or through counsel. On January 19, the referee filed a report including findings of fact and recommendations for disciplinary sanctions, which we summarize here.

On June 1, 2005, respondent sent a letter to the Nebraska State Bar Association requesting a termination of his membership. The letter revealed confidential information about J.N. It also stated that the disciplinary proceeding in case No. S-04-1399 was the "result of a complaint filed by [J.N.], 22, with direction and assistance by a very dangerous woman attorney." It further stated that during the hearing in case No. S-04-1399, "[t]ruth mattered little" to the Assistant Counsel for Discipline and the referee and that it "took about 10 seconds . . . to realize this was going to be a jam job, [respondent's] being the jamee." The letter indicated that copies were sent to "[t]en judges, the Counsel [for Discipline], [the referee], several other lawyers, a few civilians and my pals." Respondent also sent a copy of the letter to the attorney mentioned therein, with a handwritten notation stating: "The practice was more enjoyable before feminazi bitches like you came on the scene."

On June 6, 2005, respondent sent a letter to the Counsel for Discipline regarding the disciplinary hearing in case No. S-04-1399. The letter stated: "People who know more about your outfit inform me Frobish is your hitman." It also stated: "Your rules suck in situations like this. I didn't try to screw her or steal her money. The letter I wrote to her disgusting husband had to be written and [J.N.] needed a coupleof [sic] beers on occasion to balance her wacky head." On July 14, relator notified respondent that it had filed a grievance against him regarding his conduct in sending the aforementioned letters. Respondent answered with a letter dated July 26, 2005, in which he stated:

> You and your people, Frobish, [referee], [attorney] what's her name and the Chief [of the Nebraska Supreme Court] have succeeded in ruining my livelihood, my reputation, my dignity and, finally, my health.
>
> I suffered a stroke a few days ago the proximate cause of which is the bull shit case filed against me by your office.
>
> All I have wanted out of life the past few years is to watch my grandchildren grow up. Now, thanks to you pricks, that wish will likely be denied me.
>
> I have several pissed off friends who are meaner than junk-yard dogs and have good memories.

> All this over a crazy, alcoholic, drug addict who will never have a normal life.

On December 26, 2005, respondent sent a letter to the referee appointed to hear the proceedings in case No. S-05-1116 and the relator. The letter generally criticized the state of the legal profession and specifically criticized the disciplinary process. The letter concluded: "Do to me what you will. I submit on the pleadings and waive oral argument. The aforementioned should be submitted to the chief. This, likely, is only the beginning."

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005); *State ex rel. Counsel for Dis. v. Chapin*, 270 Neb. 56, 699 N.W.2d 359 (2005). However, because neither party has taken exception to the findings of the referees in these cases, our task is limited to a determination of appropriate discipline. See *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. 328, 674 N.W.2d 464 (2004).

ANALYSIS

[2] When neither party files written exceptions to the referee's report, the Nebraska Supreme Court may consider the referee's findings final and conclusive. See *State ex rel. Counsel for Dis. v. Kleveland*, 270 Neb. 52, 703 N.W.2d 244 (2005). Based upon the findings in the referees' reports, which we consider to be final and conclusive, we conclude the formal charges in both cases are supported by clear and convincing evidence.

[3-6] Under Neb. Ct. R. of Discipline 4 (rev. 2004), this court may impose one or more of the following sanctions: (1) disbarment, (2) suspension, (3) probation in lieu of or subsequent to suspension, (4) censure and reprimand, or (5) temporary suspension. *State ex rel. Counsel for Dis. v. Jones, supra*. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and 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. *Id.*; *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005). Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005); *State ex rel. Counsel for Dis. v. Janousek, supra*. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *Id.* To determine the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the disciplinary proceeding. *State ex rel. Counsel for Dis. v. Widtfeldt, supra*; *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

[7,8] While these cases do not involve theft or misappropriation of client funds, the misconduct is nevertheless very serious in nature. The referee in case No. S-04-1399 specifically found that respondent's client, J.N., "was a drug addicted, psychologically impaired woman in need of legal and personal help." She retained respondent to represent her with respect to a probation revocation case. Before she finally discharged him as her lawyer, respondent accompanied her to bars and purchased alcoholic beverages for her, in violation of the terms of her probation; urged her estranged husband to commit suicide; and directed her to sign a divorce petition which he had drafted without being requested to do so. When disciplinary charges were filed against him, respondent directed his verbal fury at the Counsel for Discipline, court-appointed referees, the attorney representing J.N., the bar association, and this court. Some of his letters disclosed confidential information about J.N. to persons having no association with these proceedings. Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability and adversely reflects on one's fitness to practice law. *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. 328, 674 N.W.2d 464 (2004); *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001). An attorney's conduct which includes progressively abusive language, demeanor, and threats violates disciplinary rules that prohibit engaging in conduct prejudicial to the administration of justice and engaging in conduct that

adversely reflects on one's fitness to practice law. *State ex rel. Counsel for Dis. v. Lopez Wilson, supra.*

[9] 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. Janousek, supra*; *State ex rel. Counsel for Dis. v. Cannon*, 266 Neb. 507, 666 N.W.2d 734 (2003). The records in these two cases reflect numerous acts of hostile, threatening, and disruptive conduct which is similar in nature to that for which respondent was previously disciplined. His 1991 private reprimand resulted from a letter he wrote to a female attorney then representing his former client in which he referred to the client as a "crazy bitch" and closed with an even more crude and degrading remark about women. Respondent's 1996 private reprimand resulted from his verbal harassment of a female client who had terminated his services. We agree with the determination of the referee in case No. S-05-1116 that "[r]espondent's implied threat of vigilante justice administered by his [angry] friends clearly demonstrates complete and total disrespect for the rule of law and those that administer the law." In light of this pattern of highly unprofessional conduct marked by a "serial disregard for our disciplinary rules," a significant sanction is necessary to maintain the reputation of the bar as a whole, deter others from similar conduct, and protect the public. See *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. at 338, 674 N.W.2d at 473.

Respondent's attitude in light of the evidence does little to warrant leniency. As noted by the referee in case No. S-05-1116, respondent has failed "to acknowledge that any of his conduct is outside the bounds of conduct governed by the Code, let alone outside the bounds of human decency." In his final communication with the referee, respondent stated: "The status of my license means nothing in the big picture. You and all those involved in kangaroo proceedings of this nature mean absolutely nothing in the big picture." In mitigation, respondent asserted at various times in the proceedings that he had suffered a stroke soon after receiving the referee's report in case No. S-04-1399 and that his actions thereafter were affected by this medical condition. However, respondent presented no medical evidence to substantiate this claim.

In other cases involving a pattern of abusive conduct by an attorney, we have imposed severe sanctions. *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46 (1982), involved a lawyer who made repeated unsubstantiated derogatory statements about other attorneys during a political campaign. After disciplinary charges were filed, he filed documents in which he "continue[d] to vilify certain attorneys, the bar generally, and the Nebraska Supreme Court." *Id.* at 561, 316 N.W.2d at 55. Noting that the attorney demonstrated "no remorse, change in attitude, or desire to cease his scurrilous attacks upon the bar and bench of this state," we concluded that the pattern of conduct demonstrated a lack of fitness to practice law and entered a judgment of disbarment. *Id.* at 562, 316 N.W.2d at 56.

In *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. 328, 674 N.W.2d 464 (2004), a lawyer engaged in a pattern of harassment directed at a former client with whom he had had a personal relationship which ended. The conduct included degrading and threatening letters written to the former client and the attorney then representing her. One of the letters was "composed entirely of degrading, vile racism and obscenity." *Id.* at 337, 674 N.W.2d at 472. Determining that the lawyer's conduct constituted a "deliberate campaign to discredit the complainant, deprive her of legal counsel, interrupt her education, and terrorize her," we concluded that the lawyer's conduct was "not only disgraceful, but shows disrespect for the law, the legal profession, the legal process, the authority of the courts, and basic principles of justice, fairness, and human dignity." *Id.* at 336-37, 338, 674 N.W.2d at 472, 473. The lawyer had three prior disciplinary reprimands for dissimilar conduct. We entered a judgment of disbarment.

The evidence in these cases, considered in conjunction with the two prior reprimands for similar misconduct, leads to the conclusion that respondent is presently unfit to practice law. In the absence of any persuasive mitigating factors, or any acknowledgment by respondent that his conduct in these cases deviates from ethical standards to which attorneys are held, we conclude that disbarment is the appropriate sanction.

CONCLUSION

There is clear and convincing evidence in case No. S-04-1399 that respondent violated DR 1-102(A)(5) by engaging in conduct prejudicial to the administration of justice and that he violated DR 1-102(A)(6) by engaging in other conduct that adversely reflects on his fitness to practice law. Likewise, there is clear and convincing evidence in case No. S-05-1116 that respondent violated DR 1-102(A)(5) and (6) by engaging in additional conduct prejudicial to the administration of justice and reflecting adversely on his fitness to practice law. There is also clear and convincing evidence in case No. S-05-1116 that respondent violated DR 4-101(B)(1) by revealing confidences and secrets of a client without justification. It is therefore the judgment of this court that respondent, Robert H. Beach, is disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent 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 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.

HENDRY, C.J., participating on briefs in No. S-05-1116.

PAUL SCHUMACHER AND LINDA AERNI, APPELLANTS AND CROSS-APPELLEES, V. MICHAEL JOHANNS, GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLANTS, AND FRANK E. LANDIS, JR., IN HIS CAPACITY AS COMMISSIONER (DISTRICT 1, NEBRASKA PUBLIC SERVICE COMMISSION), ET AL., APPELLEES, AND NEBRASKA TELECOMMUNICATIONS ASSOCIATION ET AL., INTERVENORS-APPELLEES AND CROSS-APPELLANTS.

722 N.W.2d 37

Filed September 29, 2006. No. S-05-375.

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. **Statutes: Abatement, Survival, and Revival: Appeal and Error.** Statutory provisions relative to abatement and revivor of actions apply to cases in the appellate courts.
3. **Constitutional Law: Legislature: Statutes: Presumptions.** 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.
4. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
5. **Constitutional Law: Statutes.** Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner such that it is consistent with the constitution.
6. **Taxes: Words and Phrases.** A tax is an enforced contribution of money or other property, assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses.
7. **Taxes.** The essential characteristics of a tax are that it is not a voluntary payment but an enforced contribution and, in its essential characteristics, is not a debt.
8. **Constitutional Law: Legislature.** It is a fundamental general principle that the Legislature may not delegate legislative power to an administrative or executive authority. The Legislature does, however, have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all departments. The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act. Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available.
9. ____: ____. Where the Legislature has provided reasonable limitations and standards for carrying out delegated duties, there is no unconstitutional delegation of legislative authority.
10. **Legislature.** Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision.
11. **Constitutional Law: Public Service Commission: Jurisdiction: Legislature.** The Public Service Commission is an independent regulatory body under the Nebraska Constitution, and its jurisdiction to regulate common carriers may be restricted by the Legislature only through specific legislation.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law, P.C., for appellants.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees Michael Johanns et al.

Paul M. Schudel and James A. Overcash, of Woods & Aitken, L.L.P., for appellees Alltel Communications of the Midwest, Inc., et al.

Jack L. Shultz and Gregory D. Barton, of Harding, Shultz & Downs, for appellees Stanton Telecom, Inc., and Three River Telco, and intervenor-appellee Nebraska Telecommunications Association.

Deonne L. Bruning for appellee Cox Nebraska Telecom, L.L.C.

Daniel E. Klaus, Timothy F. Clare, and Mark A. Fahleson, of Rembolt, Ludtke & Berger, L.L.P., for appellee Nebraska Technology and Telecommunications, Inc., and intervenors-appellees Wauneta Telephone Company et al.

Steven G. Seglin, of Crosby Guenzel, L.L.P., for appellee GCC License Corporation.

Eric B. Eisenhart, of Eisenhart Law Office, for appellees Cambridge Telephone Company and Pinpoint Communications, Inc.

Jill Vinjamuri Gettman, of Gettman & Miller, L.L.P., for appellee Qwest Communications International, Inc.

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

STEPHAN, J.

Three individuals who subscribe to telecommunications services in the State of Nebraska brought this action against various state officials seeking a declaratory judgment that the Nebraska Telecommunications Universal Service Fund Act (NTUSFA), now codified at Neb. Rev. Stat. §§ 86-316 to 86-329 (Cum. Supp. 2004), is unconstitutional and further seeking an injunction against the continued implementation and enforcement of the NTUSFA. Various entities which provide telecommunications services in Nebraska intervened in opposition. Following a trial on stipulated facts, the district court for Lancaster County upheld the constitutionality of the NTUSFA and denied the declaratory and injunctive relief requested. We affirm.

BACKGROUND

Parties

Terrell R. Cannon, one of the plaintiffs below, died on August 16, 2006, after submission of this appeal. The remaining appellants, Paul Schumacher and Linda Aerni, have formally notified the court of Cannon's death and stated their intention to proceed with the appeal in their names. Schumacher and Aerni are citizens and residents of Nebraska who subscribe to and receive telecommunications services from various telecommunications service providers in Nebraska. Since July 1, 1999, these telecommunications service providers have included on appellants' telephone bills a surcharge of 6.95 percent of appellants' intrastate telephone service revenues. This surcharge was implemented by the Nebraska Public Service Commission (PSC) pursuant to the NTUSFA. Appellants have remitted the surcharge to these telecommunications service providers as part of their payment of their bills for telecommunications services. Effective October 1, 2005, the PSC apparently reduced the surcharge from 6.95 percent to 5.75 percent of intrastate telephone service revenues.

At the time the action was filed, appellee Michael Johanns was the duly elected and qualified Governor of the State of Nebraska. He has been succeeded in office by current Governor David Heineman. Appellees Frank E. Landis, Jr.; Anne C. Boyle; Lowell C. Johnson; Rod Johnson; and Gerald L. Vap are the duly elected and qualified commissioners of the PSC. Appellee Andy Pollock is the duly appointed and qualified executive director of the PSC.

The remaining appellees are various entities generally engaged in the business of providing telecommunications services in Nebraska, and many of them intervened in this action. Each of these appellees has collected and remitted the NTUSFA surcharge on intrastate telecommunications services revenues. Most of the appellees are eligible to receive financial assistance from the fund created by the surcharge moneys.

Telecommunications Act of 1996

In 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended

at scattered sections in title 47 of the U.S. Code). The express purposes of the Telecommunications Act are to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996). Prior to the passage of the Telecommunications Act, local telephone service was generally provided by carriers that provided such service as a regulated monopoly. Under the act, these carriers, known as "incumbent local exchange carriers," are, either through negotiated or arbitrated agreements, required to provide interconnection and access to their facilities to requesting telecommunications carriers, known as "competitive local exchange carriers." 47 U.S.C. §§ 251 and 252 (2000). The Telecommunications Act also seeks to foster competition by removing barriers to entry by an entity seeking to provide interstate or intrastate telecommunications service. 47 U.S.C. § 253 (2000).

While seeking to promote competitive markets for the provision of telecommunications services, Congress also sought to preserve the goal of "universal service" as defined in the Telecommunications Act. 47 U.S.C. § 254(c) (2000). Congress directed the Federal Communications Commission (FCC) to establish a federal-state joint board to assist in implementing the universal service principles found in the Telecommunications Act. 47 U.S.C. § 254(a). These principles include the following: (1) "Quality services should be available at just, reasonable, and affordable rates"; (2) "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation"; (3) "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas"; (4) "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service"; and (5) "[t]here should be

specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b). The Telecommunications Act mandates that "only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support" and that "[a]ny such support should be explicit . . . ." 47 U.S.C. § 254(e). An "eligible telecommunications carrier" (ETC) should be designated by the "State commission." 47 U.S.C. § 214(e) (2000). "State commission" is defined as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operation of carriers." 47 U.S.C. § 153(41) (2000). In Nebraska, that entity is the PSC. See Neb. Const. art. IV, § 20; Neb. Rev. Stat. §§ 86-101 to 86-124, 86-126, and 86-128 to 86-163 (Cum. Supp. 2004). Section 254(f) permits states to "adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." This subsection further provides that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State." *Id*. The FCC has implemented the Telecommunications Act through the adoption of rules, including parts 51 and 54 in title 47 of the Code of Federal Regulations, and the issuance of various orders.

Relevant FCC Orders

The primary FCC orders implementing the Telecommunications Act are a trilogy of orders commonly known as the Local Competition Order, the Universal Service Order, and the Access Charge Reform Order. The Universal Service Order is particularly relevant to this case because it establishes rules to implement the universal service provisions of 47 U.S.C. § 254 of the Telecommunications Act. *In the Matter of Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 (Supp. 1997). In this order, the FCC explained that it and state commissions had historically provided for affordable telephone service to all individuals through a combination of implicit and explicit subsidies. These subsidies were designed to benefit persons in "high

cost" areas, primarily rural, where it was expensive for carriers to provide telephone service. *Id.* at 8784. The subsidies also were designed to benefit those with low incomes who otherwise might not be able to afford telephone service. According to the Universal Service Order, "[s]tates traditionally have promoted universal service by, among other things, assuring affordable residential access by explicitly and implicitly subsidizing and pricing basic telephone service at levels associated with very high telephone subscribership rates . . . ." *Id.* at 8783. To accomplish the goal of universal service, "[s]tates have maintained low residential basic service rates through, among other things, a combination of: geographic rate averaging, higher rates for business customers, higher intrastate access rates, higher rates for intrastate toll service, and higher rates for vertical features." *Id.* at 8785. These implicit subsidy mechanisms were designed to "shift costs from rural to urban areas, from residential to business customers, and from local to long distance service." *Id.* at 8784. The Universal Service Order recognized that the system of largely implicit subsidies in existence prior to the enactment of the Telecommunications Act could not be maintained in the competitive environment mandated by the act. The FCC explained that

> [i]mplicit subsidies were sustainable in the monopoly environment because some consumers (such as urban business customers) could be charged rates for local exchange and exchange access service that significantly exceeded the cost of providing service, and the rates paid by those customers would implicitly subsidize service provided by the same carrier to others.

12 F.C.C.R. at 8786-87. "By adoption of the [Telecommunications] Act, Congress has provided for the development of competition in all telephone markets." 12 F.C.C.R. at 8787. According to the Universal Service Order, "[i]n a competitive market, a carrier that attempts to charge rates significantly above cost to a class of customers will lose many of those customers to a competitor." *Id.* Thus, the "pillars of implicit subsidies—high access charges, high prices for business services, and the averaging of rates over broad geographic areas" cannot be maintained in the competitive telecommunications environment mandated by federal law. *Id.*

In the Universal Service Order, the FCC addressed federal universal service support. The FCC explicitly noted that it was not attempting to identify implicit universal service support effected through intrastate rates and would not "attempt to convert such implicit intrastate support into explicit federal universal service support." *Id*. at 8785. Instead, the FCC noted that the "[s]tates, acting pursuant to sections 254(f) and 253 of the [Telec]ommunications Act, must in the first instance be responsible for identifying intrastate implicit universal service support." 12 F.C.C.R. at 8785.

NTUSFA

In response to the Telecommunications Act, the Nebraska Legislature enacted the NTUSFA. 1997 Neb. Laws, L.B. 686, now codified at §§ 86-316 to 86-329. The purpose of the NTUSFA is to authorize the PSC "to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans, without regard to their location, have comparable accessibility to telecommunications services at affordable prices." § 86-317. The NTUSFA creates a fund, known as the Nebraska Telecommunications Universal Service Fund (the Fund), that "shall provide the assistance necessary to make universal access to telecommunications services available to all persons in the state consistent with the policies set forth in the [NTUSFA.]" §§ 86-320 and 86-324(1). Under the NTUSFA, telecommunications companies receiving support from the Fund "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." § 86-324(1). "Any such support should be explicit and sufficient to achieve the purpose of the [NTUSFA]." *Id*.

The NTUSFA contains the Legislature's declaration of policy "to preserve and advance universal service" based on the following principles:

> (1) Quality telecommunications and information services should be available at just, reasonable, and affordable rates;
>
> (2) Access to advanced telecommunications and information services should be provided in all regions of the state;

(3) Consumers in all regions of the state, including low-income consumers and those in rural and high-cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas;

(4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service;

(5) There should be specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service. Funds for the support of high-cost service areas will be available only to the designated eligible telecommunications companies providing service to such areas. Funds for the support of low-income customers, schools, libraries, and providers of health care to rural areas will be available to any entity providing telecommunications services, maintenance, and upgrading of facilities. The distribution of universal service funds should encourage the continued development and maintenance of telecommunications infrastructure;

(6) Elementary and secondary schools, libraries, and providers of health care to rural areas should have access to advanced telecommunications services as described in the Telecommunications Act of 1996. . . .

(7) The implicit support mechanisms in intrastate access rates throughout the state may be replaced while ensuring that local service rates in all areas of the state remain affordable; and

(8) The costs of administration of the . . . Fund should be kept to a minimum.

§ 86-323. The NTUSFA sets forth various powers to be exercised by the PSC, including that the PSC:

(a) Shall have authority and power to subject eligible telecommunications companies to service quality, customer service, and billing regulations. . . .

> (b) Shall have authority and power to issue orders carrying out its responsibilities and to review the compliance of any eligible telecommunications company receiving support for continued compliance with any such orders or regulations adopted pursuant to the act;
>
> . . . .
>
> (d) Shall require every telecommunications company to contribute to any universal service mechanism established by the commission pursuant to state law. The commission shall require, as reasonably necessary, an annual audit of any telecommunications company to be performed by a third-party certified public accountant to insure the billing, collection, and remittance of a surcharge for universal service.

§ 86-324(2).

In addition, the NTUSFA provides: "The [PSC] shall determine the standards and procedures reasonably necessary, adopt and promulgate rules and regulations as reasonably required, and enter into such contracts with other agencies or private organizations or entities as may be reasonably necessary to efficiently develop, implement, and operate the fund." § 86-325. The NTUSFA requires the PSC to annually

> hold a public hearing to determine the level of the fund necessary to carry out the [NTUSFA]. The [PSC] shall publish notice of the hearing in at least one newspaper of general circulation in the state at least once each week for two consecutive weeks before the hearing. After the hearing, the [PSC] shall determine the amount of the fund for the following year, including a reasonable reserve.

§ 86-328. The NTUSFA also provides that "[i]n the initial year of the fund's operation, the [PSC] shall determine the amount of the fund to be equivalent to the amount which, in the [PSC's] judgment, after careful analysis, is necessary to keep approximately ninety-six percent of Nebraska households subscribed to local telecommunications service." § 86-328.

PSC Implementation of NTUSFA

On January 13, 1999, the PSC issued its findings and conclusions concerning access charge reform and universal service

in application No. C-1628, captioned "In the Matter of the Application of the Nebraska Public Service Commission, on its own motion, seeking to conduct an investigation into intrastate access charge reform." In the C-1628 order, the PSC acted to implement the NTUSFA by establishing a transition process during which implicit subsidies contained in intrastate access charges would be removed from the rate structures of ETC's, basic local exchange rates would be adjusted to PSC-approved benchmark rates, and the support of an ETC from the NTUSFA would equal the implicit support removed through revenue reductions created by access charge reductions less additional revenue realized from basic local service rate increases and less any support received from the federal universal service fund that expressly offset intrastate implicit support. Each ETC was required to file a "transition plan" for approval by the PSC in order to implement the directives of the C-1628 order. The rate rebalancing and restructuring effected pursuant to the C-1628 order was to be revenue neutral for the ETC's. The C-1628 order, as modified by a subsequent ruling of the PSC on February 2, 1999, directed that this implicit support be replaced through the funding mechanism created by the NTUSFA by providing for a surcharge on retail end-user revenues from intrastate telecommunications services.

In an order dated June 2, 1999, the PSC, after publishing notice and conducting a hearing, directed all affected telecommunications companies to collect and remit a surcharge of 6.95 percent on retail end-user revenue from intrastate telecommunications services to be deposited in the Fund. The surcharge was to commence July 1. In establishing the amount of the surcharge, the PSC considered several factors, including: (1) proposed and estimated access charge reductions, (2) local rate changes, (3) company earnings, (4) state support for low-income customers, and (5) administrative expenses. Since June 1999, the PSC has annually held a public hearing to determine the surcharge required to meet the funding level necessary to implement the NTUSFA.

On March 20, 2001, the PSC entered a progression order continuing the calculation of NTUSFA support mechanisms under the transitional plan set forth in C-1628. At the time of trial, the PSC was in the process of establishing a long-term universal

service funding mechanism. On April 2, 2002, the PSC approved rules and regulations for the administration of the Fund. These rules and regulations became effective on September 16, 2002, and are codified in the Nebraska Administrative Code as title 291, chapter 10.

Fund Operation

Since July 1, 1999, and the consequent reduction of intrastate access rates charged by ETC's, interexchange carriers as a group have been required by the PSC to flow through to their customers reductions in long distance charges equivalent to such intrastate access charge reductions. Since July 1, 1999, appellants have been users of intrastate long distance services and have accepted the benefits of reductions in long distance service rates.

Judgment of District Court

In its order denying declaratory and injunctive relief, the district court concluded that the surcharge imposed under the NTUSFA was not a tax because "it is not a forced contribution intended to raise revenue for the maintenance of government or governmental services offered to the general public," but, rather, is a "regulatory measure" designed to replace revenues lost by telecommunications providers "as a result of the removal of implicit support previously contained in their rates and access charges" with explicit support authorized by the NTUSFA. The district court also rejected appellants' contention that the NTUSFA lacked sufficient standards to guide the PSC in establishing and administering the Fund.

ASSIGNMENTS OF ERROR

Appellants assign that the district court erred in failing to find the NTUSFA to be unconstitutional and in denying declaratory and injunctive relief. In a cross-appeal, certain appellees assign that the district court erred in not finding (1) that appellants failed to "pursue adequate legal remedies" and (2) that appellants' claims were barred by the doctrines of waiver and/or laches.

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. *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006); *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

ANALYSIS

[2] As a preliminary matter, we note that Cannon's death during the pendency of this appeal does not affect our ability to reach the merits. Statutory provisions relative to abatement and revivor of actions apply to cases in the appellate courts. See *Keefe v. Grace*, 142 Neb. 330, 6 N.W.2d 59 (1942). Neb. Rev. Stat. § 25-1403 (Reissue 1995) provides:

> Where there are several plaintiffs or defendants in an action and one of them dies, or his powers as a personal representative cease, if the right of action survive to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers, being stated on the record.

The rights of action and assignments of error asserted by Schumacher and Aerni are the same as those asserted by Cannon, and therefore survive his death. Pursuant to § 25-1403, Schumacher and Aerni are entitled to a resolution of their appeal.

[3-5] Familiar general principles provide the framework for our analysis. 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. *Le, supra*; *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner such that it is consistent with the constitution. *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000); *Daily v. Board of Ed. of Morrill Cty.*, 256 Neb. 73, 588 N.W.2d 813 (1999).

Is Surcharge a Tax?

Appellants contend that the surcharge imposed by the PSC is an unconstitutional tax. Pursuant to Neb. Const. art. VIII, § 1, only the Legislature has the power to impose taxes. Appellants argue that although the Nebraska Constitution confers some

powers on the PSC in article IV, § 20, the power to tax is not among them. They also contend that the surcharge violates constitutional provisions prohibiting deprivation of property without due process of law. See Neb. Const. art. I, § 3. Appellees argue that the surcharge is not a tax, but, rather, is "an explicit and revenue neutral regulatory charge implemented to replace the implicit support for universal service previously provided by access charges." Brief for appellees at 42.

[6,7] In *Nebraska P. P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 418, 299 N.W.2d 514, 518 (1980), quoting Black's Law Dictionary (5th ed. 1979), we defined a tax as: " 'An enforced contribution of money or other property, assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses.' " We further stated that the "essential characteristics of a tax are that it is not a voluntary payment but an enforced contribution and, in its essential characteristics, is not a debt." *Nebraska P. P. Dist.*, 207 Neb. at 418, 299 N.W.2d at 518. Although these concepts appear relatively simple, as another court has noted, the "definition of 'tax' in the abstract is a metaphysical exercise." *Brock v. Washington Metropolitan Area Transit Auth.*, 796 F.2d 481, 489 (D.C. Cir. 1986). The term really gains meaning only from the factual and legal context in which the issue comes before the court. See *id*. Thus, to determine whether the surcharge at issue in this case is properly characterized as a tax, it is helpful to examine opinions addressing similar circumstances.

In *Citizens' Utility Ratepayer Bd. v. State Corporation Comm'n*, 264 Kan. 363, 956 P.2d 685 (1998), the Kansas Supreme Court addressed issues arising after Kansas enacted legislation in response to the Telecommunications Act of 1996. The Kansas legislation established a universal service fund and authorized the Kansas Corporation Commission to assess all telecommunications carriers, public utilities, and wireless service providers a surcharge for support of the fund. The act also authorized the providers to collect from their customers an amount equal to the required contributions to the fund. Pursuant to these mandates, the commission required all intrastate telecommunications providers to pay into the fund 14.1 percent of their

intrastate retail revenues. The commission then authorized the providers to pass this assessment through to their customers over a 3-year period, with the highest charge being $3.21 per month.

One provider challenged the assessment, arguing that it was a tax which the commission lacked constitutional authority to impose. The provider argued that the express purpose of the Kansas act was to secure access to telecommunications for the general public, and that thus the revenue raised by the assessment was a tax for the public purpose. The Kansas court disagreed, reasoning that the surcharge was not a tax because it did not raise revenue. The court noted that prior to the passage of the Kansas act, local exchange carriers charged high access rates to all companies which sought to use their services. The rates were higher than the cost of providing services, and the extra money was used to build and maintain land lines. After the passage of the Telecommunications Act of 1996 and pursuant to the Kansas act, local exchange carriers were only allowed to charge access rates which approximated the cost of providing service. To make up for this lost income, the commission imposed the surcharge to fund the universal service fund, from which money was distributed to local exchange carriers for their use in building and maintaining land lines. The Kansas Supreme Court concluded:

> As such, the implicit land line subsidy once found in high access rates is now explicit through the [Kansas Universal Service Fund] surcharge and distribution. All the [fund] surcharge does . . . is manipulate the movement of the same money (extra access rate money) to the same parties (from companies purchasing access to the [local exchange carriers]) to be used for the same reasons (to build and maintain land lines). Thus, the purpose of the [fund] surcharge . . . is not to raise revenue. As such, the surcharge is not a tax.

Citizens' Utility Ratepayer Bd., 264 Kan. at 400, 956 P.2d at 709-10.

Appellants argue that *Citizens' Utility Ratepayer Bd.* is not well reasoned and should not influence our determination of whether the surcharge is a tax. However, the distinction between generating revenue and regulating activity has been utilized by other courts in determining whether an assessment, charge, or

similar measure imposed by an administrative agency constituted a tax. *Rural Telephone Coalition v. F.C.C.*, 838 F.2d 1307 (D.C. Cir. 1988), involved a challenge to certain FCC orders that allocated local exchange costs between interstate and intrastate regulatory jurisdiction. The effect of the orders was to shift certain costs from intrastate to interstate telephone service, with the partial objective of "avoiding large increases in local telephone rates" after the breakup of the monopolistic system and "advancing the goal of universal telephone service." *Id*. at 1310. The FCC orders allocated 25 percent of the local exchange costs to interstate jurisdiction. This allocation transferred those local exchange costs to the rate bases of interstate carriers and forced them to recover those costs through their rates. An interstate carrier challenged the allocation as "an exercise of taxing power that Congress has not delegated to the [FCC]." *Id*. at 1314. Reasoning that a regulation is a tax "only when its primary purpose judged in legal context is raising revenue," the court concluded there was no "reasonable way to construe the . . . cost allocation as having the primary purpose of raising federal revenue." *Id*. The court further concluded that an agency's exercise of a power to allocate costs among state and federal jurisdictions for purposes of ratemaking was not equivalent to an exercise of the power to tax.

In *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874 (4th Cir. 1983), the court addressed whether the U.S. Secretary of Agriculture impermissibly imposed a tax on milk producers when he exercised his statutory discretion to impose a deduction of 50 cents per hundredweight from the proceeds of the sale of all milk marketed commercially. The deduction was to encourage dairy farmers to reduce milk production and to offset a portion of the cost of a milk price support program. The court reasoned that the "mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised." *Id*. at 887. Instead, the "imposition of assessments have long been held to be a legitimate means of regulating commerce." *Id*. "If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax." *Id*. Noting that the clear language and structure of the authorizing statute indicated its primary purpose

was to reduce overproduction of milk, the court concluded that the deduction "bears the indelible imprimatur of the commerce power and is not an unconstitutional exercise of the taxing power." *Id*.

In *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 446 S.E.2d 332 (1994), the North Carolina Supreme Court upheld a statute authorizing a utility commission to create a fund for the expansion of natural gas service to unserved areas. One statutorily mandated source of the fund was refunds payable from interstate pipeline suppliers to local distribution companies. The refunds occurred at random times, whenever rates charged on an interim basis to local distribution companies by their interstate pipeline suppliers were later found to be too high by a federal agency; the excess amounts already paid were then required to be refunded. Traditionally, the refunded amounts were passed along to consumers. Pursuant to its statutory authority, the commission ordered approximately $5 million in supplier refunds to be deposited into the expansion fund. A citizens' group challenged this order, arguing that the capture of the supplier refund constituted a tax and that because the funds were not used for a public purpose, it was an improper exercise of the taxing power under the North Carolina Constitution. The court disagreed, concluding that the capture of the supplier refunds was not a "charge levied upon the general citizenry for the general maintenance of the government," and thus was not a tax under North Carolina law. 336 N.C. at 683, 446 S.E.2d at 347.

In *Consumers Power v. ABATE*, 205 Mich. App. 571, 518 N.W.2d 514 (1994), a private power company sought permission to impose rate surcharges to recover costs associated with its participation in an energy assistance program. The surcharges were expressly authorized by statute. A watchdog group contended that the surcharges amounted to a tax on qualifying ratepayers. The court disagreed, finding the surcharges were intended to benefit only the participating utilities and were not intended for the general public. The court reasoned that the surcharges were not a mandatory revenue raiser, as they only became recoverable after the assistance program agreements were voluntarily established. See, also, *Brock v. Washington Metropolitan Area Transit Auth.*, 796 F.2d 481 (D.C. Cir. 1986) (holding payments into

workers' compensation fund not a tax even though they raised revenue, because primary purpose was regulation).

The NTUSFA includes a provision not found in any of the cases from other jurisdictions involving regulatory surcharges or assessments. Section 86-324(4)(a) permits the State Treasurer to transfer funds from the Fund to the General Fund when cash balances in the General Fund and the Cash Reserve Fund are inadequate to meet current obligations. Such a transfer cannot reduce the Fund balance below that needed to meet its obligations for a 60-day period. § 86-324(4). A transfer must be reversed when sufficient funds are available, but in no event later than June 30, 2007, when the provision of the NTUSFA allowing transfers from the Fund terminates. § 86-324(4)(a) and (d). After 30 days, transfers accrue interest which is credited to the Fund. § 86-324(4)(b). Any transfer which has not been reversed with accrued interest is considered an encumbrance against the General Fund. § 86-324(4)(c). The record does not indicate whether this temporary transfer provision has ever been used.

Notwithstanding this ancillary and temporary provision, we conclude that the primary purpose of the NTUSFA is not to generate revenue for governmental purposes, but, rather, to regulate the telecommunications industry through a rebalancing and restructuring of rates. The funding mechanism established by the NTUSFA enables the replacement of implicit subsidies with explicit subsidies in order to achieve universal service under the new, competitive market environment brought about by the Telecommunications Act. The NTUSFA directs that "[t]he implicit support mechanisms in intrastate access rates throughout the state may be replaced while ensuring that local service rates in all areas of the state remain affordable[.]" § 86-323(7). The rate rebalancing and restructuring achieved by the PSC's C-1628 order is intended to be revenue neutral. The surcharge is imposed only on end-user revenues from telecommunications services, and payments from the Fund are made only to eligible telecommunications companies for the sole purpose of "provision, maintenance, and upgrading of facilities and services for which the support is intended." § 86-324(1). Based upon our independent review, we conclude that the surcharge assessed by the PSC pursuant to the NTUSFA is not a tax.

Does NTUSFA Unconstitutionally Delegate Legislative Authority to PSC?

Appellants contend that the NTUSFA violates the separation of powers provision of article II, § 1, of the Nebraska Constitution, which states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Appellants argue that in enacting the NTUSFA, the Legislature improperly delegated legislative power to the PSC, an administrative agency.

[8-10] It is a fundamental general principle that the Legislature may not delegate legislative power to an administrative or executive authority. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). The Legislature does, however, have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. *Id*. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all departments. *Id*. The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act. *Id*. Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available. *Id*. Where the Legislature has provided reasonable limitations and standards for carrying out delegated duties, there is no unconstitutional delegation of legislative authority. *Id*.; *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994). In addressing this issue, we have noted:

> "The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court

> should be reluctant to interfere with such discretion. Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations . . . The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases."

Ponderosa Ridge LLC, 250 Neb. at 951-52, 554 N.W.2d at 157, quoting *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision. *Ponderosa Ridge LLC, supra*.

[11] Unlike most administrative agencies, the PSC is a regulatory body created by the Nebraska Constitution. Neb. Const. art. IV, § 20. Its powers are constitutionally defined to include "the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." *Id.* PSC authority over telephone rates is rooted in legislative, judicial, and electoral activities during the early 1900's. *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989). Constitutional amendments granted the PSC, formerly known as the Railway Commission, regulatory power over telephone rates which was "previously exercisable only by the Legislature." *State ex rel. Spire*, 233 Neb. at 275, 445 N.W.2d at 293. The PSC is an independent regulatory body under the Nebraska Constitution, and its jurisdiction to regulate common carriers may be restricted by the Legislature only through "specific legislation." See *State ex rel. Spire, supra*, citing Neb. Const. art. IV, § 20. See, also, *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975) (constitutionally prescribed powers and duties of PSC are plenary and self-executing in absence of any specific legislation on subject.)

The NTUSFA is specific legislation on a subject which the state Constitution generally entrusts to the PSC, namely, the regulation of telecommunications rates and services. It authorizes the PSC to establish a new means of achieving a longstanding goal of universal service by replacing subsidies which had previously been implicit in rates set by the PSC with explicit subsidies administered through the Fund. In their stipulation, the parties characterize the implementation of the NTUSFA by the PSC as "rate rebalancing and restructuring." In determining whether the Legislature included adequate standards to guide the PSC in implementing this new type of rate structure, we cannot ignore the fact that the PSC has powers granted to it by the Nebraska Constitution. We also are guided by the principle that, generally, regulation of telecommunications is a matter within the expertise of the PSC and involves a breadth of judgment and policy determination to which considerable deference is given even by a reviewing court. See, e.g., *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000).

The issue of whether similar legislation enacted in other jurisdictions provided sufficient standards to authorize an administrative agency to create and administer a universal service fund as a component of telecommunications rate regulation has been considered by at least two other state appellate courts. In *Citizens' Utility Ratepayer Bd. v. State Corporation Comm'n*, 264 Kan. 363, 956 P.2d 685 (1998), the Kansas Supreme Court rejected a contention that the Kansas statute authorizing the Kansas Corporation Commission to administer a universal service fund was an unconstitutional delegation of legislative power to an administrative agency because it did not include sufficient standards to guide the commission in exercising its power. Applying analytical principles very similar to those articulated in Nebraska cases and set forth above, the court concluded that the standards in the Kansas act were sufficiently definite to pass constitutional muster. Specifically, the court noted that the standards identified "which telecommunications rates should be reduced, when they should be reduced, and over what time period they should be reduced." 264 Kan. at 402, 956 P.2d at 711. The standards also identified "which rates may be increased, how much rates may be increased by," "the initial balance of the [Kansas Universal

Service Fund], who must pay into the [fund]," "who qualifies for [fund] distribution, how much distribution an entity should receive, if the [fund] surcharge can be passed along to customers, when and how supplemental funding occurs, and the [fund's] administrator's duties." *Id*. The court noted that these standards were sufficient even though they left "some discretion to the [commission] to determine exactly how a [fund] assessment and payout should occur." *Id*. It noted that due to the complexity of the subject matter and the specialized knowledge of the [commission] in the field of telecommunications regulation, "[t]o require more explicit or definite standards than the Kansas [a]ct provides would severely impede, if not make impossible, the regulation of the telecommunications industry." 264 Kan. at 403, 956 P.2d at 711.

In *Nextel West Corp. v. Indiana Utility Reg.*, 831 N.E.2d 134 (Ind. App. 2005), the Indiana Court of Appeals considered an argument that the Indiana Utility Regulatory Commission lacked statutory authority to establish and administer the Indiana Universal Service Fund. Indiana's statute recognized the maintenance of universal telephone service as a " 'continuing goal' " of the commission and further stated that the public interest required that

> "the [c]ommission be authorized to formulate and adopt rules and policies as will permit the [c]ommission, in the exercise of its expertise, to regulate and control the provision of telephone services to the public in an increasingly competitive environment, giving due regard to the interests of consumers and the public and to the continued availability of universal telephone service."

Nextel West Corp., 831 N.E.2d at 141-42, quoting Ind. Code Ann. § 8-1-2.6-1 (LexisNexis 1998). However, the statute did not specifically authorize the commission to establish the fund. Rejecting a claim that the commission lacked authority to establish the fund, the court concluded that such authority was implicit in the statutory language quoted above and the commission's general purpose to ensure that public utilities provided constant, reliable, and efficient service to the citizens of the state. The court concluded: "We simply cannot believe the legislature would expressly charge the [c]ommission with ensuring the continuing availability of universal service without also conferring

the authority necessary to effectuate that goal." *Nextel West Corp.*, 831 N.E.2d at 143.

The standards for establishment and operation of the Fund under the NTUSFA are somewhat less specific than those of the Kansas statute, but obviously far more so than under the Indiana statute. The stated purpose of the NTUSFA "is to authorize the [PSC] to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans . . . have comparable accessibility to telecommunications services at affordable prices." § 86-317. In § 86-323, the Legislature stated that it is "the policy of the state to preserve and advance universal service" based on eight principles. The principles generally provide that consumers in all areas of the state should have reasonably priced access to telecommunications services, that all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation of universal service, and that there should be "specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service." § 86-323(1) through (5). The principles also provide that funds for the support of high-cost areas will be available only to designated ETC's providing service in such areas and that the "distribution of universal service funds should encourage the continued development and maintenance of telecommunications infrastructure." § 86-323(5). The principles state that universal service rules should not preclude the sharing of facilities supported by universal service funds with other local users and that the "implicit support mechanisms in intrastate access rates throughout the state may be replaced while ensuring that local service rates in all areas of the state remain affordable." § 86-323(6) and (7). The principles also articulate that the cost of administrating the Fund should be kept to a minimum. § 86-323(8).

In § 86-324, the Legislature specified that a telecommunications company receiving support from the Fund "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purpose of the act." In addition, § 86-324(2)(a) grants to the PSC the authority to subject ETC's to service quality, customer service,

and billing regulations. Section 86-324(2)(b) authorizes the PSC to issue orders carrying out its responsibilities and to review the compliance of ETC's with such orders. Section 86-324(2)(c) allows the PSC to withhold all or a portion of the funds to be distributed for failure to comply with orders or regulations. Section 86-324(2)(d) authorizes the PSC to "require every telecommunications company to contribute to any universal service mechanism established by the [PSC] pursuant to state law." It further requires the PSC to obtain an annual audit of any telecommunications company to ensure the billing, collection, and remittance of "a surcharge for universal service." § 86-324(2)(d). Section 86-324(2)(e) requires the PSC to obtain an audit of information provided by a telecommunications company for purposes of calculating universal service fund payments to the company. Section 86-324(2)(f) allows the PSC to fine any person who violates the NTUSFA.

Section 86-325 grants to the PSC the authority to "determine the standards and procedures reasonably necessary, adopt and promulgate rules and regulations as reasonably required, and enter into such contracts with other agencies or private organizations or entities as may be reasonably necessary to efficiently develop, implement, and operate the [F]und." Pursuant to § 86-328, the PSC is required to hold an annual public hearing to determine the level of the Fund necessary to carry out the NTUSFA and a reasonable reserve, and is required to publish notice of such hearing at least once each week for 2 consecutive weeks prior thereto. Section 86-328 also provides that in the initial year of the Fund's operation, the PSC "shall determine the amount of the [F]und to be equivalent to the amount which, in the [PSC's] judgment, after careful analysis, is necessary to keep approximately ninety-six percent of Nebraska households subscribed to local telecommunications service."

We conclude that these provisions of the NTUSFA constitute reasonably adequate, sufficient, and definite standards for the guidance of the agency in the exercise of the power conferred upon it, and to enable those affected to know and understand their rights and obligations. See *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). Regulation of the telecommunications industry is a complex field as to which the

PSC has special expertise and constitutional authority. The fact that the standards set forth in the NTUSFA permit the exercise of discretion by the PSC in its implementation reflects this reality. To require more explicit and definite standards could impede or prevent effective regulation. See *Citizens' Utility Ratepayer Bd. v. State Corporation Comm'n*, 264 Kan. 363, 956 P.2d 685 (1998). The NTUSFA is not an unconstitutional delegation of legislative authority to the PSC.

Other Constitutional Claims

Appellants argue that the NTUSFA violates their due process and equal protection rights. This argument is based on the premise that the surcharge constitutes an unlawful tax, which we have rejected. We conclude that the NTUSFA does not violate appellants' state or federal rights to due process or equal protection.

Appellants also argue that the NTUSFA violates article IV, § 20, of the Nebraska Constitution which sets forth the powers and duties of the PSC "in the absence of specific legislation" on a subject. However, as noted above, the NTUSFA is specific legislation on a subject within the regulatory jurisdiction of the PSC, and its enactment does not in any way violate article IV, § 20.

CONCLUSION

Based upon our independent review, we find no merit in any of appellants' claims that the NTUSFA violates the federal or Nebraska Constitution. We therefore do not address the issues raised in the cross-appeal and affirm the judgment of the district court.

Affirmed.

Wright, J., participating on briefs.

In re Interest of Veronica H., a child under 18 years of age. State of Nebraska, appellee, v. Arnoldo T. and Melinda O., appellees, and Nebraska Department of Health and Human Services, appellant.

721 N.W.2d 651

Filed September 29, 2006. No. S-05-425.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required

to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.

2. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the juvenile code must be construed to assure the rights of all juveniles to care and protection.
3. ____: ____. The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of juveniles who come within the provisions of the act.
4. **Juvenile Courts: Child Custody.** Juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected and to serve the best interests of the children involved.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, ELIZABETH G. CRNKOVICH, Judge. Judgment of Court of Appeals affirmed.

Jon Bruning, Attorney General, Royce N. Harper, and John M. Baker, Special Assistant Attorney General, for appellant.

No appearance for appellee.

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

WRIGHT, J.

NATURE OF CASE

In this case arising under the Nebraska Juvenile Code, the separate juvenile court of Douglas County ordered the Nebraska Department of Health and Human Services (DHHS) to replace a case manager with a more experienced case manager who had knowledge of cases involving allegations of incest. DHHS appealed, and the Nebraska Court of Appeals affirmed the judgment of the juvenile court in its entirety. See *In re Interest of Veronica H.*, 14 Neb. App. 316, 707 N.W.2d 29 (2005). This court granted the petition for further review filed by DHHS.

SCOPE OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In

reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

BACKGROUND

On July 26, 2002, a petition was filed in the juvenile court alleging that Veronica H., a minor, was a child as described in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). The petition alleged that Veronica had been subject to inappropriate sexual contact by her stepfather and that her natural mother had taken insufficient steps to protect Veronica. DHHS was given temporary custody of Veronica. Her mother admitted the allegations within the petition, and her stepfather entered no contest pleas. Veronica was subsequently adjudicated as a child within the meaning of § 43-247(3)(a). Temporary custody of Veronica remained with DHHS, and the matter was set for disposition.

The first of several disposition and permanency planning hearings was held on June 6, 2003. The juvenile court ordered that Veronica remain in the temporary custody of DHHS. The juvenile court found that the permanency objective was reunification and that reasonable efforts were being made to return Veronica to the parental home. Additional review and permanency planning hearings were subsequently held, the details of which are set forth in *In re Interest of Veronica H., supra*.

At a review and permanency planning hearing on March 10, 2004, the juvenile court expressed its concern for "a real concrete and coordinated recommendation for what kind of treatment [and] what issues are to be addressed and by whom." Following this hearing, Veronica's placement was changed to an enhanced treatment group home in Omaha, Nebraska. The case was assigned to DHHS' "Integrated Care Coordination Unit," and a new case manager was assigned.

Another review and permanency planning hearing was held on November 16, 2004, at which a case plan prepared by the new case manager was introduced. The juvenile court expressed dissatisfaction with the reports that were offered and referred the case to the "LB 1184 Treatment Team," indicating that the team was to review the case from its inception and that "somebody has to get a grip on this case from a case management standpoint."

At a January 14, 2005, hearing, the juvenile court again expressed frustration with the professionals involved and with Veronica's lack of progress. The juvenile court subsequently ordered DHHS "to reassign this case to an experienced case manager with demonstrated knowledge of incest cases and the needed treatment protocol to address these cases." The court stated it wanted to approve the name of the new case manager, who was to have an understanding of the dynamics of a case involving intrafamily sexual abuse.

DHHS appealed from that order, alleging that the juvenile court erred when it ordered DHHS to remove the case manager and to reassign the case to a case manager with experience and knowledge of incest cases. The Court of Appeals concluded that the juvenile court did not abuse its discretion and had properly exercised its authority in ordering DHHS to replace the case manager. It reasoned that because juvenile courts have been given the power by the Legislature to assent and, by implication, to dissent from decisions of DHHS, including the placement of juveniles, the juvenile court properly exercised that power when it ordered DHHS to replace the case manager. We granted further review.

ASSIGNMENT OF ERROR

DHHS assigns as error the Court of Appeals' determination that the juvenile court could order the removal of a case manager from a pending case.

ANALYSIS

DHHS argues that the Court of Appeals erred in affirming the order of the juvenile court because the juvenile court is a court of limited jurisdiction and there is no statute or provision in the Nebraska Constitution which permits the juvenile court to order the removal of a case manager. Thus, DHHS contends the juvenile court had no authority to order that the case manager be replaced in the present case.

Neb. Const. art. V, § 27, provides that "the Legislature may establish courts to be known as juvenile courts, with such jurisdiction and powers as the Legislature may provide." As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by

statute. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002).

In this case, Veronica was adjudicated as a child within the meaning of § 43-247(3)(a) after her mother admitted the allegations in the petition and her stepfather entered no contest pleas. The juvenile court placed Veronica in the temporary custody of DHHS, and the order of custody was continued throughout the proceedings. Section 43-247(5) provides that the juvenile court has jurisdiction over "[t]he parent, guardian, or custodian who has custody of any juvenile described in this section." Therefore, the juvenile court had jurisdiction over DHHS as the custodian of Veronica. The question is whether, pursuant to its jurisdiction regarding custody, the juvenile court could direct the removal of the case manager.

Neb. Rev. Stat. § 43-285(1) (Reissue 2004) provides in part:

> When the court awards a juvenile to the care of [DHHS], an association, or an individual in accordance with the Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed. Any such association and the department shall have authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it.

The Court of Appeals concluded that the provision "by and with the assent of the court" gave the juvenile court the authority to issue orders such as the one entered in the instant case. The Court of Appeals reasoned that through § 43-285(1), the Legislature gave the juvenile courts the power to assent and dissent from decisions of DHHS, including those related to the placement of juveniles. The appellate court concluded that the Legislature intended to remove from DHHS complete control of a minor whose care was given to DHHS under the juvenile code.

We agree with the reasoning of the Court of Appeals. Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court

reaches a conclusion independent of the lower court's ruling. *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

[2-4] The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the juvenile code must be construed to assure the rights of all juveniles to care and protection. *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995). The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of juveniles who come within the provisions of the act. See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). Juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected and to serve the best interests of the children involved. See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

In the case at bar, the juvenile court's order directed DHHS to replace the case manager. Such order is consistent with § 43-285(2), which provides that after a child is adjudicated under § 43-247(3), the juvenile court may order DHHS to prepare and file with the court a proposed plan for the care and placement of the child. The court has authority to disapprove or modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile's best interests. § 43-285(2).

We conclude that pursuant to § 43-285, the juvenile court has the authority to order DHHS to remove a case manager under the circumstances as set forth herein. Section 43-285 provides that when a juvenile's care is awarded to DHHS, the care and placement is "by and with the assent of the court." This provision implicitly gives the juvenile court the authority to dissent from a determination made by DHHS and to direct the removal of a case manager when the facts and circumstances require a change for the best interests of the juvenile.

Because juvenile courts have broad discretion concerning placement of children, see *In re Interest of Amber G. et al., supra*, the validity of the juvenile court's order in this case is subject to review for abuse of discretion. DHHS has not demonstrated that the juvenile court abused its discretion or exceeded

its authority. The exercise of such discretion by the juvenile court is in accord with the broad discretion given to juvenile courts in the determination of the care and placement of abused and neglected children.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the Court of Appeals in all respects.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. THE COUNTY OF LANCASTER, APPELLEE.

721 N.W.2d 644

Filed September 29, 2006. No. S-05-520.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
2. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
3. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.
4. ____. If a conflict exists between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes.
5. ____. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
6. **Statutes: Presumptions: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed.
7. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.

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

Jon Bruning, Attorney General, and Ronald L. Sanchez, Special Assistant Attorney General, for appellant.

Gary E. Lacey, Lancaster County Attorney, and Kristy Mundt for appellee.

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

GERRARD, J.

Neb. Rev. Stat. § 29-1823(1) (Cum. Supp. 2004) authorizes a district court in a criminal proceeding, when it appears the defendant may be mentally incompetent to stand trial, to order a mental examination of the accused at county expense. The question presented in this appeal is whether, if the examination is performed by a state hospital, the cost of the examination can be billed directly to the county or whether the claim must first be submitted to the district court for certification to the county board.

BACKGROUND

The underlying facts of this case are not disputed. Travis M., a resident of Lancaster County, Nebraska, was charged in the Lancaster County District Court with four counts of terroristic threats and one count of fleeing to avoid arrest. The district court, in the criminal proceeding, ordered on March 10, 2003, that Travis be committed to the Lincoln Regional Center (LRC) for a competency evaluation. The LRC is a psychiatric hospital owned by the State and administered and operated by the Nebraska Department of Health and Human Services (DHHS), a state agency. See Neb. Rev. Stat. § 83-305 (Cum. Supp. 2004).

Travis was admitted to the LRC, pursuant to the district court's order, on March 18, 2003, and remained there until June 4, when the court found that Travis was mentally incompetent to stand trial. However, the district court found a substantial probability that Travis would become competent in the foreseeable future and ordered commitment to the LRC for appropriate treatment until the disability was removed.

Between March 18 and April 30, 2003, a total of 44 days, Travis was held in the "forensic unit" of the LRC. No other time period is at issue in this appeal. The State billed Lancaster County for Travis' care during that time at the rate of $286 per day, for a total of $12,584. That represented the standard rate established by DHHS for such care and was not based on any individualized record of the care Travis received.

The claim was submitted to the Lancaster County clerk and considered by the Lancaster County Board of Commissioners on May 27, 2003. The board denied the claim, having been advised by a deputy county attorney that the State's claim should have been submitted to the district court in the criminal case for its review, instead of being sent directly to the county.

The State filed a separately docketed petition in error in the district court with respect to the denial of its claim. The State argued that pursuant to Neb. Rev. Stat. § 83-365 (Reissue 1999), DHHS was authorized to set the costs for treatment of patients in state institutions, including the LRC. The county, however, argued that the relevant statute was § 29-1823(1), which provides, in relevant part, that

> [i]f at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or by any person for the accused. The judge of the district court of the county where the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial. The district judge may also cause such medical, psychiatric, or psychological examination of the accused to be made as he or she deems warranted and hold such hearing as he or she deems necessary. *The cost of the examination, when ordered by the court, shall be the expense of the county in which the crime is charged. The district judge may allow any physician, psychiatrist, or psychologist a reasonable fee for his or her services, which amount, when determined by the district judge, shall be certified to the county board which shall cause payment to be made.*

(Emphasis supplied.) The county insisted that pursuant to § 29-1823(1), the State was required to submit its claim to the district court in the criminal proceeding and the district court could then certify a reasonable fee to the county.

The district court, in the error proceeding, agreed with the county. The court determined that when an individual is committed for evaluation pursuant to § 29-1823(1), the cost associated with that evaluation is to be submitted to the district court that ordered the commitment. The court noted that while it might

be that DHHS cannot practically separate out its billing time on an individualized basis, that issue should initially be addressed to the district court in the criminal proceeding. Therefore, the court affirmed the decision of the county board.

ASSIGNMENT OF ERROR

The State assigns, as consolidated, that the district court erred by holding that § 29-1823(1) required the State's claim for an inpatient competency evaluation to be submitted to the district court in the criminal proceeding, thus failing to enter judgment in favor of the State.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Reed v. State, ante* p. 8, 717 N.W.2d 899 (2006).

ANALYSIS

As previously noted, § 29-1823(1) provides, in relevant part, that when the district court in a criminal proceeding orders a competency evaluation, the examination is performed at county expense and "[t]he district judge may allow any physician, psychiatrist, or psychologist a reasonable fee for his or her services, which amount, when determined by the district judge, shall be certified to the county board which shall cause payment to be made." It is apparent that as a general matter, the fee to be assessed for a competency evaluation is determined by the district court in the criminal proceeding and certified to the county board for payment. The county does not dispute that it ultimately must pay a reasonable fee for the cost of the evaluation. The issue here is procedural—whether § 29-1823(1) is the exclusive provision by which the State can obtain payment from the county or whether § 29-1823(1) is applicable at all when a competency evaluation is performed by a state hospital.

[2] The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of

the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004), *cert. denied* 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744 (2005). The Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 71-901 to 71-962 (Cum. Supp. 2004 & Supp. 2005), expressly addresses who is responsible for the expenses associated with the involuntary confinement and subsequent treatment of the mentally ill, and it is in that context that § 29-1823(1) should be considered.

In most instances, the process of involuntary commitment is initiated when the county attorney determines that a subject is mentally ill and dangerous, such that there is a substantial risk of serious harm to the subject or another person or persons, and a treatment order from the county mental health board is necessary to prevent the harm. In such cases, the county attorney can file a petition in the district court to initiate proceedings before the county mental health board. See § 71-921. When there is probable cause to believe that the harm may occur before mental health board proceedings may be initiated to obtain custody of the subject, then the subject can be placed in emergency protective custody. See §§ 71-919 and 71-922. "Each county shall make arrangements with appropriate medical facilities inside or outside the county for such purpose and shall pay the cost of the emergency protective custody of persons from such county in such facilities." *Id*. At the conclusion of a mental health board hearing, if the board determines that the subject should remain in custody pending the entry of a treatment order, the subject can be retained in custody at county expense. The county is similarly directed to make arrangements in advance for such confinement. See § 71-926.

A mental health board, in determining whether a subject is mentally ill and dangerous, may request the assistance of DHHS or any other person or private entity, and may require the subject to submit to reasonable psychiatric or psychological evaluation to assist the board in preparing a treatment order. See § 71-925(7). "Any mental health professional conducting such evaluation at the request of the mental health board shall be compensated by the county or counties served by such board at a rate determined by the district judge . . . ." *Id*.

Similarly, when counsel is appointed to represent an indigent subject in proceedings under the Nebraska Mental Health Commitment Act, appointed counsel "shall apply to the court in which his or her appointment is recorded for fees for services performed." See § 71-947. The court shall fix reasonable fees, to be paid by the county in the amount determined by the court. See *id*. Counsel may also apply for a separate professional examination for the subject and "shall be reimbursed for costs incurred in securing such separate examination or examinations or in having other professional persons as witnesses before the mental health board" in an amount fixed by the court. See *id*.

Alternatively, an indigent subject or his or her counsel can apply to a mental health board for the expenses necessary to effectively represent the subject, including an independent evaluation of the subject's mental condition. See § 71-948. "The board shall then fix reasonable fees and expenses, and the county board shall allow payment to such person in the full amount fixed by the board." See *id*.

When a subject is committed to custody by a mental health board for mental health treatment at a state hospital, the cost is borne by the patient and his or her relatives. See Neb. Rev. Stat. § 83-364 (Cum. Supp. 2004). When the full cost is not paid by the patient or his or her relatives within 30 days of the receipt of such care, the county of the patient's residence pays a portion of the unpaid cost, in an amount specified by statute. See Neb. Rev. Stat. § 83-376 (Cum. Supp. 2004). With respect to the LRC, the county pays the first $15 per day of the unpaid cost and the balance of the unpaid cost is borne by the State. See *id*.

Pursuant to § 29-1823(1), if the district court in a criminal proceeding determines that the accused is mentally incompetent to stand trial, but there is a substantial probability that the accused will become competent in the foreseeable future, the court orders the accused to be committed to a state hospital for the mentally ill or some other state-owned or state-operated facility for appropriate treatment until the disability is removed. The State is responsible for the cost of the maintenance and care for the accused during the period of time ordered by the court for treatment to remove the disability. See § 29-1823(3). A review

hearing is held within 6 months, and every 6 months thereafter, to determine whether the accused is still incompetent to stand trial or whether there is a substantial probability that the accused will become competent within the foreseeable future. See § 29-1823(2). Should it be determined at any time that there is *not* a substantial probability that the accused will become competent within the foreseeable future, then the State is required to either release the accused or commence civil commitment proceedings. See § 29-1823(3).

In arguing that § 29-1823(1) does not apply to it, the State relies in large measure on § 83-365, which provides in relevant part:

> The Department of Health and Human Services shall periodically determine the individual cost, exclusive of the cost of education, for the care, support, maintenance, and treatment of the patients in each state institution and for persons receiving treatment prescribed by an institution following release or without being admitted as a resident patient. In making such determinations, the department may use averaging methods for each institution if, in the judgment of the director, it is not practicable to compute the cost for each patient.

The State argues that § 83-365 is part of a legislative policy empowering the executive branch of government to establish the rate to be charged for the care provided by state hospitals. The State also argues that there is no indication that § 29-1823 is intended to preclude the State's use of the general county claims provision, Neb. Rev. Stat. § 23-135 (Cum. Supp. 2004).

But § 29-1823 is part of a comprehensive scheme for allocating the costs of mental health treatment and evaluation, and contrary to the State's suggestion, there is no aspect of that scheme which permits the State to unilaterally determine the financial liability of another responsible party. For the general costs of care, the county is required to make arrangements with mental health care providers for emergency confinement and confinement pending a mental health board treatment order, which arrangements allow the county to determine in advance where subjects will be confined and what the confinement will cost the county. When other costs of mental health commitment

proceedings are allocated to the county, in each instance, those costs are subject to judicial or administrative approval.

[3,4] Thus, the statutory scheme clearly evinces the Legislature's intent to require judicial or administrative approval when the county is charged for expenses it did not incur. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005). The only interpretation of § 29-1823 consistent with the statutory scheme is that it requires the court to approve the expense of a competency evaluation—a liability incurred, not by the action of the county, but solely by an order of the court. The State's reasoning, that § 83-365 overrides § 29-1823(1) and that § 23-135 remains available as a means of demanding payment, would have the effect of nullifying § 29-1823(1) and many of the other provisions of the Nebraska Mental Health Commitment Act. Furthermore, if a conflict exists between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes. *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004). Here, the general power of the State to establish rates at state hospitals, and the general provision for claims made to a county board, are subject to the specific provisions of § 29-1823(1).

[5] The State also argues that § 29-1823(1) does not apply to the LRC because the statute provides that the court may allow "any physician, psychiatrist, or psychologist a reasonable fee for his or her services" and, according to the State, the LRC is not a physician, psychiatrist, or psychologist. This, however, is not a reasonable reading of the statutory language. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Salts v. Lancaster Cty.*, 269 Neb. 948, 697 N.W.2d 289 (2005). The statute's purpose is to allow the court to initiate a professional mental evaluation of an accused who may be incompetent to stand trial—in other words, to obtain professional mental services from a physician, psychiatrist, or psychologist. The statute obviously encompasses payment for such services,

regardless of whether the payment is issued directly to a "physician, psychiatrist, or psychologist," or his or her employer.

[6] Finally, the State argues that since § 29-1823(1) provides that the court "may allow" a fee for the competency evaluation, the statute is permissive, and not mandatory. Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005). But the State misunderstands the nature of the discretion afforded by the statute. The district court may decide to allow a requested fee for a competency evaluation, or, on the other hand, the court may decide not to allow the fee requested. The fact that the court has discretion in ordering payment, however, does not give the *parties* discretion with respect to whether they are required to follow the provisions of the statute. Nothing in the statute's use of the word "may" suggests that the State has the discretion not to follow the procedure established for obtaining payment.

[7] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). The State's arguments provide us with no basis to set aside the plain meaning of § 29-1823(1); thus, we find no merit to the State's sole assignment of error.

CONCLUSION

Pursuant to § 29-1823(1), payment for a competency evaluation, performed pursuant to a district court's order in a criminal proceeding, is determined by the court and certified by the court to the county board. The State's general authority to establish rates to be charged by state hospitals does not override the specific provisions of § 29-1823(1), which both the county board and the court in this error proceeding correctly understood to require that the costs of a competency evaluation be determined in the criminal proceeding by the court that ordered the evaluation. The judgment of the court in this proceeding is, therefore, affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

JENNIE L. YOUNG AND THOMAS J. YOUNG, WIFE AND HUSBAND, APPELLANTS, V. MIDWEST FAMILY MUTUAL INSURANCE COMPANY, APPELLEE.

722 N.W.2d 13

Filed September 29, 2006. No. S-05-540.

1. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Insurance: Judgments: Statutes: Attorney Fees.** Read together, Neb. Rev. Stat. §§ 44-359 (Reissue 2004) and 25-901 (Reissue 1995) prohibit an award of attorney fees to a plaintiff, in a suit against the plaintiff's insurer, who rejects an offer to allow judgment and later fails to recover more than the amount offered.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Judgments: Statutes: Compromise and Settlement.** Neb. Rev. Stat. § 25-901 (Reissue 1995) applies to offers to allow judgment against a defendant, which, under the plain meaning of the statute, are not equivalent to settlement offers.
5. **Insurance: Judgments.** For an insurer to take advantage of the protection of Neb. Rev. Stat. § 25-901 (Reissue 1995), it must expressly comply with the requirement that an offer to allow judgment be made.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded for further proceedings.

Thomas J. Young for appellants.

William E. Gast and Gene M. Eckel, of Gast & McClellan, for appellee.

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

CONNOLLY, J.

Under Neb. Rev. Stat. § 44-359 (Reissue 2004), a prevailing plaintiff can recover attorney fees against an insurance company. But under Neb. Rev. Stat. § 25-901 (Reissue 1995), an insurance company can shield itself from an award of attorney fees if it makes an offer to allow judgment and the plaintiff later fails to recover more than the amount offered. Midwest Family Mutual Insurance Company (Midwest) made written settlement offers to Jennie L. Young and Thomas J. Young, but not offers to allow judgment. This appeal requires us to decide whether under

§ 25-901, a written settlement offer is equivalent to an offer to allow judgment. The district court denied the Youngs attorney fees because it determined that Midwest's settlement offers complied with the statute. We reverse, because a written settlement offer is not the same as an offer to allow judgment. Because Midwest did not comply with § 25-901, the Youngs have the opportunity to pursue attorney fees.

BACKGROUND

Midwest issued a homeowner's insurance policy to the Youngs. In April 2001, the Youngs' home sustained hail damage. Although the parties differed greatly as to the damage, Midwest estimated damages of $790 and issued a check to the Youngs for $561.02 ($790 less a deductible). The Youngs, however, claimed damages of $27,500.

After the Youngs sued Midwest for breach of contract, Midwest sent the Youngs several letters offering to settle the dispute. The first offer was termed as "an offer of $22,000 in full settlement of this claim"; the second was a "settlement offer in the amount of $2,000.00, in consideration for a complete and final release"; the third was "an offer in the amount of $3,000, in lieu of going back to trial"; and the fourth was a "final offer of settlement to [the Youngs] in the amount of $9,000." The Youngs refused all of the settlement offers, and the case proceeded to trial. A jury returned a $940 verdict for the Youngs.

The Youngs moved for attorney fees under § 44-359. The district court denied their request stating that § 25-901 precluded an award of attorney fees because the Youngs failed to obtain a judgment for more than the offers made by Midwest.

ASSIGNMENTS OF ERROR

On appeal, the Youngs assign that the district court erred in (1) determining that Midwest made any offers to allow judgment to be taken against it, (2) determining that the settlement offers complied with § 25-901, and (3) failing to award attorney fees to the Youngs.

STANDARD OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent,

correct conclusion irrespective of the determination made by the court below. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

ANALYSIS

The Youngs contend that the settlement offers made by Midwest are not offers to allow judgment as required by the language of § 25-901 and thus did not preclude an award of attorney fees under § 44-359.

Section 44-359 provides that when judgment is entered against an insurance company, the court

> shall allow the plaintiff a reasonable sum as an attorney's fee . . . except that if the plaintiff fails to obtain judgment for more than may have been offered by such company, person, or association in accordance with section 25-901, then the plaintiff shall not recover the attorney's fee provided by this section.

Section 25-901 provides, in pertinent part:

> The defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff, or his attorney, an offer in writing to allow judgment to be taken against him for the sum specified therein. If the plaintiff accepts the offer and gives notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer verified by affidavit; and, in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly.

[2] Read together, these statutes prohibit an award of attorney fees to a plaintiff, in a suit against the plaintiff's insurer, who rejects an offer of judgment and later fails to recover more than the amount offered. See *Wendt v. Cavalier Ins. Corp.*, 197 Neb. 622, 250 N.W.2d 243 (1977). For this rule to apply, however, there must be an "offer in writing to allow *judgment*." (Emphasis supplied.) § 25-901.

We have not previously considered whether an offer to settle is equivalent to the offer to allow judgment contemplated by § 25-901. But courts in other jurisdictions interpreting similar

statutes have held that they are distinguishable. See, *Haberkorn v. Chrysler Corp.*, 210 Mich. App. 354, 533 N.W.2d 373 (1995); *B & H Const. v. Tallahassee Com. College*, 542 So. 2d 382 (Fla. App. 1989); *Becker v. DeLeone*, 78 Or. App. 530, 717 P.2d 1185 (1986).

In *Haberkorn*, the Michigan Court of Appeals held that an offer to settle did not fall within the scope of a similar Michigan rule permitting a party to offer " 'to stipulate to the entry of a judgment in a sum certain.' " *Haberkorn v. Chrysler Corp.*, 210 Mich. App. at 379, 533 N.W.2d at 386, quoting Mich. R. Civ. P. 2.405(A)(1). There, the defendant had made an offer of settlement using language similar to the offers at issue here. Most notably, the offer did not contain any language explicitly permitting judgment against the defendant. It stated that it was a " 'new settlement offer in the above-entitled case, in the amount of $500,000.00.' " *Haberkorn v. Chrysler Corp.*, 210 Mich. App. at 378, 533 N.W.2d at 386.

The Michigan court determined that this offer clearly did not fall within the plain language of its rule which required an offer of judgment, not just an offer to settle. *Id.* The court distinguished offers to settle, stating:

> An offer of judgment is not the same as an offer to settle. An agreement to settle does not necessarily result in a judgment. Although it usually results in a stipulated order of dismissal with prejudice, such an order does not constitute an adjudication on the merits. It merely "signifies the final ending of a suit, not a final judgment on the controversy, but an end of that proceeding."

Id. at 378, 533 N.W.2d at 385.

Similarly, the Oregon Court of Appeals addressed whether an offer of settlement would satisfy Oregon's equivalent of § 25-901. *Becker v. DeLeone, supra*. Oregon's rule contains the nearly identical " 'offer to allow judgment' " language at issue here. *Id.* at 534, 717 P.2d at 1188, quoting Or. R. Civ. P. 54 E. The court declined to apply the rule to an informal settlement offer, reasoning that to do so would be to judicially expand the scope of the rule. *Id.*

Midwest cites *Wendt v. Cavalier Ins. Corp., supra*, for the proposition that a trial court may refuse to award fees regardless

whether an offer is phrased as one to settle or to allow judgment to be taken. In *Wendt*, however, the issue whether an offer to settle is the equivalent of an offer to allow judgment was not presented to the court. Instead, the question was whether the plaintiff could be awarded attorney fees when the judgment obtained was equal to, not greater than, the offer made by the defendant. Further, the offer in *Wendt* had actually been accepted, not rejected, by the plaintiff and the resulting judgment was based on that offer. *Wendt* is not persuasive.

[3-5] Statutory language is to be given its plain and ordinary meaning. We will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005). Section 25-901 is clear—it applies to offers to allow judgment against a defendant, which, under the plain meaning of the statute, are not equivalent to settlement offers. Here, Midwest made several offers to settle. None of them, however, contained any language expressing a willingness to allow a judgment against it. For Midwest to take advantage of the protection of § 25-901, it must expressly comply with the requirement that an offer to allow judgment be made. This is particularly important when application of § 25-901 would result in the denial of fees that would otherwise be mandatory under § 44-359.

CONCLUSION

The district court erred in applying § 25-901 to deny the Youngs' motion for attorney fees because Midwest did not offer to allow judgment to be taken against it. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

NEBRASKA LIQUOR DISTRIBUTORS, INC., APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

722 N.W.2d 10

Filed September 29, 2006. No. S-05-890.

1. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Administrative Law: Liquor Licenses: Appeal and Error.** The Administrative Procedure Act governs appeals from Nebraska Liquor Control Commission decisions.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes: Presumptions: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed.
5. **Administrative Law: Appeal and Error.** Under Neb. Rev. Stat. § 84-917(6)(b) (Reissue 1999), a district court has discretion concerning the disposition of an appeal from an administrative agency.

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

Jon Bruning, Attorney General, J. Kirk Brown, and Milissa Johnson-Wiles for appellant.

Michael J. Lehan for appellee.

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

CONNOLLY, J.

On remand from our decision in *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005), the district court reversed the decision of the Nebraska Liquor Control Commission (Commission) that denied a wholesale liquor license to Nebraska Liquor Distributors, Inc. (NLD). Under Neb. Rev. Stat. § 84-917(6)(b) (Reissue 1999), in an appeal from an administrative agency, a district court "may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings." This case presents the question whether the district court should have remanded the matter to the

Commission for further proceedings, instead of reversing the Commission's decision. The district court chose to reverse, as permitted by the statute. We affirm.

PRIOR PROCEEDINGS

On September 6, 2001, NLD applied for a class X wholesale liquor license from the Commission. The Commission denied the license, concluding that NLD was disqualified because of a business relationship prohibited by Neb. Rev. Stat. § 53-169.01 (Reissue 2004). The Commission found that NLD's sole shareholder, Mitchell Johnson, had a continuing business relationship with his brother, Lynn Johnson, who is chairman of the board of Johnson Brothers Liquor Company (Johnson Brothers).

The Commission had previously denied Johnson Brothers a wholesale liquor license because of its relationship with United States Distilled Products Company (USDP), a liquor manufacturer. The Nebraska Court of Appeals affirmed that decision in *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication). In that case, the evidence showed that Lynn was a de facto officer or employee of USDP. This created a prohibited relationship between Johnson Brothers and USDP, requiring the denial of Johnson Brothers' application.

The Commission relied on the *Johnson Bros. Liquor Co.* decision to establish a connection between USDP and Mitchell as well, and denied NLD a liquor license. NLD appealed the Commission's decision, and the district court affirmed. In its affirmance, the district court took judicial notice of the *Johnson Bros. Liquor Co.* decision and found that Mitchell had an interest in USDP through Johnson Brothers. The case was then appealed to this court. We held that it was inappropriate for the district court to rely on *Johnson Bros. Liquor Co.* in affirming the Commission's decision. *Nebraska Liq. Distrib., supra*. We reversed the judgment and remanded the cause with directions to the district court to complete its de novo review of the record.

DISTRICT COURT'S DECISION

On remand, after a de novo review, the district court found that the record did not establish a prohibited relationship between

NLD and USDP. The district court found that there was no evidence of a business interest between Johnson Brothers and USDP and the *Johnson Bros. Liquor Co.* opinion could not be considered. The district court reversed the Commission's decision and directed the Commission to issue a wholesale liquor license to NLD. The Commission now appeals, arguing that the district court should have remanded the matter to the Commission so it could produce evidence of the relationship between NLD and USDP that was inappropriately established through judicial notice.

ASSIGNMENT OF ERROR

The Commission assigns that the district court erred in failing to remand this matter to the Commission for further proceedings.

STANDARD OF REVIEW

[1] The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Arndt v. Department of Motor Vehicles*, 270 Neb. 172, 699 N.W.2d 39 (2005).

ANALYSIS

The Commission contends that after this cause was remanded to the district court, the court should have remanded the matter to the Commission for further proceedings. It argues that because the district court relied on the Court of Appeals' decision in *Johnson Bros. Liquor Co.* without knowledge that it was incorrect to do so, the court should have allowed it another opportunity to adduce evidence of the relationship it attempted to establish through judicial notice.

[2] The Administrative Procedure Act governs appeals from Commission decisions. See § 84-917. Section 84-917(6)(b) provides, "When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings." Because the statute does not provide a standard for determining when remand would be appropriate, the Commission has asked this court to adopt one. The Commission proposes the following standard:

> When certain evidence has been found on appeal to have been inappropriately received and weighed in the original agency decision, a remand to that agency for further proceedings would serve the interests of justice if: (1) additional evidence on a pivotal issue can be shown to be available either on the existing record or by an affirmative post-remand showing by a party; and (2) there is no showing that the party that offered the evidence which was found on appeal to be inappropriately considered in the original proceeding did so in bad faith.

Brief for appellant at 9. The Commission argues that the public interest would be best protected by applying this standard and remanding the matter to the Commission. *Id.*

[3-5] We decline to adopt the Commission's proposed standard. Under § 84-917(6)(b), a district court hearing an appeal from an agency "*may* . . . remand the case for further proceedings." (Emphasis supplied.) Statutory language is to be given its plain and ordinary meaning. We will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005). Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005). Thus, under § 84-917(6)(b), a district court has discretion concerning the disposition of an appeal from an administrative agency.

Here, the district court, in its discretion, chose to reverse the Commission's decision, as it was empowered by the Legislature to do. The Commission does not argue that the district court incorrectly decided the case, nor does it argue that the court abused its discretion by failing to remand the matter. Instead, it requests an exception which would allow it another opportunity to produce additional evidence. The Commission had the opportunity in its original hearing to present evidence to support its denial of a liquor license to NLD. It failed to do so, and we see no reason why it should get a "second bite at the apple."

CONCLUSION

We conclude that the district court did not err in failing to remand the matter to the Commission for further proceedings. Therefore, we affirm.

AFFIRMED.

HENDRY, C.J., not participating.

KEITH BOHABOJ, APPELLANT, V.
ERIN RAUSCH, APPELLEE.

721 N.W.2d 655

Filed September 29, 2006. No. S-05-1504.

1. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** Where the trial court's decision on a motion to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) is based upon the complaint and its own determination of a disputed factual issue, the factual finding is reviewed under the "clearly erroneous" standard.
2. ____: ____: ____: ____: ____. Aside from factual findings, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) is subject to de novo review.
3. **Statutes.** The meaning of a statute is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Courts: Paternity: Adoption.** Although under Neb. Rev. Stat. § 43-104.05 (Reissue 2004) a father who fails to petition for an adjudication of paternity in county court within 30 days after filing his notice of intent to claim paternity would be precluded from claiming paternity in an adoption proceeding, such father would not be precluded from seeking to establish paternity under the paternity statutes in district court where there is no consent or relinquishment by the mother and no adoption proceeding is pending.
6. **Statutes: Appeal and Error.** In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded for further proceedings.

Anthony W. Liakos, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellant.

Jeffrey A. Wagner and Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Keith Bohaboj filed an action pursuant to the parental support and paternity statutes found in Neb. Rev. Stat. § 43-1401 et seq. (Reissue 2004), in the district court for Douglas County, seeking to establish his paternity of a child born to Erin Rausch. Rausch moved to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) for lack of subject matter jurisdiction. The court found, inter alia, that "Rausch intends to relinquish the child for adoption" and, based on this finding, concluded that the matter was governed by the adoption statutes, Neb. Rev. Stat. § 43-101 et seq. (Reissue 2004), over which the county court has jurisdiction. The district court therefore concluded that it lacked subject matter jurisdiction, granted Rausch's motion, and dismissed the action. Bohaboj appeals the dismissal. We reverse.

STATEMENT OF FACTS

On February 24, 2005, Rausch gave birth to a son in Omaha, Douglas County, Nebraska. The Nebraska Children's Home Society, located in Omaha, sent a letter dated February 28, 2005, to Bohaboj informing him that Rausch intended to execute a relinquishment of the child for adoption. The notice informed Bohaboj that as a possible biological father, he had the right to deny paternity and waive parental rights, relinquish his parental rights and consent to adoption, or file a notice of intent to claim paternity and obtain custody of the child within 5 days of the child's birth or the date of the letter, whichever was later. The letter was received by Bohaboj on March 3, and on March 7, Bohaboj filed a notice of intent to claim paternity and obtain custody with the Nebraska Department of Health and Human Services.

During the period April 15 to May 24, 2005, Bohaboj filed three complaints seeking to establish paternity. Each complaint indicated that Bohaboj and Rausch resided in Colfax County, Nebraska, and that the child was found in Omaha, Douglas County. One complaint was filed in the county court for Colfax County; one complaint was filed in the district court for Colfax

County; and one complaint was filed in the county court for Douglas County. Each complaint was dismissed for lack of jurisdiction.

On July 28, 2005, Bohaboj filed the action that is the subject of this appeal in the district court for Douglas County. Bohaboj fashioned the action as a complaint to establish paternity pursuant to § 43-1401 et seq. Rausch filed a motion to dismiss under rule 12(b)(1) for lack of subject matter jurisdiction and under rule 12(b)(6) for failure to state a claim. The record contains the child's birth certificate, the letter sent to Bohaboj by the Nebraska Children's Home Society, and the notice of intent filed by Bohaboj. Although, the parties stipulated that there had been no actual relinquishment of parental rights to the child by Rausch, the record indicates that there was a dispute as to whether Rausch intends to relinquish the child.

In its order filed December 6, 2005, the district court found that "the record clearly shows that Rausch intends to relinquish the child for adoption." For completeness, we note that elsewhere in its order, the district court found that "Rausch has consented to relinquishment of the minor child." Based on these findings, the district court reasoned that the matter was not a paternity matter under § 43-1401 et seq., as asserted by Bohaboj. Instead, the district court determined that the matter was governed by the adoption statutes and concluded that the case should have been filed in county court. The district court therefore concluded that it lacked subject matter jurisdiction, granted Rausch's motion, and dismissed Bohaboj's action. Bohaboj appeals the dismissal of his action by the district court for Douglas County.

ASSIGNMENTS OF ERROR

Bohaboj claims that the district court erred in determining that it lacked subject matter jurisdiction and in dismissing his action.

STANDARDS OF REVIEW

[1] As discussed above, this action was filed on July 28, 2005, and thus, we apply the new rules for notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). This court has not previously discussed the standard of review for a motion to dismiss for lack of subject matter jurisdiction filed under rule 12(b)(1) where the trial court has made a finding of a disputed

issue. Because the new rules are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance. See, similarly, *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). We do hereby determine, as did the Court of Appeals for the Eighth Circuit, that where, as here, the trial court's decision is based upon the complaint and its own determination of a disputed factual issue, we review the finding under the "clearly erroneous" standard. See, *KCCP Trust v. City of North Kansas City*, 432 F.3d 897 (8th Cir. 2005); *Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635 (8th Cir. 2003).

[2] Aside from factual findings, the granting of a motion to dismiss for lack of subject matter jurisdiction under rule 12(b)(1) is subject to de novo review. See *Anderson, supra*.

[3,4] The meaning of a statute is a question of law. *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (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

Bohaboj claims on appeal that the district court erred in finding that Rausch had relinquished the child for adoption or, in the alternative, that Rausch intends to relinquish the child for adoption. Bohaboj further claims on appeal that the district court erred in concluding that the present action was an adoption matter subject to the adoption statutes, § 43-101 et seq., rather than a general paternity action subject to the general paternity statutes, § 43-1401 et seq. Bohaboj urges this court to reverse the district court's order concluding that it lacked subject matter jurisdiction, thus granting Rausch's motion under rule 12(b)(1) and dismissing the complaint. In response, relying on the adoption statutes, specifically § 43-104.05, Rausch claims that Bohaboj's paternity action under consideration was filed out of time and that because Rausch intends to relinquish the child, the district court did not err in concluding that the matter belonged in county court. We find merit to certain of Bohaboj's arguments and conclude that the district court erred when it ruled it lacked subject matter jurisdiction. Accordingly, we reverse.

In its order, the district court found in one instance that "Rausch has consented to relinquishment." However, the parties stipulated that no actual relinquishment of Rausch's parental rights had been made and there was no evidence to support this finding. The court's finding of relinquishment was unwarranted and for purposes of further analysis we ignore this finding.

Elsewhere in its order, the district court found that Rausch intends to relinquish the child for adoption. Whether Rausch intends to relinquish was a disputed fact, and because there was some evidence to support this finding, we cannot say it was clearly erroneous; and for purposes of analysis, we will accept this finding. However, the district court reasoned that because Rausch may be considering relinquishing the child for adoption, this matter must be considered an adoption case where subject matter jurisdiction is placed in the county court. Given the controlling statutes which we discuss below, the district court erred as a matter of law in concluding that an intention to relinquish for adoption converted this general paternity case, filed in district court under § 43-1401, into an adoption case. Contrary to the district court's ruling, the case remained a paternity action for which the district court had subject matter jurisdiction.

Consideration of several statutes is necessary to our resolution of this case.

Section 43-1411 of the paternity statutes provides in relevant part:

> A civil proceeding to establish the paternity of a child may be instituted, in the court of the district where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act, where the alleged father is domiciled, by . . . the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth, unless consent or relinquishment has been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption . . . .

Section 43-104.05 of the adoption statutes provides:

> If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall,

> within thirty days after filing the notice, file a petition for an adjudication of the claim of paternity and right to custody. The petition shall be filed in the county court in the county where such child was born or, if a separate juvenile court already has jurisdiction over the child, in such separate juvenile court. If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child shall not be required, he is not entitled to any further notice, and any alleged parental rights of the claimant-father shall not be recognized thereafter in any court. After the filing of such petition, the court shall set a trial date upon proper notice to the parties not less than twenty nor more than thirty days after such filing. If the mother contests the claim of paternity, the court shall take such testimony as shall enable it to determine the facts. The claimant-father's rights and the custody of the child shall be determined pursuant to section 43-104.22. The court shall appoint a guardian ad litem to represent the best interests of the child.

We have previously considered these two statutes in relation to each other and the proper application of each statute.

In *Armour v. L.H.*, 259 Neb. 138, 144, 608 N.W.2d 599, 604 (2000), we acknowledged the "obvious tension" between §§ 43-1411 and 43-104.05. In *Armour*, we concluded that a petition to adjudicate paternity filed pursuant to § 43-104.05 is a matter of adoption over which the district courts have no subject matter jurisdiction. We further noted that under § 43-1411, a general paternity proceeding should be brought in district court "unless consent or relinquishment has been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption," § 43-1411, in which case the paternity issue is to be resolved in connection with the adoption matter in county court or under certain circumstances, a separate juvenile court.

Notwithstanding our discussion in *Armour*, Rausch urges us to conclude that Bohaboj's complaint is not only filed in the wrong court but is out of time in any event. We decline to so conclude. In *Armour*, we anticipated and effectively rejected the argument urged by Rausch in the instant case which if accepted would have us conclude that where the father files a notice of

intent to claim paternity with the biological father registry, as Bohaboj did herein, a father seeking to establish paternity would in all cases thereafter be subject to the 30-day limitation period in § 43-104.05, regardless of whether the mother had in fact relinquished or consented to adoption and regardless of the fact that no adoption proceeding was pending.

[5] Contrary to Rausch's argument, we determine that although under § 43-104.05 a father who fails to petition for an adjudication of paternity in county court within 30 days after filing his notice of intent to claim paternity would be precluded from claiming paternity in an adoption proceeding, such father would not be precluded from seeking to establish paternity under the paternity statutes in district court where there is no consent or relinquishment by the mother and no adoption proceeding is pending.

[6] In *Armour*, we noted that § 43-1411 provides generally that a biological father of a child born out of wedlock has 4 years to commence a paternity action in district court. In *Armour*, we stated:

> In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998). We can conceive of no reason why the Legislature would create a procedure whereby the general [4-year] statute of limitations applicable to paternity actions would be drastically shortened [to 30 days] by a biological father's stated intent to bring such an action.

259 Neb. at 144, 608 N.W.2d at 604.

In the instant case, Bohaboj filed a complaint in the district court within 4 years after the child's birth to establish paternity under the general paternity statutes, § 43-1401 et seq. This proceeding was proper "unless consent or relinquishment has been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption." See § 43-1411. There is no claim or evidence of consent to adopt in this case. As noted above, there was a stipulation that Rausch had not relinquished the child and the district court's finding to the contrary was in error. The district court also found that Rausch intends to

relinquish the child and reasoned that such intention converted the action into an adoption matter. This reasoning was an error of law. Given the plain language of § 43-1411, consent or relinquishment must have "been made," not merely contemplated, to exclude the general paternity action from the subject matter jurisdiction of the district court. The district court erred as a matter of law when it concluded that Rausch's intention to relinquish the child transformed the instant action into an adoption matter, thereby depriving the district court of subject matter jurisdiction of this case. The district court's order granting Rausch's motion to dismiss for lack of subject matter jurisdiction must therefore be reversed.

CONCLUSION

On the record before us, the district court for Douglas County had subject matter jurisdiction over Bohaboj's complaint seeking to establish paternity under § 43-1401 et seq. We conclude the district court erred when it granted Rausch's motion to dismiss for lack of subject matter jurisdiction and dismissed Bohaboj's complaint. We reverse the order of dismissal and remand the cause to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

JEFFERY J. MARKSMEIER ET AL., APPELLANTS AND CROSS-APPELLEES, V. McGREGOR CORPORATION, NOW KNOWN AS McGREGOR II, L.L.C., A DELAWARE LIMITED LIABILITY COMPANY, ET AL., APPELLEES AND CROSS-APPELLANTS.

722 N.W.2d 65

Filed October 6, 2006. No. S-05-423.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the 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. **Products Liability: Limitations of Actions.** For products manufactured outside of Nebraska, a product liability action must be commenced within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than 10 years.
4. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
5. **Summary Judgment.** Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

Daniel P. Bracht, of Law Offices of Daniel P. Bracht, P.C., L.L.O., for appellants.

Lisa M. Meyer, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees.

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

GERRARD, J.

NATURE OF CASE

Jeffery J. Marksmeier was severely injured when the T-shirt he was wearing caught fire. Marksmeier, Beth Boston, and Harlan Boston (collectively the appellants) brought a product liability claim against McGregor Corporation (McGregor) and various "John Doe" defendants, alleging strict liability and negligence causes of action. After the original complaint had been filed, the appellants amended their complaint to add Delta Apparel, Inc. (Delta), as a defendant. The district court for Cuming County dismissed their amended complaint, and the appellants filed this appeal.

The issues in this appeal are whether the appellants' claims are barred by either the statute of repose or the statute of limitations. Finding that the appellants' claims are barred by the statute of

repose, we affirm the judgment of the district court which had entered summary judgment against the appellants.

BACKGROUND

On April 20, 1999, Marksmeier was seriously injured when the T-shirt he was wearing caught fire while he was placing garbage on a burn pile. The T-shirt Marksmeier was wearing was a one-pocket black T-shirt with the registered trademark of the word "McGregor." The T-shirt was manufactured in Tennessee by Standard Knitting Mills, Inc., pursuant to a licensing agreement with McGregor. The licensing agreement was entered into on September 26, 1983, and granted Standard Knitting Mills permission to manufacture and distribute clothing, including T-shirts utilizing McGregor's trademarks.

In 1986, Standard Knitting Mills stopped manufacturing the type of T-shirt Marksmeier was wearing at the time of the accident. Two years later, Delta merged with Standard Knitting Mills and assumed the licensing agreement. Following the merger, Delta never manufactured one-pocket black T-shirts with McGregor's trademark. The licensing agreement expired on December 31, 1989. Pursuant to the licensing agreement, Delta was prohibited from selling any McGregor-licensed merchandise after June 30, 1990.

Neither Marksmeier nor his mother, Beth Boston, were able to affirmatively state when and how the T-shirt came into their possession. Marksmeier testified in his deposition that he had the T-shirt for "a couple of years" prior to the injury and that the shirt was probably "like a hand-me-down" shirt from "Goodwill." Beth Boston speculated in her deposition that the T-shirt could have come from Marksmeier's aunt. However, when specifically asked about the shirt's origin, she testified she did not know when or where she acquired the shirt.

On April 18, 2003, the appellants filed their original complaint, naming McGregor as a defendant and also naming various "John Doe" defendants. The "John Doe" defendants were alleged to be participants in the manufacture, sale, and distribution of the T-shirt at issue. The appellants alleged a product liability claim based upon theories of negligence and strict liability. The appellants eventually discovered the identity of Delta

and on August 25, 2003, filed an amended complaint naming Delta as an additional defendant.

Delta and McGregor filed motions for summary judgment alleging that the appellants' claims were barred by the 10-year product liability statute of repose and 4-year statute of limitations. McGregor also argued that it was entitled to summary judgment, since it did not manufacture the T-shirt in question. The district court sustained McGregor's motion for summary judgment, finding that McGregor was not the manufacturer of the T-shirt. The court therefore dismissed all claims against McGregor.

Delta's motion for summary judgment was denied. In so doing, the district court concluded that the unrefuted evidence showed that the T-shirt was manufactured in Tennessee no later than 1986 by Standard Knitting Mills. The court determined that the statute of repose in Tennessee for strict liability actions is 10 years from the date on which the product was first purchased or used for consumption. The court concluded that Tennessee's 10-year product liability statute of repose applied to strict liability theories of recovery but did not extend to product liability actions based on negligence. The court concluded that questions of fact existed and overruled Delta's motion.

Delta filed a motion for leave to reopen summary judgment, which was granted. After Delta submitted additional evidence, the district court sustained Delta's second motion for summary judgment. The court determined that pursuant to Neb. Rev. Stat. § 25-201.02(2) (Cum. Supp. 2004), the amended complaint filed by the appellants naming Delta as a defendant did not relate back to the original complaint and was therefore barred by the statute of limitations.

With regard to Delta's 10-year statute of repose argument, the district court found that Delta had offered uncontroverted evidence that the latest possible date the T-shirt could have been placed in commerce for sale to the consumer was June 30, 1990, approximately 13 years before the appellants filed their complaint. The court determined that Delta had presented a prima facie case that the 10-year statutory period of repose had expired prior to the appellants' filing of their complaint. The burden then shifted to the appellants to show that the first retail sale to the

original consumer occurred within the 10-year statute of repose. The district court determined that the appellants failed to produce any such evidence, and as a result, the court concluded that the 10-year statute of repose had expired on the appellants' strict liability claim.

In sum, the district court dismissed the appellants' amended complaint in its entirety as to all the defendants. The appellants then appealed the judgment of the district court, and Delta cross-appealed.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred (1) in determining that the appellants' claims set forth in their amended complaint were barred by the applicable statute of limitations because, pursuant to § 25-201.02(2), the amended complaint did not relate back to the date the original complaint was filed and (2) in finding that there were no genuine issues of material fact relating to Delta's statute of repose and statute of limitations affirmative defenses.

In a cross-appeal, Delta assigns as error the district court's determination that Tennessee's statute of repose applied only to the appellants' strict liability theory of recovery and not to the appellants' negligence theory of recovery. We note that the appellants do not contend that it was error to dismiss McGregor, and thus, we do not consider any issues relating to McGregor in this appeal.

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. *Didier v. Ash Grove Cement Co., ante* p. 28, 718 N.W.2d 484 (2006).

[2] In appellate review of a summary judgment, the 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. *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003).

ANALYSIS

The first issue we address is Delta's argument raised in its cross-appeal that the district court erred in finding that the Tennessee statute of repose does not apply to negligence causes of action. We conclude, based on the relevant Tennessee statute and case law, that Tennessee's statute of repose does apply to negligence claims.

[3] In the present case, the undisputed facts show that the T-shirt in question was manufactured in Tennessee. Nebraska's product liability statute provides in relevant part that for products manufactured outside of Nebraska, the product liability action must be commenced "within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than ten years." Neb. Rev. Stat. § 25-224(2)(a)(ii) (Cum. Supp. 2004). Thus, the applicable statute of repose is Tennessee's statute of repose which provides:

> Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within [the applicable Tennessee statute of limitations], but notwithstanding any exceptions to these provisions, it must be brought within . . . ten (10) years from the date on which the product was first purchased for use or consumption . . . .

Tenn. Code. Ann. § 29-28-103(a) (2000).

Tennessee courts have interpreted this statute to apply to both negligence and strict liability claims. See, *Greene v. Brown & Williamson Tobacco Corp.*, 72 F. Supp. 2d 882, 887 (W.D. Tenn. 1999) (explaining that "reference to 'any action' in § 29-28-103 has been interpreted broadly, and certainly encompasses Plaintiff's negligence and strict tort liability claims"); *Electric Power Bd. of Chattanooga v. Westinghouse*, 716 F. Supp. 1069, 1073 (E.D. Tenn. 1988) (stating that "[c]laims based on strict liability, negligence, warranty or 'any other substantive legal theory in tort or contract whatsoever' are subject to the statutory limitations prescribed in . . . § 29-28-103(a)"); *Jones v. Methodist Healthcare*, 83 S.W.3d 739 (Tenn. App. 2001) (finding that plaintiffs' negligence cause of action was barred by § 29-28-103(a)). In light of this well-reasoned authority, we conclude the Tennessee

statute of repose does apply to the appellants' strict liability and negligence claims.

We next address whether the district court correctly granted Delta's motion for summary judgment with regard to the expiration of the 10-year statutory period of repose. The appellants contend that genuine issues of material fact exist and that Delta failed to present evidence sufficient to make a prima facie case for summary judgment.

[4] 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. *Didier v. Ash Grove Cement Co., ante* p. 28, 718 N.W.2d 484 (2006). A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

The Tennessee statute of repose begins to run on "the date on which the product was first purchased for use or consumption." § 29-28-103(a). This statute is consistent with statutes of repose from Nebraska and other jurisdictions that provide that the statute of repose begins to run on the date the product is sold or delivered to a consumer as opposed to a sale or delivery to a dealer or intermediary. See, e.g., *Wilson v. Studebaker-Worthington, Inc.*, 699 F. Supp. 711 (S.D. Ind. 1987); *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); *Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 391 S.E.2d 211 (1990); *Willis v. Herman Holtkamp Greenhouses, Inc.*, No. 01A01-9011-CV-00429, 1991 Tenn. App. LEXIS 467 (June 7, 1991).

In the present case, neither party was able to affirmatively state when the T-shirt was first sold to a consumer. Marksmeier testified in his deposition that he had the T-shirt for "a couple of years" prior to the injury and that the shirt was probably "like

a hand-me-down" shirt from "Goodwill." Beth Boston speculated that the T-shirt could have come from Marksmeier's aunt. However, when specifically asked, she testified she did not know when or where she acquired the shirt.

Like the appellants, Delta was also unable to point to the specific date the T-shirt was sold to a consumer. However, through the affidavit of Delta's vice president of sales, Delta presented uncontroverted evidence that it did not sell any McGregor-licensed products, including black T-shirts, through any trade channel after June 30, 1990. In light of this evidence, the district court found that the last possible date in which Delta could have delivered the T-shirt to a retailer for sale was June 30, 1990. The court determined that this evidence was sufficient to satisfy Delta's prima facie case for summary judgment, and the burden then shifted to the appellants to show that the first sale to a consumer occurred within 10 years of the filing of the complaint, i.e., within the 10-year window provided by the Tennessee statute of repose. The appellants were unable to do so, and as a result, the district court granted Delta's motion for summary judgment.

The appellants contend that summary judgment was improperly granted because there exists a genuine issue of material fact as to when the T-shirt was first sold to a consumer. Specifically, the appellants speculate that Delta could have sold the T-shirt to a retailer on or before June 30, 1990, and that the T-shirt could have remained, unsold, on the retailer's shelf until finally being sold to a consumer at some point within the 10-year period prior to the filing of their complaint. The appellants did not present any evidence to prove that the T-shirt indeed sat on a retailer's shelf for an extended period of time.

The Seventh Circuit in *Schamel v. Textron-Lycoming*, 1 F.3d 655 (7th Cir. 1993), addressed a similar argument. In *Schamel*, the plaintiff brought a wrongful death action against the defendant, a manufacturer of aircraft parts. The trial court granted the defendant's motion for summary judgment, finding that the plaintiff's product liability action was barred by the Indiana statute of repose. On appeal, the Seventh Circuit Court of Appeals affirmed the district court's judgment. The court found that the uncontradicted evidence showed the defendant had stopped manufacturing

the product 25 years before commencement of the action, the product was sold exclusively by the defendant's distributors, the product was last sold to a distributor 19 years before commencement of the action, and the latest date the product could have been sold was 16 years before the commencement of the action. *Id.*

In *Schamel*, the plaintiff argued that "a part could have stayed on one of the distributor's shelves to be sold [within ten years of the filing of the complaint] bringing the present action within the ten-year window provided by the Indiana statute of repose." 1 F.3d at 656. The court "reject[ed] the plaintiff's contention that the evidence [did] not support the award of summary judgment because the defendant did not establish that a part was not left on a distributor's shelf even after [the defendant] discontinued [the product]." *Id.* at 657. The court explained:

> A defendant need not rebut any and every possible factual scenario in order to obtain summary judgment. Rather, once the defendant had shown that it stopped distributing the part [16 years before filing the complaint], it became incumbent upon the plaintiff to create an issue of fact by making an evidentiary showing to the contrary. She did not. Her belated, unsupported hypothesis of parts in the pipeline is, in short, too little, too late.

Id. at 657-58.

We find the reasoning of *Schamel* to be persuasive. Like the defendant in *Schamel*, Delta presented uncontroverted evidence that it had stopped manufacturing one-pocket black T-shirts in 1986, 16 years before the appellants filed their complaint. Furthermore, Delta's evidence showed the last possible date it could have sold the T-shirt through a trade channel was June 30, 1990, approximately 13 years before the appellants filed their complaint. We conclude that this evidence is sufficient to satisfy Delta's burden of presenting a prima facie case for summary judgment.

[5] The burden then shifts to the appellants to produce evidence showing the existence of a material issue of fact that would prevent judgment as a matter of law. We reject the appellants' assertion that a genuine issue of material fact exists as a result of their argument that the T-shirt at issue could have possibly remained unsold on a retailer's shelf until eventually being

purchased by a consumer within the 10-year statute of repose. Similar to the plaintiff in *Schamel v. Textron-Lycoming*, 1 F.3d 655 (7th Cir. 1993), the appellants in the present case have failed to present any evidence to support their contention that the T-shirt sat on a retailer's shelf. In this regard, we have specifically stated that "[c]onclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment." *Richards v. Meeske*, 268 Neb. 901, 909, 689 N.W.2d 337, 344 (2004). Because the appellants have failed to show the existence of a material issue of fact, we conclude the district court did not err in granting Delta's motion for summary judgment. Because the statute of repose bars the appellants' negligence and strict liability claims, the district court did not err in dismissing the appellants' amended complaint as to all their claims.

This ruling is dispositive; therefore, we need not address the appellants' other assignments of error.

CONCLUSION

Delta was entitled to summary judgment because the 10-year statute of repose had expired on the appellants' negligence and strict liability claims. Accordingly, we affirm the judgment of the district court dismissing the appellants' amended complaint.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
NATHANIEL DECKARD, JR., APPELLANT.

722 N.W.2d 55

Filed October 6, 2006. No. S-05-871.

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. **Records: Proof: Appeal and Error.** In appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity.
3. **Actions: Judicial Notice.** When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the

former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.

4. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
6. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
7. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.
8. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
9. **Postconviction: Constitutional Law: Effectiveness of Counsel.** There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel.
10. **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.

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

Nathaniel Deckard, Jr., pro se.

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

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

STEPHAN, J.

Nathaniel Deckard, Jr., appeals from an order of the district court for Douglas County denying his motion for postconviction relief following an evidentiary hearing. We find no error and affirm the judgment of the district court.

I. BACKGROUND

On June 26, 1973, Deckard was charged by information with first degree murder for a killing in the perpetration of or the attempt to perpetrate a robbery in Douglas County. His appointed counsel filed a motion to suppress all oral, written, or recorded statements taken from Deckard by Omaha police. Deckard escaped from custody before the motion was resolved. He was subsequently located in Georgia, where he was serving a sentence for a robbery conviction. Deckard ultimately entered into a plea agreement in Nebraska in which he pled guilty to a reduced charge of second degree murder and also pled guilty to the escape charge. On April 25, 1974, he was sentenced to life in prison on the second degree murder conviction and to 10 years in prison on the escape conviction. Pursuant to the plea agreement, the sentences were ordered to be concurrent, and it was further ordered that Deckard's time of confinement in Georgia on the robbery conviction would count toward fulfillment of the murder and escape sentences in Nebraska.

Deckard was released on parole after serving 12½ years. His parole was revoked due to a misdemeanor theft charge and drug use in 1995, and he has been incarcerated since that time. On May 7, 2002, he filed a motion for postconviction relief. After conducting an evidentiary hearing, the district court denied postconviction relief. Deckard filed this timely appeal from the order denying postconviction relief, and we removed the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). Additional facts relevant to the analysis will be discussed therein.

II. ASSIGNMENTS OF ERROR

Deckard assigns, consolidated, restated, and renumbered, that the district court erred in (1) failing to find that his due process rights were violated by the lack of a verbatim record of certain

proceedings held in 1973 and 1974, (2) taking judicial notice of docket entries, (3) failing to find that his trial counsel was ineffective for failing to file an appeal after being requested to do so, (4) failing to find that his trial counsel was ineffective in not securing Deckard's presence at a suppression hearing, (5) failing to find that his trial counsel was ineffective for advising him to plead guilty to an amended charge of second degree murder, (6) failing to find that an admission by his trial counsel was prejudicial to Deckard's defense, (7) failing to address Deckard's claims of ineffective assistance of postconviction counsel, and (8) failing to observe the canon of impartiality by purveying false information in the final order.

III. STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006); *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

IV. ANALYSIS

1. Lack of Verbatim Record

The record establishes that sometime before November 14, 1978, the stenographic notes of the proceedings on Deckard's motion to suppress, plea, and sentencing were inadvertently destroyed. It is therefore impossible to prepare a transcript or bill of exceptions of the criminal proceedings.

The record does, however, contain the docket sheet from the criminal case, which includes the following entry for August 29, 1973: "Plaintiff appeared by counsel . . . . Defendant present with counsel . . . . Evidence adduced by Defendant in support of his Motion to Suppress filed August 29, 1973, and by Plaintiff in opposition thereto." The judge's initials appear next to this entry. A docket entry dated April 15, 1974, provides:

> Defendant present with counsel . . . . Plaintiff represented . . . . With leave of Court plaintiff filed an amended Information charging Second Degree Murder. Defendant waived preliminary hearing and service of a copy of the Information 24 hours heretofore. Defendant was arraigned and after advise [sic] by the Court as to his rights, defendant

> voluntarily, knowingly and intelligently entered a plea of guilty to the amended Information and thereupon was adjudged by the Court to be guilty as charged and a judgment of conviction entered thereon.

The judge's initials appear next to this entry. A docket entry dated April 25, 1974, states: "Defendant present in Court with counsel . . . . Defendant was informed of conviction for the crime of second degree murder and stated no reason why sentence should not be passed against him." The judge's initials appear next to this entry.

Deckard contends that the lack of a verbatim record of the proceedings violates his due process rights. In a similar situation, the U.S. Supreme Court held that no constitutional rights were violated. *Norvell v. Illinois*, 373 U.S. 420, 83 S. Ct. 1366, 10 L. Ed. 2d 456 (1963). The defendant in *Norvell* was convicted of murder in 1941. Although he was indigent, he had counsel at the time of trial. He did not appeal. In 1956, the defendant requested a stenographic record of his trial. The official court reporter had died, and no one could read his shorthand notes. Efforts to reconstruct the trial through the testimony of persons who had attended were unsuccessful, and thus in 1956, it was not possible for Illinois to supply the defendant with adequate appellate review of his conviction. The U.S. Supreme Court reasoned that although *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956), held that an indigent defendant could not be denied a direct appeal, "[w]hen, through no fault of the State, transcripts of criminal trials are no longer available because of the death of the court reporter, some practical accommodation must be made." *Norvell*, 373 U.S. at 424. The Court concluded that under the circumstances, the defendant's right to due process was not violated.

[2] Notably, the instant case involves a postconviction proceeding, not a direct appeal. Moreover, in Nebraska the controlling rule is that in appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity. *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992). The judge's entries on the docket sheet in the record before us provide an adequate basis for our review of Deckard's postconviction claims.

We conclude that the lack of a verbatim record of the proceedings does not violate Deckard's right to due process.

2. Judicial Notice

During the postconviction evidentiary hearing, the State requested that the court take judicial notice of all the court files and records related to Deckard's postconviction claims. Deckard's counsel did not object, and the court took judicial notice of its files and records. After the conclusion of the evidentiary hearing, Deckard filed pro se objections to the taking of judicial notice. The court allowed him to make a record of his objections. Deckard argued, generally summarized, that judicial notice of the record, particularly the docket sheet, was improper because he disputed its factual accuracy.

[3] In its order denying postconviction relief, the court noted that it was proper for it to take judicial notice of the file, records, and docket sheet in the prior proceeding, as all related to the case upon which Deckard sought postconviction relief. When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Neb. Rev. Stat. § 29-3001 (Reissue 1995) specifically authorizes a district court to review "files and records of the case" in a postconviction proceeding. Although Deckard disputes the factual accuracy of the journal entries, the district court found that his testimony was not credible. We find no error in the decision of the district court to take judicial notice of its docket sheet in the criminal proceeding.

3. Ineffective Assistance of Counsel

[4-6] Deckard contends that he is entitled to postconviction relief because his trial counsel was ineffective. Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005). When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

(a) Failure to Appeal

[7] Deckard's initial contention is that his trial counsel failed to file a direct appeal after being directed to do so. After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). At the evidentiary hearing on the postconviction motion, Deckard testified that he asked his trial counsel to file an appeal on the excessiveness of his sentences within 5 days of the 1974 sentencing. His trial counsel, however, testified that Deckard never requested an appeal and that counsel specifically discussed the effect the plea bargain would have on Deckard's appeal rights. The district court found that the testimony of trial counsel was credible and that the evidence did not support Deckard's claim. We find no clear error in this finding and affirm that there was no ineffective assistance of counsel in this regard.

(b) Attendance at Suppression Hearing

As noted, there is no verbatim record of the suppression hearing. Deckard claims that no suppression hearing occurred and that even if it did, he was not permitted to attend. He alleges that

his trial counsel was ineffective for failing to ensure his attendance at the hearing.

Deckard's trial counsel testified that there was a suppression hearing at which Deckard attended and testified. The docket entry, initialed by the trial judge, states that the suppression hearing was held on "8 29 73" and that "[d]efendant [was] present with counsel." Based on this record, we conclude that the district court was not clearly erroneous in determining that a suppression hearing took place and that Deckard was present at the hearing. Trial counsel was not ineffective in this respect.

(c) Advising Deckard to Plead Guilty to Second Degree Murder

Deckard contends that his trial counsel was ineffective for advising him to plead guilty to the second degree murder charge. His argument is based on the premise that counsel's performance was deficient because he failed to inform Deckard that the motion to suppress was still pending at the time the plea was entered into.

The motion to suppress sought to exclude from evidence "all statements, oral, written or recorded, taken from [Deckard] on or about June 2, 1973, by the Omaha Police Department" on the basis that the statements were involuntary. Shortly after the crimes were committed and after Deckard had been arrested, he gave at least two statements to police. In the first statement, he admitted to the killing but denied that it was committed in the course of a robbery. In the second statement, he admitted that the killing was done in the course of a robbery or an attempted robbery. This second statement was recorded. Although his argument is not clear, Deckard generally contends that both statements were inadmissible evidence that should have been suppressed.

At the evidentiary hearing on the postconviction motion, Deckard's trial counsel testified about what occurred with respect to the statements during the suppression hearing. According to counsel, one police officer swore the initial nonrobbery confession was never recorded, one officer thought it might have been, and one officer testified that it was and that he erased it at the direction of another officer. Trial counsel also testified about the substance of Deckard's testimony at the suppression hearing.

According to trial counsel, Deckard testified that he initially confessed to the murder but in doing so, explained that it did not take place during a robbery. Deckard testified that he later told the police that the murder was committed during a robbery because he was coerced by the police into believing such a confession would result in a lesser charge.

The record reveals that the motion to suppress was never ruled upon. Deckard generally argues that trial counsel was ineffective for advising him to plead guilty prior to the resolution of the suppression motion. At the time the plea was entered, Deckard was facing a charge of first degree murder, with a maximum sentence of death. He also was facing an escape charge and had time remaining on a sentence in Georgia. His trial counsel succeeded in getting the first degree murder charge reduced to second degree murder and in having the sentence on the escape conviction and the Georgia sentence run concurrent to the second degree murder sentence. Deckard was ultimately sentenced to a term of life imprisonment on the murder conviction, which at the time meant a maximum of life imprisonment and a minimum of 10 years' imprisonment prior to the time he would be eligible for parole. See Neb. Rev. Stat. §§ 28-402 (Reissue 1964) and 83-1,105 (Cum. Supp. 1974). The record reflects that he was paroled after serving 12½ years.

We addressed a somewhat similar situation in *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982). In *Herren*, the defendant was originally charged with first degree murder and attempted first degree murder. A motion to suppress was filed. While the court's decision on the motion was pending, trial counsel succeeded in persuading the State to file an amended information charging the defendant with second degree murder and second degree assault. The defendant entered a plea of no contest to the reduced charges and was ultimately sentenced to a term of 35 years' imprisonment on the second degree murder conviction and to 20 months' to 5 years' imprisonment on the assault conviction. In rejecting the defendant's claim that his trial counsel was ineffective, we cited the significant evidence against the defendant and noted that counsel did a masterful job of significantly reducing the charges. We found that the defendant's contention that trial counsel was ineffective for failing to wait for

the outcome of the motion to suppress was without merit, reasoning that once the defendant entered his plea, "the court's ruling on the motion to suppress was irrelevant." *Herren*, 212 Neb. at 712, 325 N.W.2d at 155.

In this case, considering the magnitude of the sentences Deckard faced, the potential evidence that could have been used against him at trial, and the favorable sentences negotiated in the plea agreement, we conclude that the district court did not err in concluding that trial counsel did not perform deficiently by advising Deckard to accept the plea.

4. Trial Counsel's Admissions

[8] Deckard assigns that the postconviction court erred in failing to recognize what he characterizes as the inherent prejudice to his case which came to light during the evidentiary hearing on the postconviction motion. He contends that this prejudice occurred when his trial counsel testified about the possible destruction of the tape recording of the statement in which he admitted to the killing but claimed it was not done during a robbery. This argument was not raised in his original postconviction motion. Although Deckard filed three additional pro se motions after the evidentiary hearing, none of them raised this argument. An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

To the extent the argument is preserved in the record before us, we conclude that it relates to Deckard's assignment that trial counsel was ineffective for advising him to plead prior to resolution of the suppression motion, which we have already concluded is without merit.

5. Postconviction Counsel

Deckard argues that the postconviction court erred in failing to address his complaints against his postconviction counsel. These complaints were made via a series of ex parte letters written by Deckard to the district court after the postconviction evidentiary hearing. Liberally construed, the letters alleged that his postconviction counsel was ineffective for various reasons.

[9] There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel. *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005); *State v. Dandridge*, 264 Neb. 707, 651 N.W.2d 567 (2002). Any claim made by Deckard with respect to ineffective assistance of his postconviction counsel is without merit.

6. Judicial Impartiality

The district court gave several reasons for its conclusion that the evidence did not support Deckard's claim that he asked his trial counsel to file a direct appeal, including the following:

> [A]t Deckard's request [trial counsel] assisted Deckard in getting him transferred to Nebraska from Georgia in July of 1977. Thus, within three years of his sentence in this case, Deckard requested and obtained [trial counsel's] professional assistance. Deckard's action in 1977 certainly negates his claim that [trial counsel] failed to comply with any request to file an appeal in 1974.

Deckard argues that there is "absolutely no truth" to this finding and that it calls into question the impartiality of the district judge. Brief for appellant at 28.

Contrary to Deckard's argument, there is some evidence in the record to support the finding. Trial counsel testified that Deckard requested that he attempt to arrange his transfer from Georgia to Nebraska to serve his sentences and that counsel took certain actions in response to this request. Although the record is somewhat ambiguous as to when this occurred, the district court's resolution of this collateral issue does not suggest bias or partiality under an objective standard of reasonableness. See *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). This assignment of error is without merit.

7. Motion for New Evidentiary Hearing

[10] After his appeal was fully briefed and several days before oral argument, Deckard filed a pro se "Motion for a New Evidentiary Hearing" in this court requesting that we remand the cause to the district court in order "to prevent a miscarriage of justice." In his motion, Deckard asserts various arguments and assignments of error which are not included in his brief

and, in some instances, were not raised in the district court. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006). An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001). We conclude that the matters asserted in the motion are not properly before us in this appeal, and we therefore overrule the motion.

V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court denying Deckard's motion for postconviction relief, and we overrule his pro se motion for a new evidentiary hearing filed in this court.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM WHITE, APPELLANT.

722 N.W.2d 343

Filed October 6, 2006. No. S-05-1028.

1. **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.
2. **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.

Appeal from the District Court for Phelps County: TERRI HARDER, Judge. Affirmed.

Clarence E. Mock and Matthew M. Munderloh, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

William White appeals his convictions in the district court for Phelps County on eight counts of theft by unlawful taking or disposition. White was charged with the theft of grain which was being stored by farmers at a warehouse owned by White. On appeal, White asserts that his convictions should be set aside because the evidence presented at trial was insufficient to prove that the grain at issue was the "property of another" as defined by statute and that the evidence was insufficient to prove that he had the intent to deprive the farmers of their grain. We affirm White's convictions.

STATEMENT OF FACTS

White was the president and owner of Atlanta Elevator, Inc. (AEI), a public grain warehouse located in Atlanta, Nebraska. On March 11, 2002, warehouse examiners from the Nebraska Public Service Commission (PSC) inspected AEI and determined that the quantities of grain actually in storage with AEI were significantly below the amount necessary to cover AEI's apparent storage obligations. As a result of the inspection, AEI voluntarily surrendered its grain warehouse license and the PSC took control of the facilities and assumed title to all grain in storage at the warehouse for the benefit of the owners, depositors, and storers of the grain. There ensued certain claims to the grain. The PSC denied various claims, and we affirmed certain denials after the claimants appealed. *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

The State brought criminal charges against White in connection with events surrounding the insolvency of AEI. These charges gave rise to the instant criminal case. On February 23, 2004, the State filed an information charging White with nine counts of theft by unlawful taking or disposition in violation of Neb. Rev. Stat. § 28-511 (Reissue 1995). Each count alleged that the property involved had a value over $1,500, making each count a Class III felony under Neb. Rev. Stat. § 28-518(1) (Reissue 1995). One of the nine counts was dismissed on the State's motion at trial. The eight remaining counts involved corn and soybeans owned by several farmers. It was alleged in each count that White had unlawfully exercised control over movable property of another with the intent to deprive him thereof, causing monetary loss in excess of $1,500.

At the trial held June 13 through 16, 2005, the State presented evidence intended to prove that each farmer had exclusive ownership of a quantity of corn or soybeans he had deposited. The evidence included a showing that each of the farmers had filed claims with the PSC asserting that he had grain in an "open storage" arrangement with AEI as of March 11, 2002. Pursuant to an "open storage" arrangement, the farmers deposited grain with the warehouse for storage for an agreed-upon fee but retained title and ownership to the grain. Certain of the farmers also testified that they had received scale tickets evidencing their ownership. At trial, White claimed that AEI had "price later" contracts with the farmers which entitled them to the proceeds of the sale of corn or soybeans rather than an ownership of grain. Pursuant to a "price later" contract, title and ownership of grain held in open storage is transferred to the warehouse. Although AEI records indicated that the farmers had "price later" contracts for the grain at issue, none of the price later contracts in AEI's files were signed. Each of the farmers testified at trial that he had an open storage arrangement, that he retained ownership of the grain, and that either he never received a price later contract or he received such contract but never signed it. Each farmer admitted on cross-examination that he had not requested a warehouse receipt from AEI relating to the grain.

The evidence shows that the farmers delivered their grain to AEI in September and October 2001. AEI records showed that

from September 2001 through February 2002, AEI issued significant quantities of collateral warehouse receipts pursuant to which a purchaser advanced 90 percent of the price to AEI and AEI became obligated to ship the grain at a later date. The amount of grain for which AEI issued warehouse receipts exceeded the amount shown by AEI records to be in inventory. A federal warehouse examiner conducted an examination on February 20, and following the examination, the examiner informed White of the shortages. It was during this period, in early 2002, that AEI sent the price later contracts to the farmers in this case. Changing the status of the farmers' grain from open storage to price later, if successful, would allow AEI to reflect the grain as being owned by AEI rather than by the farmers. When the PSC took control of AEI's warehouse in March, AEI records purported to show that the farmers' grain was being held under price later contracts.

Following trial, on July 13, 2005, the district court found White guilty of eight counts of theft. On August 18, the court sentenced White to imprisonment for 6 to 10 years on each count with the sentences to be served concurrently. White appeals his convictions.

ASSIGNMENTS OF ERROR

White generally asserts that there was not sufficient evidence to support his convictions. He specifically asserts that the evidence indicated that he was "privileged to infringe" upon the grain of each farmer and that therefore, the grain was not the "property of another" as those expressions are used in Neb. Rev. Stat. § 28-509 (Reissue 1995) and § 28-511. White also asserts that there was not sufficient evidence to establish that he had the intent to deprive the farmers of their grain.

STANDARD OF REVIEW

[1] 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. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

ANALYSIS

White makes the general assertion that the evidence was insufficient to support his convictions, and he argues that the evidence was insufficient in two specific respects, which we discuss separately.

Evidence Was Sufficient to Support Finding That Grain Was "Property of Another."

White first argues that the evidence was not sufficient to support a finding that the grain at issue was the "property of another" as required to find him guilty of theft under § 28-511. We conclude that there was sufficient evidence for the district court to find that grain was being held by AEI for the farmers under open storage arrangements and that therefore, the grain was the property of the farmers.

Section 28-511(1) provides that one is "guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." In § 28-509(6), "[p]roperty of another" is defined in part as "property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property."

At trial in this case, all the farmers testified that they had grain stored at AEI in an open storage arrangement pursuant to which the farmers retained title and ownership of the quantity of grain they had deposited. The farmers all testified that they had never signed price later contracts that would have transferred title to AEI. For completeness, we note that some of the farmers testified that they had received scale tickets when they delivered the grain and that an employee of AEI testified that part of the routine when receiving grain for open storage was to issue scale tickets. In this regard, we note that pursuant to Neb. Rev. Stat. § 88-535 (Reissue 1999), a scale ticket is "prima facie evidence of the holder's claim of title to the goods described in such ticket."

White argues that he cannot be guilty of theft of the grain because the grain was not the "property of another." White asserts that the grain was under price later contracts pursuant to which he was "privileged to infringe" on the interests of the farmers. Although there was evidence that White prepared and sent price later contracts to the farmers, the contracts were not signed by the farmers. Such grain contracts must be signed by all parties pursuant to the PSC's grain warehouse rules and regulations. See 291 Neb. Admin. Code, ch. 8, § 002.07E6 (1994) (now found at § 002.07H6).

We need not determine whether White would have been "privileged to infringe" on the farmers' interests under price later contracts, because the evidence was sufficient for the district court as finder of fact to have believed the farmers' testimony and other evidence. The court found that the grain was delivered to AEI pursuant to open storage arrangements and that the farmers never agreed to change the arrangements to price later contracts. Under their open storage arrangements, the farmers retained title and ownership and White was not privileged to infringe on their ownership interests by disposing of the grain without their permission. Therefore, there was sufficient evidence from which the district court could have found that the grain was the "property of another," and we reject White's argument to the contrary.

Evidence Was Sufficient to Support Finding That White Had Intent to Deprive Another of Property.

White next argues that the evidence was not sufficient to support a finding that he had the intent to deprive the farmers of their grain as required for a finding of guilt under § 28-511. We conclude that there was sufficient circumstantial evidence for the district court to find that White intentionally disposed of the grain in such a way as to create a substantial risk that the farmers would not recover the quantity of grain to which they were entitled and that therefore, White had the required intent to deprive the farmers of their property.

Under § 28-511(1), theft requires "the intent to deprive" another of property. Under § 28-509(1)(b), one of the definitions of "deprive" is "[t]o dispose of the property of another so as to create a substantial risk that the owner will not recover it in the condition it was in when the actor obtained it."

[2] 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. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006). There was evidence in the present case from which the district court could have inferred that White intentionally disposed of the grain in such a way as to create a substantial risk that the farmers would not recover the quantity of grain to which they were entitled, and such intent would support a finding of guilt.

Documentary evidence and testimony indicated that after the farmers delivered their grain to AEI, AEI sold the grain and incurred commitments to deliver grain in amounts that exceeded what it had available, causing AEI to be out of position. At the time AEI was out of position, in a flurry of activity, AEI prepared and sent price later contracts to the farmers and also changed its records to purportedly show that such grain was held under price later contracts rather than in open storage. The effect of changing the classification of the farmers' grain was to make AEI records appear to show that the grain was owned by AEI rather than the farmers. Testimony indicated that such actions of AEI were taken at the direction and under the control of White. White's dealings with regard to the grain at a time when AEI was out of position created a substantial risk that the farmers would not recover the quantity of grain to which they were entitled. The court could infer from White's actions that he intentionally took such actions knowing that they would create such substantial risk.

White argues that the evidence is not sufficient to establish that he had the intent to permanently deprive the farmers of the grain. He argues instead that the evidence showed that he knew what was owed to each farmer and that he thought he would be able to rectify AEI's problems and make the proper quantity of grain available to the farmers. However, the statutory definition of "deprive" noted above does not necessarily require that one intend to permanently deprive another of his or her property; instead, it is sufficient if one intentionally creates a substantial risk that the other person will not recover the property in its

original condition. The evidence in this case was sufficient for the court to find that White intentionally created a substantial risk that the farmers would not recover their proper quantity of deposited grain, thus depriving the farmers of their property. We therefore reject White's argument.

CONCLUSION

We conclude that the evidence in this case was sufficient for the court to find that the grain was the "property of another" and that White had the "intent to deprive" the farmers of the quantity of grain to which they were entitled. The evidence was sufficient to support the convictions for theft. We therefore reject White's assignments of error and affirm his convictions.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
CARL M. HUMBERT, APPELLANT.

722 N.W.2d 71

Filed October 6, 2006. No. S-05-1221.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Constitutional Law: Double Jeopardy.** The Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
4. ____: ____. The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
5. **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.
6. ____: ____. While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the clause does not prohibit the State from prosecuting a defendant for multiple offenses in a single prosecution.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Daniel W. Ryberg for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

WRIGHT, J.

NATURE OF CASE

Carl M. Humbert (Humbert) was charged by information with two misdemeanors and four felonies. He pleaded no contest to the misdemeanor charges and filed a plea in bar asserting that prosecution on the two corresponding felony charges in the information is barred by the Double Jeopardy Clauses of the state and federal Constitutions. The district court overruled Humbert's plea in bar, and he filed this interlocutory appeal.

SCOPE OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

FACTS

The charges against Humbert were filed after his estranged wife, Mayra Humbert (Mayra), claimed that on the evening of April 27, 2005, Humbert had stabbed her and restrained her from leaving the residence the couple had previously shared in Bellevue, Nebraska. Humbert then allegedly tied Mayra to a chair or couch with an extension cord so he could retrieve her cellular telephone from her vehicle. After Humbert returned to the residence, he untied Mayra. At approximately 1:15 a.m., she escaped from the residence and was later treated at an Omaha hospital for her injuries.

Humbert told police that he and Mayra had argued on April 27, 2005. In order to scare Mayra, he picked up a "ceremonial type" knife that was on a counter in the residence. Humbert said that as Mayra approached him, she "walked into the knife." Humbert saw blood on Mayra's pants, but he did not ask her if she was hurt.

Humbert was charged by complaint in county court with four felonies: first degree false imprisonment, second degree assault (domestic violence), terroristic threats, and use of a weapon to commit a felony. After he was bound over to district court, an information was filed charging Humbert with the same four felony counts and two additional misdemeanors: second degree false imprisonment and third degree assault (domestic violence). At arraignment, Humbert stood mute. Counsel informed the district court that Humbert was filing a plea in abatement and a motion to quash on the four felony charges. Humbert then pleaded no contest to the misdemeanor charges.

The district court examined Humbert and determined that he understood the charges, the possible penalties, and his constitutional rights. Upon finding that Humbert's pleas of no contest were voluntarily, freely, and intelligently made, the court then found him guilty of the misdemeanor charges.

After his conviction on the misdemeanor charges, Humbert filed a plea in bar alleging that (1) second degree false imprisonment is a lesser-included offense of first degree false imprisonment; (2) third degree assault (domestic violence) is a lesser-included offense of second degree assault (domestic violence); (3) the charges of first degree false imprisonment and second degree assault (domestic violence) are barred by double jeopardy as set forth in article I, § 12, of the Nebraska Constitution and the Fifth Amendment to the U.S. Constitution; and (4) the use of a weapon to commit a felony charge is moot. The district court overruled the plea in bar.

ASSIGNMENT OF ERROR

Humbert claims the district court erred in overruling his plea in bar.

ANALYSIS

[3,4] In this interlocutory appeal, Humbert argues that his right not to be subjected twice to trial and conviction for the same crime has been violated. The Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005). The

protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *Id.*

[5] 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. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). Humbert argues that he is being threatened with multiple punishments for the same offense because all of the charges arose from the same incident. Humbert claims that the two misdemeanors to which he pleaded no contest are lesser-included offenses of first degree false imprisonment and second degree assault (domestic violence) and therefore prosecution on the corresponding felony charges is barred by these convictions.

The U.S. Supreme Court addressed this issue in *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). Respondent Kenneth Johnson was indicted by an Ohio grand jury for four offenses: murder, grand theft, involuntary manslaughter, and aggravated robbery, which resulted from the killing of the victim and the theft of property from the victim's apartment. Johnson offered to plead guilty to charges of involuntary manslaughter and grand theft, but he pleaded not guilty to charges of murder and aggravated robbery. The trial court accepted the guilty pleas and dismissed the remaining charges because it concluded that involuntary manslaughter and grand theft were lesser-included offenses of murder and aggravated robbery, respectively. The court determined that continued prosecution of murder and aggravated robbery charges after acceptance of Johnson's guilty pleas on involuntary manslaughter and grand theft was barred by the Double Jeopardy Clause. The Ohio Supreme Court affirmed, and the State appealed to the U.S. Supreme Court.

The U.S. Supreme Court noted the basic protections offered by the Double Jeopardy Clause and stated: "In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion

of courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. at 499.

[6] The Court pointed out that the trial court's dismissal of the more serious charges completely halted the proceedings which would ultimately have led to a verdict of guilt or innocence on those charges. In the event of a guilty verdict, the trial court would have had to confront the question of cumulative punishments, but that stage of the prosecution was never reached because the trial court dismissed the more serious offenses. "While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution." *Ohio v. Johnson*, 467 U.S. at 500.

The Court noted that Johnson had not been exposed to conviction on the charges to which he pleaded not guilty, "nor ha[d] the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial." *Ohio v. Johnson*, 467 U.S. at 501.

> The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses. [Citations omitted.] There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws.

Ohio v. Johnson, 467 U.S. 493, 501-02, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984).

The Court stated, "Notwithstanding the trial court's acceptance of [Johnson's] guilty pleas, [Johnson] should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Ohio v. Johnson*, 467 U.S. at 502. Thus, the Double Jeopardy Clause did not prohibit the State from continuing its prosecution of Johnson on the more serious charges.

In the case at bar, Humbert pleaded no contest to second degree false imprisonment and third degree assault (domestic violence), which may be lesser-included offenses of two of the felony charges—first degree false imprisonment and second degree assault. See, e.g., *State v. Brownell*, 11 Neb. App. 68, 644 N.W.2d 166 (2002); *State v. Bachelor*, 6 Neb. App. 426, 575 N.W.2d 625 (1998).

The State is not seeking a subsequent prosecution of Humbert for a greater offense after he had previously been tried for the lesser-included offense. There has been no trial on any of the charges. Humbert has pleaded no contest to the above-described misdemeanors, but he has not been sentenced and he has not been subjected to a trial on the felony charges.

This case is analogous to the situation presented in *Ohio v. Johnson, supra*. The State has not yet had an opportunity to prosecute Humbert on all of the charges. Humbert can assert his double jeopardy claims as to cumulative punishments based on convictions for greater and lesser offenses when and if that issue is presented. Based upon *Ohio v. Johnson*, we conclude the facts of this case do not demonstrate a present violation of the Double Jeopardy Clause.

Humbert relies upon *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006), to support his contention that double jeopardy protections apply upon acceptance of a plea. In *Vasquez*, the State filed an exception to the order of the district court. State law provides that when the prosecuting attorney takes exception to a trial court decision pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), the judgment of the trial court "shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy." Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2004).

We stated in *Vasquez* that jeopardy attaches (1) when the jury is impaneled and sworn in a case tried to a jury, (2) when a judge begins to hear evidence as to the guilt of the defendant in a case heard without a jury, or (3) at the time the trial court accepts the defendant's guilty plea. We held that jeopardy attached when the trial court accepted the defendant's guilty plea and that, therefore, the trial court's judgment could not be reversed or affected in any way by the State's filing of an exception to the district

court's order. However, in the case at bar, the point at which jeopardy attaches is not the issue.

Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id*. We conclude that the district court properly overruled Humbert's plea in bar. Double jeopardy protects a defendant against cumulative punishments for convictions on the same offense; however, it does not prohibit the State from prosecuting a defendant for multiple offenses in a single prosecution. See *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984).

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

MIKE ROSELAND ET AL., APPELLEES AND CROSS-APPELLANTS,
v. STRATEGIC STAFF MANAGEMENT, INC.,
APPELLANT AND CROSS-APPELLEE.

722 N.W.2d 499

Filed October 20, 2006. No. S-04-627.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law in which an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Employer and Employee: Wages: Penalties and Forfeitures.** Under Neb. Rev. Stat. § 48-1232 (Reissue 2004), it is in the court's discretion whether to order an employer to pay to the common schools fund an amount equal to the judgment.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the District Court for Douglas County, RICHARD J. SPETHMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jeffrey A. Silver for appellant.

Mary L. Hewitt, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., for appellees.

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

WRIGHT, J.

NATURE OF CASE

The Douglas County District Court determined that four former employees of Strategic Staff Management, Inc. (Strategic), were entitled to compensation for accrued but unused vacation time upon their voluntary resignations. The district court also awarded the employees attorney fees. The Nebraska Court of Appeals concluded that the district court had erred in awarding the compensation and the attorney fees. See *Roseland v. Strategic Staff Mgmt.*, 14 Neb. App. 434, 708 N.W.2d 841 (2006). We granted the employees' petition for further review.

SCOPE OF REVIEW

[1] Statutory interpretation presents a question of law in which an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

FACTS

Mike Roseland, Tim Brotzki, Tom Lentz, and Loyce Meister (collectively referred to as "the employees") are former employees of Strategic who each resigned voluntarily during the summer of 1998. At the time of their resignations, Roseland and Brotzki each had 3 weeks of accrued vacation, Meister had 2 weeks, and Lentz had 1 week. In March 2000, each of the employees sent a letter to Strategic demanding payment for his unused vacation time, but Strategic refused to make payment.

In April 2000, the employees commenced this action pursuant to the Nebraska Wage Payment and Collection Act (Wage Act), Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1998). They sought wages, attorney fees, and additional relief available pursuant to the Wage Act, including payment to a fund to be distributed to the common schools of this state (which we will

refer to as "the common schools fund"). The matter was eventually submitted to the district court upon a stipulation of facts. Among the exhibits received into evidence was Strategic's employee handbook, which provided for paid vacation for full-time employees depending upon the length of their employment. After 1 year of continuous service, employees were eligible for 1 week of paid vacation. After 2 years, they were eligible for 2 weeks of paid vacation, and after 5 years of continuous service, they were eligible for 3 weeks of paid vacation. However, the handbook stated, "Upon termination, employees will not be paid for unused vacation time." (Emphasis in original.)

The district court found that Strategic's employee handbook directly conflicted with state law and was therefore void. It awarded the employees payment for their unused vacation time and attorney fees equal to 25 percent of the unpaid wages. The court found that there was a reasonable dispute as to whether wages were owed, and it declined to find that Strategic acted willfully. Therefore, the court did not order Strategic to pay an award to the common schools fund.

Strategic timely appealed to the Court of Appeals, which concluded that the district court had erred as a matter of law in awarding the employees compensation for their unused vacation time. The Court of Appeals reversed both the judgment in favor of the employees and the award of attorney fees. The employees filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

In summary, the employees claim that the Court of Appeals erred (1) in concluding that the employee handbook, as opposed to the Wage Act, controlled their entitlement to payment for earned and unused vacation upon termination of their employment and (2) in reversing the award of attorney fees. The employees also question the amount of attorney fees awarded and have preserved for our consideration the question of whether Strategic should be ordered to make payment to the common schools fund.

ANALYSIS

The issue before us is the validity of the provision in Strategic's employee handbook which states: "Upon termination, employees

will not be paid for unused vacation time." (Emphasis in original.) In concluding that such provision was enforceable, the Court of Appeals relied upon our decision in *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004).

Our decision in *Rosno* is not decisive of the issue presented. *Rosno* concerned the enforceability of a noncompetition covenant in a professional employment agreement. Stephen Rosno, an employee of a separate accounting firm, performed the majority of the work in the tax practice area for Professional Business Service Co. (PBS). Eventually, PBS hired Rosno and the parties signed a professional employment agreement which, in addition to the noncompetition covenant, provided that Rosno would receive 3 weeks of paid vacation per year.

When Rosno left his employment with PBS, the company sued for breach of the noncompetition covenant. Rosno counterclaimed for unpaid vacation and sick leave. The trial court found that the covenant was unenforceable and also awarded Rosno payment for 32 hours of vacation and 72 hours of unused sick leave.

One of PBS' arguments on appeal was that the trial court erred in finding that Rosno was owed payment for unused vacation and sick leave. We affirmed the judgment of the trial court and concluded that although Rosno's employment agreement did not define an " 'employee benefit plan,' " the Wage Act defined " 'fringe benefits' " to include " 'sick and vacation leave plans . . . .' " *Professional Bus. Servs. v. Rosno*, 268 Neb. at 114, 680 N.W.2d at 187, quoting § 48-1229(3). Therefore, Rosno was entitled to receive payment for the vacation and sick leave. We did not address whether PBS' handbook conflicted with the Wage Act because the terms of the employee handbook permitted Rosno to receive compensation for earned but unused vacation and sick leave.

Our decision in *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), is instructive in the case at bar. Brad Moore was employed as a personnel recruiter by Eggers Consulting Company, Inc. (Eggers), from May 1989 to August 1992. His duties included solicitation of, consultation with, and placement of employee prospects. In August 1989, Moore was asked to sign an employment agreement which provided that

employees would not compete with Eggers within a geographic area, namely the continental United States, for a specified time period of 1 year.

Moore left his employment with Eggers and, at the time of the litigation, was the sole proprietor of an executive recruiting firm which placed employees with data processing companies. Moore admitted that in the year after he left his employment with Eggers, he contacted companies he had dealt with while employed by Eggers. Moore sued Eggers for unpaid wages, and Eggers counterclaimed, alleging that Moore had violated the terms of the covenant not to compete between the parties.

In granting a partial summary judgment in favor of Moore, the trial court concluded that certain provisions of the employment agreement were overbroad and could not be enforced. Trial was then held on the issue of what commission was payable to Moore upon termination of his employment. The employment agreement at issue provided:

> "Employee shall be entitled only to those commissions which are due and payable on the final day of employment. A commission is due and payable upon collection of the fee from the client. No commission shall be paid to the Employee until such time as the client pays the commission and the Candidate begins employment. In the event of termination for any reason, the Employee shall not be entitled to any bonus, award, prize or other incentive payment which may be payable at any time after termination."

Id. at 405, 562 N.W.2d at 541. The trial court found that the above-stated provision of the employment agreement was void because it was against public policy, and the court awarded Moore commissions on placements he had made before he left Eggers' employment, finding the commissions to be wages, as defined by the Wage Act.

One issue raised on appeal was whether the employment agreement or the Wage Act controlled the payment of certain commissions after Moore's employment was terminated. The Wage Act provides in part:

> Wages shall mean compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met

> by the employee, whether the amount is determined on a time, task, fee, commission, or other basis. Wages shall include commissions on all orders delivered and all orders on file with the employer at the time of termination of employment less any orders returned or canceled at the time suit is filed.

§ 48-1229(4).

We concluded that the Wage Act controlled the determination of what commissions were payable to Moore as wages defined by the Wage Act. We held that Eggers could not circumvent the statutory definition of wages via provisions in its employment agreement with Moore. We stated: "If an act is prohibited by statute, an agreement in violation of the statute is void." *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 406, 562 N.W.2d 534, 542 (1997).

In the case at bar, paid vacation was a part of the fringe benefits contained in the employment agreement between Strategic and the employees. The amount of paid vacation that regular full-time employees received increased with the length of their employment. The question presented to the district court was whether Strategic could, upon an employee's termination, refuse to pay the employee for vacation time that accrued prior to such termination. We conclude that Strategic cannot. We hold that accrued vacation time, which is part of an employment agreement, is due and payable as wages upon termination of employment.

Statutory interpretation presents a question of law in which an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). Section 48-1229 stated in relevant part:

> (3) Fringe benefits shall include sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit plans or benefit programs regardless of whether the employee participates in such plans or programs; and
>
> (4) Wages means compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been

> met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis.

Pursuant to the Wage Act, the payment of unpaid wages is mandatory. "Whenever an employer, other than a political subdivision, separates an employee from the payroll, the unpaid wages shall become due on the next regular payday or within two weeks of the date of termination, whichever is sooner." § 48-1230. Vacation leave, if provided by terms of the employment agreement between the employer and the employee, is a fringe benefit, which is included in the definition of wages under the Wage Act. See § 48-1229(3) and (4). Upon termination of his or her employment, an employee is entitled to payment for any accrued vacation time that is provided for in the employment agreement.

The district court correctly determined that Strategic's policy of not paying accrued vacation pay upon termination of employment directly conflicted with the provisions of the Wage Act. The payment of vacation pay was an "agreed to" benefit between Strategic and its employees, see § 48-1229(4), and Strategic could not circumvent the payment of wages that had accrued by refusing to disburse accrued vacation pay because employment had been terminated.

The parties stipulated to the amount of vacation time that had accrued for each of the employees prior to their termination. Pursuant to the Wage Act, payment was due on the next regular payday or within 2 weeks of termination, whichever was sooner. To the extent that Strategic's policy of refusing to compensate employees for accrued vacation time upon termination of their employment conflicted with the Wage Act, the policy was void and unenforceable. The district court's order granting judgment in favor of the employees in the amount of $8,788.29 was correct.

In their petition for further review, the employees also claim that the Court of Appeals erred in refusing to consider whether the circumstances warranted an award of attorney fees greater than the 25-percent statutory minimum and in failing to order Strategic to make payment to the common schools fund. See §§ 48-1231 and 48-1232. The district court had entered an award of attorney fees equal to 25 percent of the unpaid wages but declined to award any additional fees. The court also stated

that because there was a reasonable dispute as to whether wages were owed, it would not order Strategic to pay an amount equal to the judgment to the common schools fund. The Court of Appeals did not analyze the issues related to attorney fees or the common schools fund because it reversed the district court's judgment and award of attorney fees. We now affirm the district court's order of attorney fees and its denial of an award to the common schools fund.

The issue of attorney fees is governed by §§ 48-1231 and 48-1232. Section 48-1231 provides that if an employee secures a judgment for unpaid wages under the Wage Act, the employee is

> entitled to recover (1) the full amount of the judgment and all costs of such suit and (2) if such employee has employed an attorney in the case, an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages. If the cause is taken to an appellate court and the plaintiff recovers a judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court, which fees shall not be less than twenty-five percent of the unpaid wages.

The employees established a claim for unpaid wages, and thus, they are entitled to attorney fees of not less than 25 percent of the unpaid wages under § 48-1231. However, the employees argue that they should receive a larger award because the employment policy in question clearly violated the Wage Act and Strategic's actions were clearly willful. We conclude the district court did not abuse its discretion in not awarding a fee greater than the minimum 25 percent of the judgment.

We next consider whether the district court erred in failing to order Strategic to pay an amount to the common schools fund pursuant to § 48-1232. Section 48-1232 provides that if an employee establishes a claim and secures judgment under § 48-1231,

> (1) [A]n amount equal to the judgment may be recovered from the employer; or (2) if the nonpayment of wages is found to be willful, an amount equal to two times the amount of unpaid wages shall be recovered from the employer. Any amount recovered pursuant to subdivision (1)

or (2) of this section shall be placed in a fund to be distributed to the common schools of this state.

[2] Under § 48-1232, it is in the court's discretion whether to order an employer to pay to the common schools fund an amount equal to the judgment. *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003). We stated in *Kinney* that because the payment provision is in the nature of a penalty, discretion should be exercised only where there is no reasonable dispute as to whether wages are owed or as to the amount of the wages. We held that the trial court had discretion to determine both whether to impose a penalty and the amount of any such penalty, subject to the limitations prescribed by statute. In that case, the trial court found no reasonable dispute as to the wage claim, and we held that the lower court properly exercised its discretion to order the penalty.

Although the district court determined that Strategic's policy of refusing to pay employees for unused vacation time directly conflicted with state law and was void, the court also found that a reasonable dispute existed as to the fact the wages were owed, and it declined to order Strategic to pay an amount equal to the judgment to the common schools fund. We agree with these findings of the district court.

In *Morris v. Rochester Midland Corp.*, 259 Neb. 870, 612 N.W.2d 921 (2000), we affirmed an order declining a request to require an employer to pay an amount equal to or double the amount of the judgment to the common schools fund. We found there were factual issues as to whether an employee had procured contracts and, if he had, whether those contracts constituted orders on file. We stated, "Section 48-1232 should not be invoked where there is a reasonable dispute as to the fact that wages are owed or as to the amount of the wages." *Morris v. Rochester Midland Corp.*, 259 Neb. at 875, 612 N.W.2d at 925.

In the case at bar, there was a reasonable dispute concerning whether payment for unused vacation leave was due to the employees, and the district court did not abuse its discretion in determining that such a dispute existed.

CONCLUSION

The provision in Strategic's handbook stating that employees shall not be paid for unused vacation leave upon termination

conflicts with state law and is void. The district court's order was correct, and the Court of Appeals erred in reversing it. The decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to affirm the judgment of the district court in all respects.

The employees have been required to argue in both the Court of Appeals and this court. We therefore award, in addition to the fees awarded in the district court, attorney fees equal to one-third of the judgment to reflect the appeal to the Court of Appeals and this court.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

JOSEPH PEPITONE AND ELIZABETH PEPITONE, APPELLANTS, V. KATHERINE S. WINN AND PETER D. WINN, APPELLEES.

722 N.W.2d 710

Filed October 20, 2006. No. S-05-527.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Statutes: Words and Phrases.** The word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
3. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
4. ____. That which is implied in a statute is as much a part of it as that which is expressed.
5. **Real Estate: Sales: Attorney Fees.** Attorney fees are mandatory in an action under Neb. Rev. Stat. § 76-2,120(12) (Cum. Supp. 2004).

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded with directions.

James Polack, P.C., L.L.O., for appellants.

Kristina B. Murphree, of Berkshire & Blunk, for appellees.

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

McCormack, J.

NATURE OF CASE

The issue in this case is whether attorney fees are mandatory under the provision of Neb. Rev. Stat. § 76-2,120(12) (Cum. Supp. 2004) which provides in part: "If a conveyance of real property is not made in compliance with this section, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney's fees."

BACKGROUND

Joseph Pepitone and Elizabeth Pepitone purchased a single family residence in Omaha, Nebraska. They subsequently discovered a preexisting sewer backup problem in the basement of the residence and brought suit against Katherine S. Winn and Peter D. Winn as sellers of the home.

The Pepitones alleged a claim against the Winns for fraudulent misrepresentation; for violation of § 76-2,120; and for violation of Nebraska's Consumer Protection Act, Neb. Rev. Stat. § 59-1601 et seq. (Reissue 2004). The Pepitones sought damages, court costs, attorney fees, and, for their claim under the Consumer Protection Act, injunctive relief.

The Pepitones filed a motion for summary judgment. The Winns attempted to raise various material issues of fact, including their allegation that a corporation was the actual seller of the home. However, on November 12, 2004, the district court granted summary judgment in favor of the Pepitones on their first and second causes of action in the amount of $28,758.74. The court later dismissed the Pepitones' third cause of action under the Consumer Protection Act.

The Pepitones filed a motion for attorney fees. However, the Pepitones failed to attach to the motion any affidavit stating the amount of such alleged fees. The court overruled the Pepitones' motion for attorney fees, noting that the Pepitones "recovered all the damages they alleged based on their affidavits, which w[ere] the only evidence I have." At this point, the Pepitones' attorney offered the affidavits supporting attorney fees into the record, which were admitted after the Winns' attorney expressly stated he had no objection to the offer. The affidavits show an expenditure of $7,280 in attorney fees and $394.29 in expenses,

for a total of $7,674.29. Nonetheless, an order file stamped January 3, 2005, was entered reflecting the district court's denial of attorney fees. The Pepitones filed a motion to alter or amend the district court's ruling denying attorney fees. This motion was overruled, and the Pepitones appeal.

ASSIGNMENT OF ERROR

The Pepitones assign that the district court erred in determining that under § 76-2,120, an award of attorney fees for a successful plaintiff is discretionary and not mandatory.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

ANALYSIS

The only issue presented by the Pepitones in their appeal is whether attorney fees for a successful plaintiff are mandatory under § 76-2,120. The relevant statutory provision states in part that "[i]f a conveyance of real property is not made in compliance with this section, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney's fees." § 76-2,120(12). The issue of whether attorney fees in an action under § 76-2,120 are mandatory is one of first impression for this court.

The Pepitones assert that the Nebraska Court of Appeals' decision in *Lomack v. Kohl-Watts*, 13 Neb. App. 14, 688 N.W.2d 365 (2004), provides support for their argument that fees are mandatory in this case. In *Lomack*, the Court of Appeals concluded that attorney fees were mandatory under the Uniform Residential Landlord and Tenant Act, which provides in relevant part that "the *tenant may recover* the property and money due him or her and reasonable attorney's fees." (Emphasis supplied.) Neb. Rev. Stat. § 76-1416(3) (Reissue 2003). In holding the fees to be mandatory, the court relied on cases from other jurisdictions which focused on the context of the sentence in which the term "may" resided.

For instance, the court in *Bisson v. Ward*, 160 Vt. 343, 628 A.2d 1256 (1993), reasoned that the term "may," as contained in the phrase "tenant may recover," was not intended to give *the court* discretion in awarding attorney fees. The court explained that " 'may' refers to the tenant, not the judge or the court." *Id.* at 347, 628 A.2d at 1259. The court further explained: " 'To the extent that the word "may" connotes discretion, it is a discretion vested in the tenant to elect his remedies, not in the court to deny a remedy clearly provided by the statute.' " *Id.* at 347, 628 A.2d at 1259, quoting *Prevatte v. Asbury Arms*, 302 S.C. 413, 396 S.E.2d 642 (S.C. App. 1990). See, also, *Beckett v. Olson*, 75 Or. App. 610, 707 P.2d 635 (1985). The court in *Bisson* thus found no merit to the landlords' argument that the legislature would have stated "shall" had it intended the award of attorney fees to be mandatory.

We have found similar reasoning from other jurisdictions in cases examining the term "may" in various statutes that use the term in the same way. For instance, the Texas Supreme Court has drawn a general distinction between statutes stating that *a court* "may" award attorney fees and statutes stating that *a party* "may recover" attorney fees. While the former provision is considered discretionary, the latter is considered mandatory. See, *Bocquet v. Herring*, 972 S.W.2d 19 (Tex. 1998) (collecting cases); *Cox v. Wilkins*, No. 03-05-00110-CV, 2006 WL 821202 (Tex. App. Mar. 31, 2006) (unpublished memorandum opinion).

Likewise, the Wisconsin Supreme Court in *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 275 Wis. 2d 1, 13-14, 683 N.W.2d 58, 65 (2004), found mandatory a provision regulating the automobile business which states: " 'Any retail buyer suffering pecuniary loss because of a violation by a licensee . . . may recover damages for the loss in any court of competent jurisdiction together with costs, including reasonable attorney fees.' " The court noted that although the provision did not use the term "shall," the term "may" referred to the buyer/plaintiff and did not refer to the court. This was contrasted with clearly permissive provisions which state that "*the court may* award costs." (Emphasis supplied.) *Id.* at 29, 683 N.W.2d at 72. See, also, *T.W. Morton Builders v. von Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (S.C. App. 1994) (while also examining legislative intent,

concluding that "may" referred to power of claimant, not to discretion of court).

The court in *Kolupar* further noted that alongside "attorney fees," "damages" were stated as an object of "may recover." The court explained: "It would certainly be odd for a circuit judge to decline to impose damages once it has been determined that the plaintiff suffered pecuniary loss as a result of a listed violation . . . ." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 275 Wis. 2d at 14, 683 N.W.2d at 65. The inference the court made was that it would be "odd" to interpret attorney fees as discretionary where damages and attorney fees shared the same grammatical context.

The Winns, in arguing that attorney fees under § 76-2,120(12) are not mandatory, rely on *State v. Dethlefs*, 239 Neb. 943, 479 N.W.2d 780 (1992). Therein, we found the term "may" to be discretionary in the context of Neb. Rev. Stat. § 29-2261(5) (Reissue 1989), which stated that before imposing a sentence, "the court may order the offender to submit to psychiatric observation and examination." That same statutory subsection later stated that "[t]he report of the examination shall be submitted to the court." See § 29-2261(5). We reasoned: "It is evident to us that the Legislature clearly intended a distinction to be drawn when it used both 'may' and 'shall' in the same statutory provision." *State v. Dethlefs*, 239 Neb. at 945, 479 N.W.2d at 782-83.

[2] The Winns argue that since the provision here in question likewise uses both the terms "shall" and "may," then "may" should also be interpreted as discretionary. They also rely on the general proposition stated by this court that the word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

While § 76-2,120(12) does use both the terms "may" and "shall," the contrasting of those terms does not result in the conclusion that the granting of attorney fees is at the discretion of the court. The statute considered in *Dethlefs* set forth various provisions as to what *the court* "shall" and "shall not" do prior to sentencing. Then, § 29-2261(5) provided that *the court* "may order" a psychiatric observation and examination before sentencing. As we paraphrased, in the event that the court ordered

such a discretionary evaluation, then the evaluation "shall" be submitted to the court.

Here, the "shall" portion of the provision in § 76-2,120(12) establishes a cause of action for the purchaser of real property not made in compliance with the disclosure statement requirements. The other segment of the provision, stating that the purchaser "may recover the actual damages, court costs, and reasonable attorney's fees," uses the term "may" because recovery of damages, court costs, and reasonable attorney fees is dependent upon the purchaser's proving his or her case and proving those elements of recovery.

In other words, the contrasting of the terms "shall" and "may," as well as the general proposition that the word "may" usually connotes discretion, does not resolve the issue presented here. The term "may," insofar as it means that its object is permissive and discretionary, is referring to the purchaser's discretion in pursuing the stated remedies, not to the court's discretion to grant them, once the purchaser's right to them is proved. Compare *State v. County of Lancaster, ante* p. 376, 721 N.W.2d 644 (2006) (focusing on fact that court, not parties, was subject relating to phrase "may allow").

The provision here in issue is analogous to the various provisions discussed in the cases above, because the subject of the sentence is the party and not the court. Thus, while we agree with the Winns that the term "may" is to be understood as discretionary, this does not lead us to the Winns' conclusion that the discretion lies with *the court*. Instead, the discretion lies with "the purchaser."

[3] Furthermore, a court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Salts v. Lancaster Cty.*, 269 Neb. 948, 697 N.W.2d 289 (2005). In enacting § 76-2,120(12), the Legislature provided a purchaser with a new cause of action in addition to other common-law and statutory causes of action available to purchasers of real estate. *Bohm v. DMA Partnership*, 8 Neb. App. 1069, 607 N.W.2d 212 (2000). It follows that in order to achieve the viability of this new cause of action, the Legislature would provide purchasers with a remedy to pursue such a claim without having to bear the burden of

attorney fees. Such a remedy is especially pertinent in disclosure actions because the attorney fees could, in many cases, be more than the underlying damages, thus discouraging purchasers from pursuing claims and sellers from complying with disclosure requirements. The purpose of the statute is best effectuated by the conclusion that once a purchaser's claim is proved, attorney fees are part of the recovery.

[4,5] In addition, we find persuasive the observation in *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 275 Wis. 2d 1, 683 N.W.2d 58 (2004), regarding the fact that "damages" and "attorney fees" share together their position as the objects that "may" be recovered. That which is implied in a statute is as much a part of it as that which is expressed. *State, ex rel. Johnson, v. Consumers Public Power District*, 142 Neb. 114, 5 N.W.2d 202 (1942). Damages is an element that is commonly understood not to be at the court's discretion to grant, once the injury and a plaintiff's legal entitlement to damages have been shown. It can be inferred that "attorney's fees," where they share in the same position as "damages," are likewise not at the court's discretion to grant, when proved. We hold that attorney fees are mandatory in an action under § 76-2,120(12).

No issue has been presented regarding any failure of proof as to the attorney fees in this case, and affidavits supporting those fees are found in the record. Thus, the district court erred in not awarding attorney fees in an amount substantiated by that evidence.

CONCLUSION

We reverse the judgment and remand the cause with directions for the district court to enter an award in favor of the Pepitones for reasonable attorney fees in their cause of action against the Winns under § 76-2,120(12).

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Reginald J. Rogers, respondent.

722 N.W.2d 505

Filed October 20, 2006. No. S-06-820.

Original action. Judgment of disbarment.

Heavican, 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, Reginald J. Rogers.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on August 8, 1984. On June 22, 2006, the District of Columbia Court of Appeals disbarred respondent from the practice of law in the District of Columbia. See *In re Rogers*, 902 A.2d 103 (D.C. 2006). The District of Columbia Court of Appeals' opinion reflects that respondent "intentionally, dishonestly and criminally misappropriated more than $260,000 from his client . . . after her husband died." *Id.* at 103. The District of Columbia Court of Appeals disbarred respondent as a result of his misappropriation of his client's funds. *Id*. On July 27, 2006, relator filed a motion for reciprocal discipline, based upon the District of Columbia Court of Appeals' disbarment of respondent. On August 30, 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 did not file a response to our show cause order.

ANALYSIS

We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed

and, if so, the type of discipline appropriate under the circumstances. See *State ex rel. Counsel for Dis. v. Hogan, ante* p. 19, 717 N.W.2d 470 (2006). 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 misconduct has occurred and 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 each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. See *State ex rel. Counsel for Dis. v. Hogan, supra*. 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 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. 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.

TAJUDDIN MILLATMAL, APPELLANT, V.
PARVEEN MILLATMAL, APPELLEE.

723 N.W.2d 79

Filed October 27, 2006. No. S-05-237.

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. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
3. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
4. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
5. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
6. ____: ____: ____. In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2004), in dividing property and considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation.
7. **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.
8. ____. 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.

9. ____. Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties.
10. **Property Division: Proof.** The burden to show that a debt is nonmarital is on the party making that assertion.
11. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed in part, and in part vacated.

Kelly T. Shattuck, of Cohen, Vacanti, Higgins & Shattuck, for appellant.

Brian Zdan for appellee.

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

MCCORMACK, J.

I. INTRODUCTION

On January 24, 2005, the district court for Douglas County entered a decree dissolving the marriage of Tajuddin Millatmal (Taj) and Parveen Millatmal. Taj appealed. We moved this case to our docket pursuant to our authority to regulate the dockets of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. BACKGROUND

Taj and Parveen were married in Pakistan in 1984 and have lived in the U.S. for 13 years. Taj and Parveen, as well as their two daughters, Nelam and Naheed, are U.S. citizens. Nelam was born June 25, 1985, and was married via an arranged marriage in Pakistan in late 2002. She currently resides in Omaha, Nebraska, with her husband. Naheed was born November 18, 1986, and in the summer of 2002 was also married via an arranged marriage in Pakistan. Naheed resides in Omaha with Parveen and attends school. Naheed's husband still lives in Pakistan. According to the record, there are currently no divorce actions pending in either the United States or Pakistan with respect to these marriages.

Parveen has been employed as a seamstress for almost 13 years and, at the time of trial, earned $8.25 per hour. Parveen also rents out rooms in the family home, earning approximately $550

per month. In addition, it is apparently customary in Pakistan that working children living at home give part or all of their salaries to their parents. Accordingly, Parveen also receives between $600 and $1,000 per month from Naheed, who, in addition to being a student, has several part-time jobs.

Taj is employed as a telephone interpreter and as a cabdriver. According to Taj, he earns $700 per month as a cabdriver and another $300 per month as an interpreter, for a total income of $1,000 per month. Taj also testified that he volunteers at a nonprofit organization about 20 hours per week.

The parties own a home in Omaha valued by the Douglas County assessor at $159,000. Parveen testified that she believed the property to be worth no more than $180,000, while Taj testified that he believed the property to be worth $220,000. The record indicated that between $101,000 and $109,000 remained unpaid on the mortgage.

There was evidence presented as to certain debts owed by the parties. Parveen testified that at Taj's direction, while in Pakistan preparing for her daughters' weddings, she borrowed $25,000 from her family in order to pay living and wedding expenses. According to Parveen, taking such a loan was necessary because while traveling, Taj had misplaced a briefcase containing cash that was to be used by Parveen to cover those expenses. Parveen testified that there was no contract for repayment because the loan was from family. Taj testified that he did not direct Parveen to borrow the money. He also acknowledged that he had lost a briefcase containing $10,000, but that such event occurred subsequently to the time period referred to by Parveen, and that in any event, he had been acting as a courier, so not all of that money belonged to him and Parveen. In addition, Taj testified that he borrowed a total of $18,907 from friends in order to cover various household expenses.

The couple also owned several vehicles and various personal effects. According to Parveen, the couple owned a 1995 Ford Windstar minivan and a 1990 Toyota Corolla. In addition, since the couple separated, Taj had purchased a 2004 Honda Civic. Both parties testified, however, that the minivan had been sold, though it is not clear from the record when that sale took place. Taj testified that the Toyota was paid for.

At trial, there appeared to be little dispute over the division of personal effects, with the exception of certain items which Parveen testified were part of her dowry, including jewelry, valued at $30,000, and seven rugs, valued at $2,000 to $3,000 each. Parveen alleged that Taj had taken those items, as well as all household items except the furniture, while she was still in Pakistan following the weddings. Taj denied this and testified that when he left the marital home, he took only his clothes, a bed, and a computer desk.

The district court entered its decree on January 24, 2005. In relevant part, that decree concluded that Naheed was not emancipated and accordingly awarded custody of Naheed to Parveen. Taj was ordered to pay $60 per month in child support. The district court's decree placed an equity value of $72,000 on the parties' home and awarded that home to Parveen. In addition, the district court found that the debts owed by Taj were not marital debts, but that the $25,000 which Parveen testified was owed to her family was a joint marital debt. The court ordered Parveen to pay to Taj a total of $23,500, which was Taj's 50-percent interest in the home equity less his 50-percent liability in the marital debt. This amount was to be paid upon the sale of the property or in 5 years, whichever occurred first. The parties were awarded the personal property in their possession. In addition, Taj was awarded several other items if those items could be recovered from the parties' marital home. Parveen was additionally awarded, as nonmarital property, the rugs and jewelry that were part of her dowry, should those items be recovered. Taj was awarded the Honda, and Parveen was awarded the Ford, if the latter vehicle was still in the possession of either party. There was no explicit disposition made by the district court of the Toyota. Finally, Taj was ordered to pay spousal support to Parveen in the amount of $300 per month for 48 months or until Parveen's death or remarriage.

III. ASSIGNMENTS OF ERROR

On appeal, Taj assigns that the district court erred in (1) awarding child support for a child who was married at the time of the entry of the order, (2) awarding alimony, and (3) its division of the marital estate.

IV. STANDARD OF REVIEW

[1] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.*

V. ANALYSIS

1. Child Support

In his first assignment of error, Taj argues that the district court erred in its award of child support. Taj contends that the record is undisputed Naheed was married at the time of the entry of the decree and that pursuant to Neb. Rev. Stat. § 42-371.01(1)(b) (Reissue 2004), he had no obligation to pay child support. That section provides in relevant part that "[a]n obligor's duty to pay child support for a child terminates when . . . the child marries . . . ."

In support of his argument, Taj directs us to Neb. Rev. Stat. § 42-117 (Reissue 2004), which provides that "[a]ll marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state." See, also, *Randall v. Randall*, 216 Neb. 541, 545, 345 N.W.2d 319, 321 (1984) ("validity of a marriage is generally determined by the law of the place where it was contracted"). There is no indication from the record that the marriage was invalid under Pakistani law. Thus, under the plain language of § 42-117, we must deem Naheed's marriage valid in Nebraska.

Although Parveen's brief claims that in a marriage where consent was obtained by force or fraud, the marriage is voidable, the record does not reflect that either Naheed or Parveen have taken any steps to void this marriage. Thus, the marriage is not, for purposes of our analysis, void.

Given that Naheed's Pakistani marriage is considered valid in Nebraska, we conclude that Naheed is emancipated. As a result of her emancipation, the district court abused its discretion in ordering Taj to pay child support to Parveen. Accordingly, we vacate the district court's award of child support.

2. Alimony

In his second assignment of error, Taj argues that the district court erred in awarding alimony that was excessive in both amount and duration. Taj argues that he simply cannot afford to pay an alimony award and, further, that the record indicates that Parveen's financial situation is such that she does not require spousal support. Parveen asserts that the amount and duration were reasonable, as the payments would allow her to obtain further education.

[2-4] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id*. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id*.

[5,6] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Id.*; Neb. Rev. Stat. § 42-365 (Reissue 2004). In addition to the specific criteria listed in § 42-365, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. See *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996).

The parties were married for 20 years. From the record, it appears that for at least part of that time, Parveen worked to support the family. In addition, Parveen quit her job to move with the parties' daughters to Pakistan in order to plan and attend the daughters' weddings. Upon her return to the United States, she was able to regain the same employment, but at a lower wage. A review of the record indicates that Parveen receives about $2,570 per month, from all sources of income. The record

further indicates that prior to trial, Parveen had monthly expenses of about $1,460; however, that does not include any mortgage payments, for which she is responsible under the terms of the decree. According to the record, Parveen has expressed an interest in obtaining further education in computer programming.

With respect to Taj, the record shows that he earns about $1,000 per month and apparently runs a monthly deficit of about $400. However, Taj currently holds both a medical degree and a master's degree in public administration and, within the last few years, earned as much as $1,500 per month. Taj has expressed interest in obtaining further education in nursing.

The record would support a finding that Parveen has made certain sacrifices for the family. Moreover, Taj's earning capacity exceeds the income he now makes as a cabdriver and part-time interpreter. Alimony would allow Parveen the opportunity to obtain higher education and a higher-paying job. We will affirm a trial court's award of alimony unless it is so untenable as to deprive a party of a substantial right or just result. We cannot conclude that the award in this case meets this standard. Accordingly, we conclude that the district court's award of alimony was not an abuse of discretion.

3. Property Division

In his third assignment of error, Taj argues that the district court erred in its division of the marital estate. Specifically, he asserts that the court erred (1) in its findings regarding marital and nonmarital debt, (2) in its valuation of the marital home, (3) in allowing Parveen 5 years in which to pay Taj his portion of the equity value of the marital home, (4) by not including in the division of property the parties' Toyota, and (5) in not making an itemized list of the marital property, valuing those items, and then dividing those assets as provided by statute.

[7,8] Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). 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. *Id.*

(a) Division of Marital Debt

Taj first contends that the district court erred in concluding that the $25,000 debt to Parveen's family was a marital debt and also in concluding that certain debts incurred by Taj were nonmarital.

With respect to the $25,000 debt to her family, at trial, Parveen testified that she had borrowed the funds in question from her family in Pakistan and that the debt was incurred to pay living and wedding expenses while she and the parties' daughters were living in Pakistan. Parveen acknowledges that there were no written terms or contract, as the loan was a "matter of trust." Given this lack of documentation, Taj asserts that Parveen did not meet her burden to show that the debt actually existed.

Taj additionally argues that he incurred certain marital debts which the district court erroneously concluded were business debts and thus nonmarital. Taj testified regarding these debts, including their character as marital, and additionally provided canceled checks regarding these debts. Parveen, however, testified that she knew the persons allegedly loaning money to Taj and that for various reasons, she believed those loans to be fraudulent. Parveen specifically testified that at least one of the persons that Taj claimed loaned him money was a business associate of Taj's.

[9,10] Taj's arguments on these points are without merit. Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). The burden to show that a debt is nonmarital is on the party making that assertion. Cf. *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999) (burden of proof to show that *property* is nonmarital remains with person making that assertion). See, also, *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002) (burden of proof to show that debt is nonmarital remains with person making that assertion).

[11] Taj testified that he did not believe that the debt allegedly incurred by Parveen was a marital debt, but that he "couldn't [get] a straight forward answer" from Parveen's family with respect to the debt. We do not read this testimony as directly contradicting

Parveen's testimony that she incurred the debt during the marriage for the joint benefit of the parties. To the extent that it could be read in such a manner, the district court was entitled to accept as true Parveen's testimony that the debt existed. When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Mathews v. Mathews, supra*.

Taj has failed to meet his burden to show that this debt was nonmarital. We therefore conclude that the district court did not abuse its discretion in finding this debt to be a marital debt.

With regard to Taj's debts, we similarly cannot conclude that the district court abused its discretion in concluding that the debts were nonmarital. While Taj did testify to the existence of the debt, Parveen also testified that she believed the debts to be false. Again, the district court was entitled to accept as true one set of facts over another.

We conclude that Taj's arguments regarding the determinations of marital and nonmarital debt are without merit.

(b) Valuation and Award of Marital Home

Taj also asserts that the district court erred in finding that the marital home had an equity value of $72,000 and further in permitting Parveen 5 years to pay Taj his half of that value. Taj's assertions are without merit.

With respect to the district court's valuation, Parveen testified that she valued the property at $180,000 and further estimated that the total remaining mortgage on the property was between $101,000 and $109,000, leaving an equity value of between $71,000 and $79,000. Thus, the record supports the district court's equity valuation of $72,000. We cannot conclude the district court abused its discretion in its valuation.

Taj also argues that the district court erred in allowing Parveen 5 years to pay him his share of the equity value of the home. To support his contention, Taj points to his dire financial situation, as compared to Parveen's. However, our review of the record clearly indicates that Parveen is not able to finance the lump sum of $23,500 necessary to immediately pay Taj his equity share of the home. Again, under these circumstances, we cannot conclude that the district court abused its discretion in

allowing Parveen 5 years to pay Taj his portion of the equity value of the marital home.

(c) Failure to Specifically Value and Divide Marital Property

Finally, Taj argues that the district court erred by not first valuing the assets and liabilities of the marital estate and then dividing the marital estate in accordance with the principles stated in § 42-365. In connection with this argument, Taj notes that the district court failed to dispose of the Toyota owned by the parties.

We first address Taj's contention that the district court failed to dispose of the Toyota. We agree with Taj that no explicit disposition of the Toyota was made in the decree. However, the decree did award to each party the property currently in his and her possession, and Taj's undisputed testimony was that the Toyota was in Parveen's possession. While we agree that it might have been simpler for the district court to have explicitly awarded the Toyota to Parveen, we conclude that such an award is implicit in the court's decree.

With regard to the district court's property division, the record reveals the following: Parveen was awarded the marital home, valued at $180,000, subject to a $108,000 mortgage. As noted above, we can also discern from the decree that she was awarded the Toyota, valued at $1,500. Taj was awarded the Honda Civic, valued at $17,000, subject to a $16,500 encumbrance. The parties were each assessed $12,500 in marital debt. The district court equalized the estate by awarding Taj one-half the equity in the home, totaling $36,000. Without including any personal property in the estate, the marital estate was valued at $49,000 ($72,000 value of the house, plus $500 for the Honda, plus $1,500 for the Toyota, less $25,000 of marital debt).

The decree awarded each party the personal property in his and her possession, and we note that it is not entirely clear who had possession of some of those items of personal property. We also agree with Taj that the decree does not explicitly set forth the value of the personal property in the marital estate. However, a review of the record reveals that Taj assigned a value to the personal property of $8,001, including the $1,500 value for the Toyota, which we previously acknowledged was in Parveen's

possession and thus was awarded to her. We have included that $1,500 above in the estate apart from personal property. Therefore, the total value of the marital estate, using Taj's figures, was $55,501. Assuming that Parveen had all of the personal property in her possession (and it is clear from the record that this was not the case), the decree awarded her $31,501, or 57 percent of the marital estate, while Taj received $24,000, or 43 percent of the marital estate.

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. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). We conclude that where Parveen was awarded at most 57 percent of the marital estate and Taj 43 percent, such a division is within the general rule and was not an abuse of discretion. We accordingly conclude that the district court's property division was not an abuse of discretion.

VI. CONCLUSION

The district court erred in concluding that the parties' youngest daughter was not emancipated and ordering Taj to pay child support. The district court's property division and order of alimony, however, were not an abuse of discretion. The district court's decree is vacated as to child support and affirmed in all other respects.

AFFIRMED IN PART, AND IN PART VACATED.

HENDRY, C.J., not participating.

ROBERT G. EIHUSEN, APPELLEE, V.
LINDA K. EIHUSEN, APPELLANT.

723 N.W.2d 60

Filed October 27, 2006. No. S-05-523.

1. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
2. **Constitutional Law: Jury Trials.** The purpose of Neb. Const. art. I, § 6, is to preserve the right to a jury trial as it existed at common law and under statutes in force when the Nebraska Constitution was adopted in 1875.

3. **Actions: Pleadings: Equity.** The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought.
4. **Courts: Judgments: Fraud: Proof.** In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 2004), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law, P.C., for appellant.

Pamela Hogenson Govier and Mark J. Milone, of Govier, Milone & Kinney, L.L.P., for appellee.

WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Judge.

MCCORMACK, J.

NATURE OF CASE

Linda K. Eihusen appeals from an order of the district court denying her petition to vacate a decree previously entered in a marriage dissolution proceeding. She also appeals the district court's denial of her request for a jury trial.

BACKGROUND

Robert G. Eihusen and Linda were married in 1975. At the time of their marriage, both Robert and Linda were working at Chief Industries, Inc., a Nebraska corporation located in Grand Island, Nebraska. During their marriage, Robert became the chairman, president, and chief executive officer of Chief Industries.

In 2000, Robert and Linda talked about ending their marriage and, while still living together, discussed the specifics of dividing their property and establishing financial support for Linda. Their discussions culminated in a settlement agreement which was drafted by the attorney for Chief Industries.

Under the terms of the settlement agreement, Linda was to receive a cash payment of $200,000, one-half of the parties' 401K plan, alimony in the amount of $5,000 per month for 240 months ($1.2 million), a Chevrolet Suburban, bank accounts maintained

in her name, miscellaneous personal property, $10,000 in attorney fees, all Chief Industries' common stock that had been gifted to her during the marriage, and one-half of those shares purchased during the marriage.

The settlement agreement also disposed of a Chief Industries' convertible debenture, which was awarded to Robert subject to the debenture's outstanding debt, which Robert assumed. Robert had held the debenture since 1996, when he loaned Chief Industries $5 million, which he himself had borrowed. Under the terms of the debenture, Chief Industries promised to pay Robert $5 million plus interest on the outstanding principal balance. Alternatively, Robert could elect to convert the debenture into Chief Industries' common stock. With regard to Robert's right of conversion, the debenture could not be converted into common stock until 2002. Thereafter, Robert had the right to convert 20 percent of the debenture into common stock in each of the years 2002 through 2006 at a $100-per-share option price. If Robert failed to exercise his conversion rights for any year, he would lose the right to convert that portion of the debenture into common stock. On appeal, Robert claims that he has not exercised any of his conversion rights. As a result, he has lost his right to convert 80 percent of the debenture into common stock.

In addition, the settlement agreement provided as follows:

> Each of the parties expressly certifies that [he or she has] entered into this Agreement upon mature consideration and after ample opportunity to seek the advice of separate counsel; that consent to the execution of this Agreement has not been by duress, fraud, or undue influence of any person; that no representations of facts have been made by either party to the other except as herein expressly set forth; that both parties have had full access to the books and records of the other and both parties have full knowledge as to the business affairs of each other and the nature, extent and value of the property of the other and that the parties agree that this Agreement is fair and reasonable and not unconscionable.

Linda took a copy of the agreement to a certified public accountant. After reviewing the document, the accountant advised Linda to talk to an attorney before she signed the agreement.

Linda did not do so, however, and on December 1, 2000, the parties' "Separation and Property Settlement Agreement" was signed and notarized.

In January 2001, Robert filed a petition for dissolution of marriage. In February, Linda hired an attorney. Linda's attorney testified that Linda sought his advice on whether the settlement agreement was fair and that no formal discovery was conducted. After Linda retained the attorney, only minor changes were made to the settlement agreement, including an agreement that Linda's stock in Chief Industries would be redeemed at $167 per share, the employee stock option plan (ESOP) price at the time. Linda and her attorney knew, therefore, that the price to redeem her stock, and the price of the ESOP, was $167 per share when the parties appeared before the district court.

In June 2001, Robert and Linda appeared before the district court with their respective attorneys. At that time, Linda testified that she had reviewed all the documents presented, including the separation agreement and property statement setting forth the value of Robert's assets, which had been prepared by Robert. She further testified that she believed the separation agreement to be fair and reasonable. On June 6, the district court entered a decree of dissolution and approved the parties' settlement agreement.

On November 12, 2002, Linda filed the present action with the district court seeking to set aside the divorce decree under Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2004). Linda demanded a jury trial on all triable issues. In her petition, Linda alleged that the settlement agreement had been procured by fraud, coercion, and duress. The crux of Linda's fraud claim is the value the parties assigned to the Chief Industries' debenture. Linda claims that Robert committed a fraud with regard to the value attributed to the debenture. She argues that Robert concealed the true value of the debenture, which she contends is not the $5 million face value of the debenture claimed by Robert in the property statement, but, rather, $8.35 million. Linda computes this figure by multiplying the total number of shares Robert could have converted between 2002 and 2006 by the ESOP price at the time of their divorce in 2001, $167 per share, as opposed to the $100-per-share conversion price set forth in the debenture.

On July 15, 2004, the district court denied Linda's request for a jury trial. The court held that Linda's action to set aside the divorce decree was a continuation of the action to dissolve the parties' marriage and divide their property, which was an equitable action tried to the court. Thereafter, the matter proceeded as a bench trial on the merits. At trial, Linda withdrew her claim of duress and did not present any evidence on her claim of coercion. The case, therefore, was tried solely on the issue of whether the decree should be set aside on the basis of fraud.

On April 13, 2005, the district court found that no fraud had occurred and denied Linda's petition to vacate the decree. Linda filed this appeal.

ASSIGNMENTS OF ERROR

Linda assigns as error, restated, the district court's denial of her request for a jury trial on the issues of fraud and the district court's denial of her petition to vacate the decree of dissolution.

STANDARD OF REVIEW

[1] An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion. *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

ANALYSIS

Right to Jury Trial

In her first assignment of error, Linda claims she was entitled to a jury trial on the issue of whether Robert committed fraud when he submitted the separation and property settlement agreement and failed to disclose what she contends to be the true value of the debenture, which she alleges is $8.35 million.

[2,3] Article I, § 6, of the Nebraska Constitution provides that "[t]he right of trial by jury shall remain inviolate . . . ." We have explained that the purpose of this constitutional provision is to preserve the right to a jury trial as it existed at common law and under statutes in force when the Nebraska Constitution was adopted in 1875. *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999); *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). At common law, legal claims were tried by a jury and equitable claims were tried by a court.

Evans v. General Motors Corp., 277 Conn. 496, 893 A.2d 371 (2006). Accordingly, we have traditionally denied jury trials in equitable actions and provided jury trials as a matter of right in legal actions. *State ex rel. Cherry v. Burns, supra*; *State ex rel. Douglas v. Schroeder, supra*. As we stated in *Schroeder*, our task, therefore, becomes one of determining whether the action is of an equitable or legal nature. We make this determination from the action's main object, as disclosed by the averments of the pleadings and the relief sought. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

While not explicitly part of the *Schroeder* test, our case law requires a court to look to the common law and statutes in force when the Nebraska Constitution was adopted. Decisions from other jurisdictions are in accord with this rule. The U.S. Supreme Court has stated that a court should consider the custom with reference to such questions before the merger of law and equity, the remedy sought, and the practical abilities and limitations of juries. *Ross v. Bernhard*, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970). The Kansas Supreme Court has described the test to determine whether an action is equitable as " 'whether the essential nature of the action is grounded on equitable rights and is one in which equitable relief is sought.' " *Vanier v. Ponsoldt*, 251 Kan. 88, 104, 833 P.2d 949, 961 (1992). The Connecticut Supreme Court has stated:

> "[A] court must ascertain whether the action being tried is similar in nature to an action that could have been tried to a jury . . . when the constitution was adopted. This test requires an inquiry as to whether the course of action has roots in the common law, and if so, whether the remedy involved was one in law or equity."

Evans v. General Motors Corp., 277 Conn. at 510, 893 A.2d at 380. See, also, *Holt v. Parmer*, 106 Cal. App. 2d 329, 235 P.2d 43 (1951) (stating where case involves application of doctrines of equity and relief sought is equitable, parties are not entitled to jury trial).

The existence of the statutory right to vacate a judgment can be traced to 1867, prior to the adoption of the Nebraska Constitution. See Rev. Stat. § 602 (1867). The statutory provision as it read then is substantially similar to the version now in

effect. Since 1867, that provision, as now codified at § 25-2001, has bestowed upon a district court the power to vacate or modify its own judgment for one of nine enumerated reasons, including fraud. Since its enactment, the nature of this action has been equitable. As we described it in *In re Estate of West*, 226 Neb. 813, 833, 415 N.W.2d 769, 783 (1987), an action under § 25-2001 is "equitable in character, available or administered on equitable principles, and extended on equitable terms." Moreover, the relief provided by this statute—the vacation or modification of a judgment—is not legal in nature, but, rather, is equitable. See, e.g., *In re Estate of West, supra*. We conclude, therefore, that an action to set aside a judgment or order under § 25-2001 invokes the equitable powers of the court, for which there exists no constitutional right to a jury trial.

Petition to Vacate

In her second assignment of error, Linda contends that the district court erred by refusing to vacate the decree of dissolution on the basis of fraud.

[4] In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in § 25-2001(4), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). Under the rule announced in *McCarson*, it must be clear that the alleged failure to secure a just decision was attributable only to Robert's misrepresentation, and not to any fault or negligence by Linda.

In *Caddy v. Caddy*, 218 Neb. 582, 358 N.W.2d 184 (1984), we affirmed the denial of a motion to vacate or modify a divorce decree, which motion was premised on the appellee's purported submission of a false financial statement that left out certain real property accumulated during the parties' marriage. We concluded that the appellant had failed to exercise due diligence. We noted that the appellant had testified that she was aware at the time of the dissolution proceeding of the existence of the property allegedly concealed, though she was not aware of the exact value of that property. We concluded that the appellant's motion

was properly denied because she "chose to proceed without adequate representation and with at least a general knowledge of the underlying facts, and made no effort to bring before the court the correct information." *Id*. at 584, 358 N.W.2d at 186.

Similarly, the evidence here reveals that during the settlement negotiations and throughout the subsequent divorce proceeding, Linda was aware of the existence of the debenture. Prior to signing the settlement agreement, Linda sought the advice of an accountant who, in turn, advised her to seek legal advice before signing the agreement. Linda elected not to do so. After the agreement was signed and Robert had filed a petition for dissolution, Linda finally hired an attorney, as the attorney later testified, to obtain his opinion on the fairness of the settlement agreement. At that time and all times preceding, Linda had the same avenues of discovery which she has employed in the present appeal, but elected not to utilize them to her advantage. That is not to say, however, that no inquiries were made into the fairness of the agreement or that no modifications were made after the agreement was signed. In fact, Linda and her attorney negotiated for the redemption of her common stock in Chief Industries at the ESOP price of $167 per share, which was not originally provided for in the settlement agreement. It is that price which Linda now uses as the basis for valuing the debenture at $8.35 million.

On her own volition, Linda proceeded through the settlement negotiations and divorce proceeding without making any effort to ascertain what she now asserts to be the true value of the debenture, despite a general knowledge of the debenture and the ESOP price per share. Under these facts, we cannot conclude that Linda exercised the requisite due diligence and, therefore, cannot say that the district court abused its discretion in denying Linda's petition to vacate. Accordingly, we affirm the denial of Linda's petition to vacate the decree of dissolution.

CONCLUSION

For the reasons discussed above, we affirm the decision of the district court in all respects.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

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

Aaron Ferer and Robin Monsky, appellants, v. Erickson & Sederstrom, P.C., a limited liability organization, a Nebraska corporation, appellee.

759 N.W.2d 75

Filed October 27, 2006. No. S-05-619.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Supplemental opinion: Former opinion modified. Motions for rehearing overruled.

James D. Sherrets and Jason M. Bruno, of Sherrets & Boecker, L.L.C., for appellants.

Michael F. Kinney, David A. Blagg, and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Per Curiam.

This matter is before the court on motions for rehearing filed by the parties to this appeal regarding our opinion reported at *Ferer v. Erickson, Sederstrom, ante* p. 113, 718 N.W.2d 501 (2006).

The motion for rehearing filed by the appellants, Aaron Ferer and Robin Monsky, is overruled. The motion for rehearing filed by the appellee, Erickson & Sederstrom, P.C., is overruled, but we modify the opinion as follows:

In that portion of the opinion designated "Analysis," under the subheading "Individual Claim," the last paragraph, *id*. at 119, 718 N.W.2d at 507, is withdrawn. In its place, the following is inserted:

> Aaron has alleged in his operative complaint that E&S transferred his shares of AFSC to Harvey Ferer and then to Matthew Ferer and Whitney Ferer, despite his failure to endorse the stock certificate or authorize the transfer. If Aaron's allegations are true, which we must assume for purposes of a motion to dismiss, see *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006), E&S may be liable

under § 8-407 because of the alleged ineffective endorsement. We therefore conclude that Aaron has stated a claim for wrongful registration, and the district court erred in concluding otherwise.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.
MOTIONS FOR REHEARING OVERRULED.

HENDRY, C.J., not participating.

SCOTT G. STEWART, APPELLANT, V. ADVANCED GAMING TECHNOLOGIES, INC., ET AL., APPELLEES.

723 N.W.2d 65

Filed October 27, 2006. No. S-06-966.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **Constitutional Law.** Constitutional interpretation is a question of law.
3. **Supreme Court: Appeal and Error.** On questions of law, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
4. **Constitutional Law: Initiative and Referendum: Appeal and Error.** The resubmission clause under Neb. Const. art. III, § 2, presents a question whether the initiative measure is legally sufficient to be submitted to the voters, and the Secretary of State's determination of such question is subject to judicial review.
5. **Constitutional Law: Initiative and Referendum: Words and Phrases.** The phrase "essential substance" in the resubmission clause of Neb. Const. art. III, § 2, requires a broader, conceptual analysis and comparison of the fundamental theme and purpose of each initiative measure to determine if they are the "same" for purposes of the resubmission clause.
6. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
7. **Constitutional Law: Initiative and Referendum.** Substantive constitutional challenges to an initiative do not become justiciable until the proposal is approved by voters, while procedural challenges to the legal sufficiency of an initiative petition may be determined prior to an election.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Stephen D. Mossman, J.L. Spray, and Robin L. Spady, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

James A. Overcash, Krista L. Kester, and Allen M. Tate, of Woods & Aitken, L.L.P., for appellee John A. Gale.

Norman M. Krivosha, Jeremy Fitzpatrick, and Matthew M. Enenbach, of Kutak Rock, L.L.P., for appellees Advanced Gaming Technologies, Inc., et al.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

PER CURIAM.

NATURE OF CASE

Nebraska Secretary of State John A. Gale determined that an initiative measure known as the Video Keno Initiative and sponsored by Advanced Gaming Technologies, Inc.; Hastings Keno, Inc.; Big Red Lottery Services Ltd., by Big Red Lottery Services Inc. as managing general partner; and Papillion Keno, Inc. (collectively the Sponsors) should be placed on the ballot for the November 7, 2006, general election. Scott G. Stewart, appellant, brought this action against the Sponsors and Gale in the district court for Lancaster County pursuant to Neb. Rev. Stat. § 32-1412 (Reissue 2004). In his amended complaint, Stewart sought an injunction preventing Gale from placing the Video Keno Initiative on the ballot at the 2006 general election. Stewart also sought a declaratory judgment that the Video Keno Initiative violated the resubmission clause in article III, § 2, of the Nebraska Constitution, because it submitted to the people the essential substance of previous initiatives more often than once in 3 years. Stewart further sought a declaratory judgment that the Video Keno Initiative was legally insufficient and violated provisions concerning games of chance and lotteries in article III, § 24, because it sought by statutory amendment to effect change that was required to be made by constitutional amendment. The Sponsors moved to dismiss. The district court determined that the issue with regard to article III, § 24, was not ripe for determination. Gale and the Sponsors moved for summary judgment. The district court determined that the Video Keno Initiative did not violate the resubmission clause in article III, § 2. The court entered orders which granted the motions, denied relief to Stewart, and dismissed Stewart's action, thereby permitting the

Video Keno Initiative to remain on the ballot. Stewart appealed. We expedited Stewart's appeal. We affirm.

STATEMENT OF FACTS

On February 1, 2006, the Sponsors submitted to Gale a sworn statement of petition sponsors stating that they planned to sponsor an "initiative petition to authorize video keno." On February 21, the Sponsors filed with Gale the final text of the Video Keno Initiative. The Video Keno Initiative proposes to amend certain sections of the Nebraska County and City Lottery Act, Neb. Rev. Stat. §§ 9-601 to 9-653 (Reissue 1997 & Cum. Supp. 2004), to authorize the use of video keno in any county, city, or village lottery. In particular, the Video Keno Initiative proposes to add language to § 9-607(1)(c) which would allow lottery winners to be determined by the following method:

> By use of a game known as video keno in which each player selects or quick-picks numbers from a total of eighty numbers displayed on a video player station and a computer or other electronic selection device randomly selects numbers from the same pool of eighty numbers and the winning plays are determined by the correct matching of the numbers selected by the player with the numbers randomly selected by the computer or other electronic selection device and displayed on the video player station.

(Emphasis omitted.)

The Video Keno Initiative also proposes to add language to § 9-607(1)(d) which would allow in part that "[a]mounts won are shown as credits on a video player station and may be either (A) replayed or (B) printed on a paper ticket which may be redeemed for cash or replayed." (Emphasis omitted.) In addition, the Video Keno Initiative proposes to add sections to the act relating to the distribution of video keno proceeds, including the following language to be added to § 9-650:

> If a video keno lottery is operated by a lottery operator pursuant to subdivision (1)(c)(iii) of section 9-607, the county, city, or village shall require the lottery operator to remit thirty-six percent of the gross gaming revenue on a monthly basis to the county, city, or village in lieu of any other local gaming or amusement tax or contractually agreed amount which might otherwise apply to the video keno lottery, and

> the lottery operator shall retain the remainder of the gross gaming revenue. Out of that remainder, the lottery operator shall deduct and retain fourteen percent of the gross gaming revenue as a service fee for video keno lottery conducted at a sales outlet location, and any remaining amount shall be divided equally between the lottery operator and the sales outlet location. The sales outlet location shall be responsible for depositing cash from the video player station to a separate account established by the lottery operator and shall be responsible for the cost of any required bond or other security.

(Emphasis omitted.)

The Video Keno Initiative further proposes to amend § 9-648 to impose on any county, city, or village conducting a video keno lottery a tax of 9 percent of the gross gaming revenue. The Video Keno Initiative proposes to define "[g]ross gaming revenue" as "gross proceeds minus (1) prizes, (2) any prize reserves established by the county, city, village, or lottery operator, and (3) any federal tax imposed on the video keno lottery." (Emphasis omitted.)

On July 7, 2006, the Sponsors submitted to Gale what they contended were sufficient valid signatures from registered voters, sufficiently distributed by county, to qualify the Video Keno Initiative for consideration by the people at the November 7 general election. On July 12, Gale issued a memorandum in which he set forth, among other things, his conclusion that the Video Keno Initiative did not violate the resubmission clause found in article III, § 2. Gale also noted a "potential constitutional impediment" to the Video Keno Initiative raised in an opinion issued by the Attorney General. Gale stated as follows:

> The issue is this: whether the Video Keno initiative can be placed on the ballot because it proposes enactment of a "statute" to allow a form of gambling not permitted by the Nebraska Constitution. If legislative proposals to authorize "electronic" or "video" keno are unconstitutional because such gambling is not a permissible form of "lottery" for community betterment purposes, then is this statutory initiative measure equally an impermissible "game of chance" prohibited by Article III, section 24, of the Nebraska Constitution?

Gale stated that he had "limited authority to interpret the validity or construction of any proposed law," and he declined to address the issue. Gale further noted that there was a question whether the issue was ripe for review until after the election.

On August 3, 2006, Stewart, a Nebraska resident, taxpayer, and registered voter of Lincoln, Lancaster County, Nebraska, filed a complaint in the district court for Lancaster County, naming the Sponsors and Gale as defendants. Stewart filed an amended complaint on August 9. Stewart asserted that his complaint was filed pursuant to Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1995 & Cum. Supp. 2004) (Uniform Declaratory Judgments Act), §§ 25-1062 to 25-1080 (Reissue 1995 & Cum. Supp. 2004) (regarding injunctions), and various provisions found in §§ 32-1401 to 32-1417 (Reissue 2004), including but not limited to § 32-1412 (regarding authority of district court for Lancaster County to review decision of Secretary of State to place initiative on ballot). Stewart sought a temporary and permanent injunction preventing Gale from placing the Video Keno Initiative on the November 7 general election ballot. Stewart also sought declaratory judgments that (1) the Video Keno Initiative violated the resubmission clause of article III, § 2, and (2) the Video Keno Initiative was legally insufficient because it "seeks to enact a Statutory Initiative to provide for gambling which would require the passage of a Constitutional Amendment."

Stewart asserted what he labeled as three theories of recovery. In his "First Theory of Recovery," Stewart alleged that the Video Keno Initiative was legally insufficient because it violated the resubmission clause. He asserted that the Video Keno Initiative was the same measure, in essential substance, as Initiatives 417, 419, and 420 which were submitted to Nebraska voters on November 2, 2004. We recently noted that of these three initiatives, only Initiative 419 was approved by the voters, and we described the three initiatives as follows:

> Initiative 417 proposed to amend article III, § 24, of the Nebraska Constitution, which generally prohibits the Legislature from authorizing games of chance which are not specifically permitted in the constitution, by adding the following language: "(5) This section shall not apply to laws

> enacted by the people by initiative measures by which the people may, contemporaneously with the adoption of this subsection or at any time thereafter, provide for the authorization, operation, regulation, and taxation of all forms of games of chance." Initiative 419 dealt with taxation of games of chance conducted at casinos and other locations. Initiative 420 proposed a statute to (1) authorize all games of chance at casinos in metropolitan class cities within 2 miles of the Nebraska border; (2) authorize the use of electronic, mechanical, or other gaming devices at "strategic premises" where at least 250 such devices were operated, as well as at racetracks; and (3) authorize the use of "[l]imited gaming devices" at casinos, "strategic premises," racetracks, and establishments selling alcoholic liquor for consumption on the premises. Initiative 420 also sought to establish the numbers of such casinos and gaming devices to be operated at various locations and to create a commission to regulate gaming. Initiatives 417 and 420 were defeated by the voters at the 2004 election, but Initiative 419 was approved. See Nebraska Blue Book 2004-05 at 1020-23. See, also, Neb. Rev. Stat. §§ 9-901 to 9-904 (Supp. 2005).

State ex rel. Lemon v. Gale, ante p. 295, 298-99, 721 N.W.2d 347, 352 (2006).

In his "Second Theory of Recovery," Stewart asserted that the Video Keno Initiative was legally insufficient in that the changes proposed by the Video Keno Initiative could not be achieved by statutory amendment and would require an amendment to the Nebraska Constitution because the proposed changes would violate article III, § 24(1), which provides:

> Except as provided in this section, the Legislature shall not authorize any game of chance or any lottery or gift enterprise when the consideration for a chance to participate involves the payment of money for the purchase of property, services, or a chance or admission ticket or requires an expenditure of substantial effort or time.

Finally, in his "Third Theory of Recovery," Stewart asserted that the "Ballot Title and Explanatory Statement" for the Video Keno Initiative was insufficient in that it failed to explain to voters that the proposed statutory amendments would require a

constitutional amendment in order to allow video keno games. Stewart subsequently moved to dismiss his third theory of recovery, and such theory is not at issue in this appeal.

The Sponsors moved to dismiss Stewart's claims. The district court, on August 29, 2006, entered an order which denied the motion to dismiss Stewart's first theory of recovery (regarding resubmission) but granted the motion to dismiss the second theory of recovery (regarding article III, § 24). With respect to the second theory of recovery, the court determined that Stewart was requesting the court to determine the substantive constitutionality of the Video Keno Initiative under article III, § 24. The court concluded that because the initiative was only a proposed statute, the "controversy is not ripe for determination and this court is without jurisdiction to enter a judgment." The article III, § 24, theory of recovery was dismissed.

The Sponsors and Gale moved for summary judgment on the first theory of recovery (regarding resubmission). On August 31, 2006, the court entered an order which granted summary judgment in favor of the Sponsors and Gale. The court noted that "[k]eno had been made legal earlier, but it was in the form of pen and paper only." The court determined that the only change proposed pursuant to the Video Keno Initiative was to "permit electronic keno in addition to the paper kind, as well as create an alternative distribution of keno revenue." The court compared the Video Keno Initiative with Initiatives 417, 419, and 420 considered by the voters in 2004, and concluded that the Video Keno Initiative and the prior initiatives were "not the same as a matter of law." The court rejected Stewart's argument that the resubmission clause applied to "any measure relating to the same general topic as the earlier measure" and that the Video Keno Initiative and the earlier initiatives related to the general topic of expanded gambling. The court instead applied what it described as a " 'substantially the same' " test or a " 'same essential substance' " test. The court noted that Initiative 420 "was intended to expand casino gambling and other forms of gambling, which are currently illegal, throughout the state," while the Video Keno Initiative did not "purport to increase the number of keno lotteries or the location in which keno lotteries are planned" but instead aimed to "permit the electronic version of the game to be

played, while the current statute allows only paper ticket forms of the game to be played." The court concluded that under either a "substantially the same" test or a "same essential substance" test, the Video Keno Initiative did not violate the resubmission clause. The court therefore granted summary judgment in favor of the Sponsors and Gale with respect to Stewart's first theory of recovery, and, Stewart's other theories of recovery having been dismissed, the court dismissed Stewart's action. Stewart appeals.

ASSIGNMENTS OF ERROR

Stewart claims, restated and consolidated, that the district court erred in concluding that the Video Keno Initiative did not violate the resubmission clause and in concluding that Stewart's challenge regarding article III, § 24, was not ripe for review.

STANDARDS OF REVIEW

[1-3] A jurisdictional question which does not involve a factual dispute is a matter of law. *State ex rel. Lemon v. Gale, ante* p. 295, 721 N.W.2d 347 (2006). Constitutional interpretation is a question of law. *Id*. On questions of law, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *Id*.

ANALYSIS

Video Keno Initiative Does Not Violate Resubmission Clause.

Stewart first asserts that the district court erred in determining that the resubmission clause did not preclude the Video Keno Initiative from being placed on the ballot for the November 2006 general election. We conclude that the court did not err in this determination.

[4] We initially note that the parties agree and we conclude that the resubmission issue presented in this case is justiciable prior to the election. We recently reasoned in *State ex rel. Lemon, supra*, that in connection with a resubmission challenge, the question is not whether the initiative measure, if adopted, would violate one or more substantive provisions of the state or federal Constitution, but, rather, whether the initiative measure complies with the requirement of article III, § 2, that it not be the same "either in form or in essential substance" as another measure submitted to the voters within a preceding 3-year period.

The resubmission clause presents a question whether the initiative measure is legally sufficient to be submitted to the voters, and the Secretary of State's determination of such question is subject to judicial review. *Id.*

[5] The resubmission clause provides that "[t]he same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years." Neb. Const. art. III, § 2. In *State ex rel. Lemon, supra*, we rejected arguments that the resubmission clause imposed a narrow restriction preventing only the same initiative measure from being resubmitted using synonyms or mere rewording of language. In *State ex rel. Lemon*, we also rejected the district court's interpretation of the phrase " 'same . . . in essential substance' " to mean " 'substantially the same.' " *Ante* at 305, 721 N.W.2d at 356. Instead, we interpreted the phrase "essential substance" in the resubmission clause to require a broader, conceptual analysis and comparison of the fundamental theme and purpose of each initiative measure to determine if they are the "same" for purposes of the resubmission clause. *Id.*

The parties in this case do not argue that the Video Keno Initiative measure is the same in form as the 2004 measures. Instead, we must determine whether the Video Keno Initiative is the "same . . . in essential substance" as the initiative measures which appeared on the ballot in 2004. Although in his complaint, Stewart asserted that the Video Keno Initiative was the same measure as Initiatives 417, 419, and 420, on appeal, Stewart focuses his arguments on Initiatives 417 and 420. Stewart argues that the Video Keno Initiative and Initiatives 417 and 420 all had the same broad purpose of expanding gambling in Nebraska. Stewart argues in particular that video keno was among the "games of chance" that could have been authorized under the constitutional amendment proposed in Initiative 417 and that would have been authorized by the statutory amendment proposed in Initiative 420, had those two initiatives been adopted. The Sponsors and Gale argue that in contrast to the 2004 initiative measures which sought to authorize a variety of new "games of chance," the Video Keno Initiative seeks to authorize an alternative method of playing keno, which is a form of

"lottery" already authorized under the Nebraska City and County Lottery Act, §§ 9-601 to 9-653.

In Gale's July 12, 2006, memorandum concluding that the Video Keno Initiative did not violate the resubmission clause, he noted that the Video Keno Initiative "seeks to amend current statutory provisions contained in the Nebraska City and County Lottery Act, by allowing the use of 'video keno' devices." Gale further noted that "the proposed statutory change does not mandate new dedicated gaming sites or create a new board or commission to regulate the proposed devices as proposed in Initiative Measure 420 of 2004." Gale further found nothing in Initiative 417 that bore "any similarity to provisions contained in the current Video Keno measure."

The district court, in granting summary judgment in favor of the Sponsors and Gale, concluded that the Video Keno Initiative did not violate the resubmission clause. The court stated as follows:

> Initiative 420 was intended to expand casino gambling and other forms of gambling, which are currently illegal, throughout the state. The video keno initiative does not purport to increase the number of keno lotteries or the location in which keno lotteries are planned. It does however . . . permit the electronic version of the game to be played, while the current statute allows only paper ticket forms of the game to be played. Therefore, the purpose and effect of the two initiatives demonstrate the two are not "substantially the same."

Although the court used the "substantially the same" test that we rejected in *State ex rel. Lemon v. Gale, ante* p. 295, 721 N.W.2d 347 (2006), we agree with the conclusion that the Video Keno Initiative does not violate the resubmission clause.

Initiative 417 proposed to amend article III, § 24, of the Nebraska Constitution, which provides in paragraph (1) that except as otherwise provided, "the Legislature shall not authorize any game of chance or any lottery or gift enterprise when the consideration for a chance to participate involves the payment of money for the purchase of property, services, or a chance or admission ticket or requires an expenditure of substantial effort or time." As we noted in *State ex rel. Lemon*, Initiative 417

would have removed a constitutional barrier to the operation of casinos by providing that article III, § 24, would not apply to laws enacted by initiative which authorized the " 'operation, regulation, and taxation of all forms of games of chance.' " *Ante* at 307, 721 N.W.2d at 358. We further noted in *State ex rel. Lemon* that the consequence of the constitutional amendment proposed by Initiative 417 was apparent from Initiative 420 which would have enacted a statute by initiative providing for the operation of games of chance at various locations, including casinos located in a city of the metropolitan class. In *State ex rel. Lemon*, we determined that the essential substance of Initiative 417 submitted to the electorate in 2004 was "amending the constitution to authorize enactments permitting the operation of games of chance." *Ante* at 308, 721 N.W.2d at 358.

Initiative 420 proposed statutory amendments that under the authority of the constitutional amendment proposed in Initiative 417, would have authorized games of chance at casinos in metropolitan class cities within 2 miles of the Nebraska border; authorized the use of electronic, mechanical, or other gaming devices at "strategic premises" where at least 250 such devices were operated, as well as at racetracks; and authorized the use of "[l]imited gaming devices" at casinos, "strategic premises," racetracks, and establishments selling alcoholic liquor for consumption on the premises. The statutory amendments proposed by Initiative 420 would also have established the numbers of such casinos and gaming devices to be operated at various locations and would have created a commission to regulate gaming. The fundamental theme and purpose of Initiative 420 was the enactment of a statute authorizing the operation of "games of chance" at casinos and other locations.

By contrast, the fundamental theme and purpose of the Video Keno Initiative is to amend the definition of "lottery" under the Nebraska City and County Lottery Act to include video keno and to provide for the distribution of proceeds and the taxation of revenues from video keno. The Video Keno Initiative does not propose to expand the types of sites at which keno is played or the types of entities that may operate keno lotteries. The Video Keno Initiative therefore has a fundamental theme different from that of Initiative 417 which proposed a constitutional

amendment to authorize enactments by initiative permitting the operation of a variety of "games of chance" and from that of Initiative 420 which proposed a statutory amendment to authorize the operation of such "games of chance" at various new and existing locations.

In deciding the resubmission issue, it is important to note that a distinction is made in article III, § 24, between a "game of chance" and a "lottery." In paragraph (1) of article III, § 24, "game of chance" and "lottery" are referred to as distinct activities that are generally prohibited. However, paragraphs (2) and (3) provide that a "lottery" may be authorized under certain conditions and with certain requirements. Lotteries have been authorized by the Legislature pursuant to certain statutes, including the Nebraska City and County Lottery Act. Keno in its traditional paper form has been authorized as a form of "lottery" under the Nebraska City and County Lottery Act. See § 9-607(1)(c)(ii). Whereas Initiative 417 proposed a constitutional amendment to permit the authorization of enactments by initiative permitting "games of chance" and Initiative 420 proposed a statutory amendment to authorize certain "games of chance," the Video Keno Initiative proposes to amend the statutory term "lottery" to authorize an additional method of playing keno. The Video Keno Initiative therefore has a fundamental theme of amending the types of legally authorized "lotteries," whereas the 2004 initiatives had a fundamental theme of expanding the types of constitutionally authorized "games of chance."

In connection with the resubmission analysis, Stewart argues that video keno is in reality a type of "game of chance" that would have been permitted under the constitutional and statutory amendments proposed by Initiatives 417 and 420. For completeness, we note that Stewart makes a similar argument, which we do not resolve, with respect to his assertion that the Video Keno Initiative violates article III, § 24, because it impermissibly authorizes a form of "lottery" that is actually a prohibited "game of chance." For purposes of determining whether the Video Keno Initiative violates the resubmission clause, we consider only what the Video Keno Initiative purports to achieve in comparison to what the 2004 initiatives proposed to achieve. In making this comparison for purposes of our resubmission analysis, we need

not determine whether the Video Keno Initiative can constitutionally achieve what it proposes to do.

Having determined that the fundamental theme and purpose of the Video Keno Initiative is not the same as the fundamental theme and purpose of Initiatives 417 and 420, we conclude that the Video Keno Initiative does not violate the resubmission clause. The district court reached the same conclusion and did not err in granting summary judgment in favor of the Sponsors and Gale on the resubmission issue. The order on summary judgment is affirmed.

The Substantive Constitutional Challenge to the Video Keno Initiative Is Not a Preelection Justiciable Issue.

Stewart next asserts that the district court erred in determining that Stewart's challenge with respect to article III, § 24, was not ripe for review and in therefore granting the Sponsor's motion to dismiss the theory of recovery as to that issue. Because we conclude that Stewart's challenge is a substantive constitutional challenge and is not a preelection justiciable issue, we affirm the district court's order dismissing this theory of recovery.

[6] In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *State ex rel. Lemon v. Gale, ante* p. 295, 721 N.W.2d 347 (2006); *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001); *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). At this time, the statutory amendments proposed under the Video Keno Initiative have not been and, indeed, may not be approved by the voters. We must therefore initially decide whether we can reach Stewart's challenge based on article III, § 24, prior to the election at which voters will be asked to consider the Video Keno Initiative.

As we recently noted in *State ex rel. Lemon, supra*, this court held in *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996), that the district court was correct in *Duggan* in declining to rule on the constitutionality of an initiative measure prior to the election because "[t]o the degree that appellants sought a declaration that [the initiative measure], if adopted, would enact amendments which violated the U.S. or the Nebraska Constitution, appellants were seeking an advisory opinion." 249

Neb. at 424, 544 N.W.2d at 77. We held in *Duggan* that the question did not become justiciable until the measure was adopted by the voters. Other courts have stated similar reasoning. For example, the Supreme Court of Nevada recently observed that "Preelection challenges to an initiative's substantive constitutionality are not ripe. [A]ny harm is highly speculative since the measure may not even pass at election time." *Herbst Gaming, Inc. v. Sec'y of State*, 122 Nev. 877, 887-88, 141 P.3d 1224, 1231 (2006). See, similarly, *Purcell v. Gonzalez*, 549 U.S. 1, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006) (Stevens, J., concurring) (counseling against speculation in case involving constitutional challenge to existing election law).

In contrast to the substantive constitutional challenge which was not ripe in *Duggan*, we have had occasion to consider challenges which bear on the regulation of the initiative process itself and we have found these latter challenges justiciable prior to an election. Recently, we found that the resubmission issue in *State ex rel. Lemon* involved requirements for placing a measure on the ballot and, as such, was logically justiciable prior to the election. See § 32-1409(3). Similarly, in *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003), this court held that an issue regarding whether an initiative petition was defective because it failed to include a sworn statement listing the names and addresses of its sponsors, as required by § 32-1405(1), was justiciable prior to the election. We held that § 32-1412(2) permitted a court to hear and decide a challenge to the legal sufficiency of an initiative petition prior to an election. We stated that "[q]uestions dealing with statutory provisions concerning the form of a petition and the technical requirements of the sponsors affect the legal sufficiency of an initiative." *Loontjer*, 266 Neb. at 908-09, 670 N.W.2d at 307. Furthermore, in two separate concurrences to *Loontjer*, three justices of this court indicated that the issue whether an initiative violated the single subject rule of article III, § 2, was a justiciable issue prior to the election. The separate concurrence of two justices in *Loontjer* distinguished the holding with respect to preelection justiciability in *Duggan, supra*. The concurrence noted that *Duggan* involved an attempt "to litigate the substantive constitutionality of the measure before it was adopted," whereas the single subject rule contained in article III,

§ 2, was a "procedural requirement" affecting the legal sufficiency of the measure which would be justiciable prior to the election. *Loontjer*, 266 Neb. at 920, 925, 670 N.W.2d at 314, 317 (Wright, J., concurring; Gerrard, J., joins).

[7] We have thus made a distinction between substantive constitutional challenges to an initiative which do not become justiciable until the proposal is approved by voters and procedural challenges to the legal sufficiency of an initiative petition which may be determined prior to an election. Other courts have also carefully distinguished between procedural and substantive constitutional challenges. In this regard, the Alaska Supreme Court has stated that "[o]ne type of challenge invokes 'the particular constitutional and statutory provisions regulating initiatives' " while "[o]ther challenges are grounded in 'general contentions that the provisions of an initiative are unconstitutional.' " *Alaska Action v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004). The Alaska Supreme Court stated that courts may review the first type of challenge "right away," while "the court should not decide [the second] type of challenge until the initiative has been enacted by the voters." *Id*. See, also, *Coppernoll v. Reed*, 155 Wash. 2d 290, 119 P.3d 318 (2005). We agree with this observation of the Alaska Supreme Court.

Procedural challenges generally involve issues of compliance with the requirements that govern the process by which initiatives are submitted to the electorate. Procedural challenges to the legal sufficiency of initiative petitions are authorized by § 32-1412, and such challenges may involve violations of either statutory or constitutional requirements relating to the initiative process. See, *State ex rel. Lemon v. Gale, ante* p. 295, 721 N.W.2d 347 (2006) (violation of resubmission rule of Neb. Const. art. III, § 2); *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003) (violation of sworn statement requirement of § 32-1405(1)).

We have stated that the power of initiative must be liberally construed to promote the democratic process. *State ex rel. Lemon, supra*; *Loontjer, supra*. Further, the right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter. *State ex rel. Lemon, supra*; *State ex rel. Stenberg v. Moore*, 258

Neb. 199, 602 N.W.2d 465 (1999). Finally, the provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. *State ex rel. Lemon, supra*; *Loontjer, supra*. With these admonitions in mind, and given the statutory directive in § 32-1412 which anticipates involvement of the courts, it necessarily follows that procedural challenges involving initiative petitions will be resolved by the courts. Thus, issues involving protection and regulation of the initiative process are appropriate for preelection resolution so that the voters are presented with an initiative which does not suffer from a procedural or technical infirmity.

In contrast to procedural challenges to the legal sufficiency of initiative petitions which are authorized by statute, there is no statutory authorization for courts to issue preelection advisory opinions regarding the substantive constitutionality of proposed initiatives, and it would not ordinarily be prudent to issue such opinions. As an initial matter, we note that a challenged initiative may not be adopted by the voters and thus an opinion would become unnecessary. Further, we have stated that the Legislature and the electorate are concurrently equal in rank as sources of legislation. *State ex rel. Lemon, supra*; *Loontjer, supra*. Because the Legislature and the electorate are concurrently equal in rank as sources of legislation, and because a court would not be expected to render an advisory opinion regarding the substantive constitutionality of legislation pending in the Legislature prior to its enactment, a court should similarly avoid passing on the substantive constitutionality of a proposed initiative unless and until the measure is approved by the voters. In this regard, we note that the Arizona Supreme Court has stated: "The separation of powers doctrine dictates our deference to legislative functions. 'The legislative power of the people is as great as that of the legislature.' . . . Voter initiatives, part and parcel of the legislative process, receive the same judicial deference as proposals before the state legislature . . . ." (Citations omitted.) *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997).

Article III, § 2, of the Nebraska Constitution provides in part: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted independently of the Legislature." The legislative power of the

people must be effectual. *State ex rel. Lemon, supra*; *Loontjer, supra*. Preelection judicial review of substantive challenges to initiatives tends to lessen the effectiveness of the constitutional initiative power "reserved by the people," Neb. Const. art. III, § 2, and, regardless of the merits of the proposed initiative, inappropriately injects the courts into political debates. In *Coppernoll v. Reed*, 155 Wash. 2d 290, 304, 119 P.3d 318, 325 (2005), the Washington Supreme Court observed:

> Not only would [preelection judicial review of substantive constitutional challenges] infringe upon the constitutional rights of the people, but it would needlessly inject our courts into a political dispute that is time sensitive. . . . We do not substantively review the legislature's bills before enactment, and will not do so with the people's right of direct legislation.

Perhaps anticipating the barrier to preelection review of Stewart's substantive constitutional challenge to the Video Keno Initiative, he alleges that the Video Keno Initiative is "legally insufficient" because the proposed statutory amendments would violate the "prohibition on gambling" in article III, § 24. He argues that the change sought to be effected by the Video Keno Initiative would require the passage of a constitutional amendment. Stewart thus attempts to characterize his article III, § 24, challenge as a procedural challenge by arguing that an initiative is "legally insufficient" if it attempts to achieve by statutory amendment that which can only be achieved by constitutional amendment. While it may be true that a statutory amendment cannot effect change that requires a constitutional amendment, Stewart's challenge is nevertheless in essence a challenge to the substantive constitutionality of the Video Keno Initiative. Before one could conclude that the proposed statutory change could not be effected without a constitutional amendment, it would need to be established that the proposed statutory change is not consistent with substantive provisions of the constitution. Such an intricate and complex challenge is in reality a substantive constitutional challenge to the initiative rather than a procedural challenge to the legal sufficiency of the initiative. This substantive constitutional challenge in the guise of a procedural challenge is not suitable for preelection review. See *Herbst Gaming,*

Inc. v. Sec'y of State, 122 Nev. 877, 884, 141 P.3d 1224, 1229 (2006) (stating that "if substantive constitutional challenges were allowed in the guise of procedural . . . challenges, it would open the floodgates to almost any kind of preelection challenge"). See, also, *Coppernoll, supra*.

We determine that Stewart's challenge to the Video Keno Initiative as violative of article III, § 24, is a substantive constitutional challenge that is not justiciable unless and until the voters approve the Video Keno Initiative. We therefore conclude that the district court did not err in determining that the issue was not ripe for review and in granting the Sponsors' motion to dismiss the theory of recovery raising the article III, § 24, issue. This order is affirmed.

CONCLUSION

Stewart brought this action against the Sponsors and Gale to remove the Video Keno Initiative from appearing on the ballot for the November 7, 2006, general election. The district court dismissed the action, thus permitting the Video Keno Initiative to remain on the ballot. Stewart appeals to this court, claiming that the dismissal and the reasoning on which it was based were in error. Specifically, Stewart challenges the district court's orders which determined that the Video Keno Initiative did not violate the resubmission clause in article III, § 2, of the Nebraska Constitution and which further determined that Stewart's substantive challenge to the Video Keno Initiative was not justiciable prior to the November election.

We conclude that the resubmission issue relates to the regulation of the initiative process itself and, being of a procedural nature, is justiciable prior to the election. Because the Video Keno Initiative is not the same in essential substance as certain initiatives submitted in 2004, we conclude that the resubmission clause does not bar the Video Keno Initiative from being placed on the ballot for the November 7, 2006, general election. We further conclude that the intricate and complex issue raised regarding the potential constitutional problem of the Video Keno Initiative under the games of chance and lottery provisions in article III, § 24, is a substantive constitutional challenge, does not relate to the initiative process itself, and is not suitable for

preelection review. This is so largely because the legislative power reserved to the people in article III, § 2, of the Nebraska Constitution is similar to that of the Legislature and, regardless of the merits of proposed voter initiatives, such initiatives receive the same judicial deference as proposals before the state Legislature.

The district court did not err in determining that the Video Keno Initiative was not barred by the resubmission clause and in further determining that the merits of the challenge under article III, § 24, were not ripe for judicial review. Having rejected Stewart's assignments of error, we affirm the district court's dismissal of the action.

AFFIRMED.

HEAVICAN, C.J., not participating.

TODD A. KANNE AND JEANETTE W. SHERMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED IN THE STATE OF NEBRASKA, APPELLANTS, V. VISA U.S.A. INC. AND MASTERCARD INTERNATIONAL, INC., APPELLEES.

723 N.W.2d 293

Filed November 3, 2006. No. S-05-299.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** Appeals of a district court's grant of a motion to dismiss for failure to state a claim require an appellate court to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Vendor and Vendee: Federal Acts: Statutes: Courts.** Because the remedial provisions of the unlawful restraint of trade statutes, at Neb. Rev. Stat. § 59-821 (Reissue 2004), and the Clayton Act, at 15 U.S.C. § 15(a) (2000), are so similar, Neb. Rev. Stat. § 59-829 (Reissue 2004) requires Nebraska courts to follow the federal courts' construction of the Clayton Act.
3. **Vendor and Vendee: Federal Acts: Damages.** Despite the broad remedial language of 15 U.S.C. § 15(a) (2000) of the Clayton Act, not every person claiming an injury from an antitrust violation can recover damages.
4. **Vendor and Vendee: Statutes: Standing.** The 2002 amendment to the remedial provision of Neb. Rev. Stat. § 59-821 (Reissue 2004) does not reject all standing requirements. It simply removed the automatic bar against indirect purchaser actions announced in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). It did not eliminate separate and distinct antitrust standing requirements.

5. **Standing.** *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004), did not eliminate antitrust standing requirements.
6. **Vendor and Vendee: Courts.** The direct-purchaser doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), and the direct-injury doctrine of *Associated General Contractors v. Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), are analytically distinct.
7. **Unjust Enrichment: Proof.** To recover on a claim for unjust enrichment, the plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff.

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

Marvin O. Kieckhafer, of Smith Peterson Law Firm, L.L.P., and Daniel M. Cohen, of Cuneo, Gilbert & LaDuca, L.L.P., for appellants.

Fredric H. Kauffman, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and Lyman L. Larsen, and, on brief, Michael J. Leahy, of Stinson, Morrison & Hecker, L.L.P., for appellees.

Stephen V. Bomse, of Heller, Ehrman, White & McAuliffe, L.L.P., for appellee Visa U.S.A. Inc.

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

CONNOLLY, J.

In their class action claims, appellants, Todd A. Kanne and Jeanette W. Sherman, allege that appellees, Visa U.S.A. Inc. (Visa) and MasterCard International, Inc. (MasterCard), violated provisions of Nebraska's unlawful restraint of trade statutes (referred to as the "Junkin Act"), Neb. Rev. Stat. §§ 59-801 to 59-831 (Reissue 2004) and Neb. Rev. Stat. §§ 59-1603 to 59-1609 (Reissue 2004) of the Consumer Protection Act. In addition, appellants allege a claim for unjust enrichment for money had and received.

Appellants claim that Visa and MasterCard each tied the sale of credit and debit network processing services to their member banks and that this tying resulted in Visa's and MasterCard's member banks charging merchants excessive fees for processing debit transactions. Appellants further claim that because of

the excessive fees, the merchants passed those costs on to consumers in artificially inflated prices.

Visa and MasterCard moved to dismiss for lack of standing. See Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). The district court dismissed appellants' claims, finding that appellants lacked standing under either the Junkin Act or the Consumer Protection Act and that they failed to allege an unjust enrichment claim. We granted bypass.

We hold that appellants lack standing for their antitrust claims because their alleged injuries are derivative and remote. Appellants' claims for unjust enrichment fail because Visa and MasterCard were not unjustly enriched. We affirm.

BACKGROUND

Appellants' Allegations

Appellants allege the following facts: Visa and MasterCard are membership corporations whose member banks issue debit and credit cards to consumers. Credit cards provide the consumer with the option to buy now and pay later, whereas debit cards deduct the purchase amount directly from the cardholder's bank account.

To accept these cards, a merchant must enter into a contract with one of the member banks. Under these contracts, merchants agree to pay a merchant discount fee, which typically ranges from 1.4 to 4.5 percent of the transaction amount. In exchange, merchants get processing services and a guarantee from the member bank that the merchants will be paid when a customer uses a Visa or MasterCard.

According to appellants, Visa and MasterCard used their market power to force merchants to purchase their debit card processing services by tying credit card services to debit card services. Under this tying arrangement, Visa and MasterCard forced merchants to accept their debit cards as a condition of accepting their credit cards. Visa and MasterCard charged the same fees for both types of cards even though the risks associated with credit cards are greater than for debit cards. Merchants normally would not pay these higher rates, but to be competitive, they need the credit card services. This arrangement restrained the market for the provision of debit card processing services by

foreclosing competition and preventing the development of more efficient and less expensive services. The tying arrangement caused merchants to pay "supra-competitive, artificially inflated costs" for their debit card processing services, and as a result, the merchants passed these costs to consumers through inflated prices for goods.

In conclusion, appellants allege the tying arrangement was an attempted monopolization that violated the provisions of the Junkin Act and the Consumer Protection Act. They also allege common-law claims for unjust enrichment.

District Court's Decision

The district court granted Visa and MasterCard's motion to dismiss appellants' petition for lack of standing. The court first addressed appellants' claims under the Junkin Act and found that because the remedial provisions in § 59-821 were similar to federal antitrust law, federal antitrust precedent was persuasive. The court then applied the standing factors set forth in *Associated General Contractors v. Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), and concluded that appellants lacked standing. The court also held that appellants are not indirect purchasers entitled to bring suit because they did not purchase Visa's or MasterCard's debit card services, either directly or indirectly.

The court also dismissed appellants' claim under the Consumer Protection Act after noting the remedial language of § 59-1609 is virtually identical to that of the Junkin Act and, therefore, the same *Associated General Contractors* standing analysis applies. Finally, the court dismissed appellants' common-law claims for unjust enrichment because appellants did not state a cause of action under either the Junkin Act or the Consumer Protection Act. The court also found that Visa and MasterCard did not retain any potential enrichment because they had settled with the merchants for the contested debit processing services.

ASSIGNMENT OF ERROR

Appellants assign that the trial court erred in granting Visa and MasterCard's motion to dismiss.

STANDARD OF REVIEW

[1] Appeals of a district court's grant of a motion to dismiss for failure to state a claim require this court to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. See, *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005); *Butler Cty. Sch. Dist. No. 502 v. Meysenburg*, 268 Neb. 347, 683 N.W.2d 367 (2004).

ANALYSIS

Appellants claim that Visa and MasterCard engaged in tying that violated the Junkin Act. The Junkin Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal." § 59-801. It prohibits an "attempt to monopolize . . . any part of the trade or commerce, within this state." § 59-802. The Junkin Act further provides a potential damages remedy to a "person who is injured in his or her business or property" by a violation of the act, whether the injured person "dealt directly or indirectly with the defendant." § 59-821.

[2] Like the Junkin Act, § 4 of the federal Clayton Act, codified at 15 U.S.C. § 12 et seq. (2000), also provides a potential damages remedy to a person "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). The Junkin Act mandates that when its provisions are "similar to the language of a federal antitrust law, the courts of this state in construing such [provisions] shall follow the construction given to the federal law by the federal courts." § 59-829. Because the remedial provisions of the Junkin Act and Clayton Act are so similar, § 59-829 requires that we follow the federal courts' construction of the Clayton Act.

[3] Despite the broad remedial language of the Clayton Act, not every person claiming an injury from an antitrust violation can recover damages under § 4. Although a "literal reading of the [federal] statute is broad enough to encompass every harm that can be attributed *directly or indirectly* to the consequences of an antitrust violation," the "federal courts have been 'virtually unanimous in concluding that Congress did not intend the antitrust

laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.' " (Emphasis supplied.) *Associated General Contractors v. Carpenters*, 459 U.S. 519, 529, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972).

Here, appellants do not allege that their injuries stem from their purchases of the purportedly tied debit network processing services that Visa and MasterCard provided to the merchants. Instead, appellants claim only derivative and remote injuries through their purchases from the merchants of a variety of retail goods that Visa and MasterCard neither manufactured nor sold.

In discussing remote injuries, the U.S. Supreme Court, in *Associated General Contractors*, identified five factors for determining whether a plaintiff asserts an injury too remote from an alleged antitrust violation to confer standing to recover damages: (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market; (2) whether the injury alleged is a direct, firsthand impact of the restraint alleged; (3) whether there are more directly injured appellants with motivation to sue; (4) whether the damages claims are speculative; and (5) whether the plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages. Applying the above factors, the U.S. Supreme Court held that the claims of a labor union, which alleged that defendants had coerced third parties to enter into relationships with nonunion firms, should be dismissed. *Id.*

The Eighth Circuit Court of Appeals and other federal courts have routinely applied the standing factors identified in *Associated General Contractors* to dismiss claims based on derivative or remote injuries under federal antitrust law. See, e.g., *Henke Enterprises, Inc. v. Hy-Vee Food Stores*, 749 F.2d 488, 489-90 (8th Cir. 1984) (affirming dismissal of plaintiff's claim because it "was neither a competitor, participant, nor consumer within the [allegedly restrained] retail grocery market"; there were "more directly affected parties" who could redress any antitrust violation; and the plaintiff's damages were "speculative" because " 'diminished consumer activity at any given shopping area could result from myriad independent reasons unrelated to [the] alleged antitrust violation' "). See, also, *Pocahontas*

Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211 (4th Cir. 1987); *Peck v. General Motors Corp.*, 894 F.2d 844 (6th Cir. 1990); *Alpha Shoe Service v. Fleming Companies, Inc.*, 849 F.2d 352 (8th Cir. 1988); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538 (9th Cir. 1987); *Sharp v. United Airlines, Inc.*, 967 F.2d 404 (10th Cir. 1992). Although the above federal decisions applying *Associated General Contractors*' standing factors postdate our decision in *Barish v. Chrysler Corporation*, 141 Neb. 157, 3 N.W.2d 91 (1942), they are consistent with *Barish*. In *Barish*, we held a shareholder-officer of a corporation lacked standing to sue under the Junkin Act for injuries that were derivative of the corporation's injuries from the alleged antitrust violation.

Application of Antitrust Standing Principles Under *Associated General Contractors*

The district court correctly dismissed appellants' Junkin Act claims for lack of standing for several reasons. First, appellants are not competitors in the allegedly affected market, which is the business of providing debit network processing services to merchants. Nor are appellants consumers of those services.

Second, appellants allege injuries that are derivative and remote. They allege that the "tying arrangements . . . have forced *Merchants* to accept [Visa and MasterCard brand debit cards] and pay fees which are supra-competitive." (Emphasis supplied.) Thus, they claim to have been injured only derivatively, because merchants allegedly raised the prices of all goods that they sold, thereby "pass[ing] those prices on to consumers in the for[m] of artificially-inflated and advanced prices for goods." Appellants do not allege that they were injured directly, or even indirectly, by purchasing debit processing services in a chain of distribution. Appellants, instead, assert a derivative injury based on a theory that merchants passed on the cost of an alleged tying of debit processing services to increase the prices of thousands of unrelated retail goods the merchants sold to consumers such as appellants.

Third, there are more directly injured parties. The alleged direct victims of Visa's and MasterCard's conduct—the more than 4 million merchants nationwide that accepted Visa or MasterCard—litigated for years, and it is undisputed that they settled a class action challenging the very same tying alleged

here. See *In re Visa Check/MasterMoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *affirmed sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), *cert. denied* 544 U.S. 1044, 125 S. Ct. 2277, 161 L. Ed. 2d 1080. Denying appellants an antitrust remedy will not leave a significant antitrust violation undetected or unremedied. See *Associated General Contractors v. Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983).

Fourth, appellants' damages claims are speculative. Appellants do not and cannot allege that they overpaid for purchases of debit processing services from merchants. Instead, appellants assert that they paid an overcharge on every retail good that they purchased from every Nebraska merchant that accepted Visa or MasterCard, over the course of several years, regardless of the form of payment used to make their purchases. Like the claimed damages in *Henke Enterprises, Inc. v. Hy-Vee Food Stores*, 749 F.2d 488, 490 (8th Cir. 1984), the claimed price increases over a period of years could have resulted "from myriad independent reasons" unrelated to the alleged violation of the Junkin Act.

Finally, appellants' claims pose a risk of a double recovery and would require a complex apportionment of damages. Visa and MasterCard settled with the nationwide merchant class for more than $3 billion, and appellants base their claims on the same alleged tying asserted in the merchants' class action. Appellants thus seek a recovery duplicative of the settlement sums that Visa and MasterCard are paying to Nebraska merchants. See, e.g., *Ho v. Visa U.S.A., Inc.*, 16 A.D.3d 256, 257, 793 N.Y.S.2d 8, 9 (2005) (defendants "have been subjected to judicial remediation . . . and any recovery here would be duplicative"). Moreover, apportioning damages would be a nightmare. Appellants' claims would require an apportionment of damages among each Nebraska merchant at which appellants shopped and among each item that each appellant purchased at each merchant—an incredibly complex task. None of the factors from *Associated General Contractors* weigh in favor of concluding that appellants' claimed injury is the type intended to be protected by antitrust laws. We conclude that appellants lack standing under *Associated General Contractors* to seek recovery for Visa and MasterCard's alleged violation of the Junkin Act.

Statutory Language of Junkin Act Does Not Eliminate Antitrust Standing Principles

Appellants attempt to skirt the antitrust standing requirements by arguing that the Junkin Act "grant[s] all persons standing to bring an action, if they suffered injury from a violation." Brief for appellants at 6.

In 1977, the U.S. Supreme Court held that only overcharged direct purchasers may recover under § 4 of the Clayton Act under a pass-on theory in an antitrust action. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). In 2002, the Nebraska Legislature amended § 59-821 of the Junkin Act for the specific and limited purpose of eliminating *Illinois Brick Co.* as a bar against suits by indirect purchasers. The amendment provides that the damages remedy afforded to persons injured by a violation of the Junkin Act would be available whether such injured person dealt directly or indirectly with the defendant. § 59-821. The amendment thus removed the bar against suits by an indirect purchaser plaintiff who dealt indirectly with the defendant by purchasing the defendant's product from an intermediary, rather than directly from the defendant.

But the amendment to the remedial provision of the Junkin Act, § 59-821, does not reject all standing requirements. Section 59-821 is silent on what standing requirements courts should apply to damages claims under it. To the contrary, § 59-821 mirrors the equally broad wording of the federal antitrust remedial statute, § 4 of the Clayton Act, pursuant to which courts uniformly impose standing requirements on antitrust damages actions. See, e.g., *Associated General Contractors v. Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972); *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910).

Moreover, the U.S. Supreme Court explained in *Illinois Brick Co.* that "the question of which persons have been injured by an illegal overcharge . . . is analytically distinct from the question of which persons have sustained injuries too remote to give them standing." 432 U.S. at 728 n.7.

[4] The 2002 amendment did not reject the application of standing requirements to damages actions under § 59-821. It

simply removed the automatic bar against indirect purchaser actions announced in *Illinois Brick Co. v. Illinois, supra*. It did not eliminate separate and distinct antitrust standing requirements that bar appellants' claims.

Arthur v. Microsoft Corp. Does Not Eliminate Antitrust Standing Principles

Appellants argue that *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004), rejected the application of antitrust standing requirements under § 59-821. In *Arthur*, we addressed whether the *Illinois Brick Co.* bar against indirect purchaser suits should apply under the Consumer Protection Act; we did not address the distinct antitrust standing requirements that bar claims based on derivative or remote injuries. The plaintiffs in *Arthur* were purchasers of Microsoft Corporation's Windows 98 operating system. They claimed that Microsoft Corporation violated the Consumer Protection Act by using its monopoly power to charge supracompetitive prices for Windows 98. The plaintiffs had a direct relationship with Microsoft Corporation because they were end-user licensees of Windows 98, but they had purchased Windows 98 indirectly through a computer distributor. Microsoft Corporation argued that because the plaintiffs were indirect purchasers of Windows 98, their claims should be barred because of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977).

[5] We emphasized that "[t]he issue presented is whether an indirect purchaser may bring a civil action under the [Consumer Protection] Act." *Arthur v. Microsoft Corp.*, 267 Neb. at 593, 676 N.W.2d at 34. We concluded that the Consumer Protection Act contemplates an action by indirect purchasers. Although we loosely used the word standing to refer to whether *Illinois Brick Co.* barred the plaintiffs' claims, we did not discuss *Associated General Contractors* or discuss, much less reject, the antitrust standing requirements that *Illinois Brick Co.* had expressly distinguished as analytically distinct. Our decision in *Arthur* does not eliminate antitrust standing requirements.

Moreover, appellants are not indirect purchasers permitted to sue under *Arthur*. The plaintiffs in *Arthur* had a direct relationship with Microsoft Corporation because they were end-user licensees of Windows 98, but each had purchased Windows 98

indirectly through an intermediary. *Arthur v. Microsoft Corp., supra*. Here, appellants did not purchase the debit card services, either directly or indirectly; rather, they claim to have paid higher prices for goods resulting from the merchants' purchase of Visa's and MasterCard's debit card services.

Application of Antitrust Standing Principles Is Consistent With *Arthur v. Microsoft Corp.*

Appellants also argue that applying the antitrust standing principles identified in *Associated General Contractors* would be inconsistent with the decision in *Arthur* to allow indirect purchaser suits. Specifically, appellants assert that "the wholesale adoption of the [Associated General Contractors] five-factor test by Nebraska courts would make meaningless the broad grant of standing to ordinary consumers . . . upheld . . . in Arthur." Brief for appellants at 17.

The antitrust standing factors articulated in *Associated General Contractors v. Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), however, can accommodate the approval of "indirect purchaser" actions in *Arthur* and the 2002 amendment to the Junkin Act.

[6] The Seventh Circuit rejected state antitrust law claims on standing grounds, despite the state's rejection of the *Illinois Brick Co.* bar. For example, in *International Broth. of Teamsters v. Philip Morris*, 196 F.3d 818 (7th Cir. 1999), the court noted that Illinois does not follow the *Illinois Brick Co.* doctrine. The Seventh Circuit nevertheless affirmed the dismissal of Illinois' antitrust law claims for lack of antitrust standing, reasoning that the *Illinois Brick Co.* doctrine "is only one of several obstacles to [plaintiffs'] recovery on an antitrust claim. The direct-purchaser doctrine of *Illinois Brick* [*Co.*] and the direct-injury doctrine of *Associated General Contractors* are analytically distinct." *International Broth. of Teamsters v. Philip Morris*, 196 F.3d at 828.

District Court Correctly Held That Appellants Fail to State Antitrust Claim Under Consumer Protection Act

Appellants also purport to allege an antitrust claim under the Consumer Protection Act. Like the Junkin Act, the Consumer

Protection Act provides that "[a]ny contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce shall be unlawful," § 59-1603, and prohibits an "attempt to monopolize . . . any part of trade or commerce." § 59-1604.

Appellants do not dispute that the standing requirements for an antitrust claim under the Consumer Protection Act should be the same as for an antitrust claim under the Junkin Act. That is because, as the district court noted, the remedial provisions in § 59-821 of the Junkin Act and in § 59-1609 of the Consumer Protection Act are nearly identical. Both provisions offer a potential damages remedy to a person injured in his or her business or property by a violation, whether such injured person dealt directly or indirectly with the defendant. §§ 59-821 and 59-1609. Both provisions also are subject to § 59-829, which provides:

> When any provision of sections 59-801 to 59-831 and sections 84-211 to 84-214 *or any provisions of Chapter 59* is the same as or similar to the language of federal antitrust law, the courts of this state in construing such sections or chapter shall follow the construction given to the federal law by the federal courts.

(Emphasis supplied.)

The district court's dismissal of appellants' Consumer Protection Act claims for lack of standing also is supported by decisions dismissing claims based on derivative and remote injuries under the consumer protection statutes of other states. For example, in the parallel action against Visa and MasterCard in New York, the consumer-plaintiffs also asserted claims under New York's consumer protection from deceptive acts and practices statute, N.Y. Gen. Bus. Law § 349 (2004). See *Ho v. Visa U.S.A., Inc.*, 16 A.D.3d 256, 793 N.Y.S.2d 8 (2005). The New York appellate court unanimously affirmed the dismissal of those claims "because of the remoteness of [the plaintiffs'] damages from the alleged injurious activity." *Id.* at 257, 793 N.Y.S.2d at 8-9. The court concluded that even if the merchants had paid overcharges for debit services, it did not result in an actionable claim for any perceived injuries to the merchants' customers. Those injuries were too remote and derivative to countenance such a cause of action. *Id.*

New York's highest court reached a similar conclusion in *Blue Cross and Blue Shield v. Philip Morris*, 3 N.Y.3d 200, 818 N.E.2d 1140, 785 N.Y.S.2d 399 (2004). There, the court refused to presume an intent to include recovery for derivative injuries under New York's consumer protection statute in the absence of a clear indication of such intent from the legislature. Such derivative injuries, the court found, occur when the loss arises solely as a result of injuries sustained by another party. The court concluded that a plaintiff alleging such derivative injuries "has no standing to bring an action under [New York's consumer protection statute] because its claims are too remote." *Blue Cross and Blue Shield v. Philip Morris*, 3 N.Y.3d at 208, 818 N.E.2d at 1145, 785 N.Y.S.2d at 404. Here, because appellants allege injuries that are derivative and remote, they also fail to state a claim under Nebraska's Consumer Protection Act.

District Court Correctly Held That Appellants Failed to State Claim for Unjust Enrichment for Money Had and Received

[7] Appellants' remaining claims seek money for unjust enrichment that Visa and MasterCard allegedly received from the purportedly inflated prices for retail goods that appellants paid. To recover on such a claim, the plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff. See *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 618 N.W.2d 429 (2000). See, also, e.g., *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

Appellants, however, fail to state a claim for unjust enrichment because they do not and cannot allege that Visa and MasterCard unjustly obtained or retained any money from appellants. Appellants contend Visa's and MasterCard's alleged tying resulted in the extraction of an extra sales tax from appellants consisting of the inflated costs associated with merchants' having to involuntarily accept Visa Check and MasterMoney debit cards. Thus, appellants argue, Visa and MasterCard "should not be permitted to profit by engaging in anti-competitive acts in violation of Nebraska's antitrust and consumer protection laws." Brief for appellants at 18. But for reasons previously noted,

appellants cannot state an actionable antitrust tying claim against Visa or MasterCard under the Junkin Act or the Consumer Protection Act. Moreover, appellants fail to allege that Visa and MasterCard retained any money. Appellants have failed to allege an enrichment that is unjust.

A nationwide class of merchants—including Nebraska merchants that accepted Visa and MasterCard—already sued to recover any extra fees purportedly related to the alleged tying. The merchant class settled those claims for more than $3 billion, a sum that the federal court found was reasonable. *In re Visa Check/MasterMoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *affirmed sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), *cert. denied* 544 U.S. 1044, 125 S. Ct. 2277, 161 L. Ed. 2d 1080. As the district court concluded, Visa and MasterCard have not retained any potential enrichment because they settled their claims with 5 million merchants and agreed to pay over $3 billion into a settlement trust over a dispute involving the same allegedly inflated costs at issue in the present case. We agree and also conclude that appellants did not allege a claim for unjust enrichment or money had and received.

CONCLUSION

Because appellants' injuries are derivative and remote, they lack standing to bring their antitrust claims. In addition, their unjust enrichment claim fails because Visa and MasterCard were not unjustly enriched. We affirm.

AFFIRMED.

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

STATE OF NEBRASKA, APPELLEE, V.
TERRY A. BARFIELD, APPELLANT.

723 N.W.2d 303

Filed November 3, 2006. No. S-05-973.

1. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.

2. **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.
3. **Trial: Prosecutorial Misconduct.** In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
4. **Trial: Prosecuting Attorneys.** Public prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial. Prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.
5. **Prosecuting Attorneys: Convictions.** It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
6. **Criminal Law: Trial.** A prosecution solidly based upon the law and the facts and supported by sound reasoning does not require bolstering by appeals to passion and prejudice.
7. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain the conviction before the cause is remanded for a new trial.
8. **Double Jeopardy: Appeal and Error.** Although the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction.
9. **Convictions: Appeal and Error.** An appellate court will not set aside a finding of guilty in a criminal case where the finding is supported by relevant evidence, and only where the evidence lacks sufficient probative force as a matter of law may the appellate court set aside a finding of guilty as unsupported by the evidence beyond a reasonable doubt.
10. **Robbery: Intent.** Neb. Rev. Stat. § 28-324 (Reissue 1995) requires an intent to "steal" for there to be the commission of the crime of robbery.
11. **Robbery.** The victim has his or her property stolen regardless of whether the thief thereafter uses it for selfish gain, destroys it, abandons it, or gifts it to another.
12. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
13. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if the aider or abettor knew that the perpetrator of the act possessed the required intent or that the aider or abettor himself or herself possessed the required intent.
14. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence.

15. **Aiding and Abetting: Proximate Cause.** An aider and abettor is accountable for that which is proximately caused by the principal's conduct regardless of whether the crime would have occurred without the aider and abettor's participation.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for a new trial.

Glenn A. Shapiro and Jill A. Daley, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

MCCORMACK, J.

I. NATURE OF CASE

On September 6, 2003, Terrill Williams, the victim, died of a single gunshot wound. He was shot at a location referred to by witnesses as "the projects" in Douglas County, Nebraska, by Clinton Lamar Barfield (Clinton). The defendant, Terry A. Barfield, Clinton's uncle, was charged with felony murder as an aider and abettor of the attempted robbery of the victim. He was also charged with use of a deadly weapon to commit a felony, possession of a deadly weapon by a felon, and being a habitual criminal.

After a trial by jury, the defendant was found guilty of felony murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. After the court's denial of the defendant's motion for new trial, the defendant was sentenced to life imprisonment for the felony murder and, pursuant to the habitual criminal statute, to 25 years' imprisonment for each of the other two counts, all sentences to run consecutively. The defendant timely appealed. The defendant argues that the evidence was insufficient to support his convictions, that the defendant was prejudiced by the trial court's refusal to declare a witness unavailable and allow into evidence her deposition testimony, that the defendant was prejudiced by the trial court's failure to include an instruction to the jury regarding the reliability of jailhouse informants, and that various remarks by the prosecutor

during closing arguments, although not objected to at trial, constituted plain error.

We conclude that the misconduct of the prosecutor during argument to the jury would, if uncorrected, result in damage to the integrity, reputation, and fairness of the judicial process. Accordingly, we find plain error in the prosecutor's conduct and reverse the convictions. We consider the sufficiency of the evidence in order to determine whether double jeopardy bars a new trial. We ultimately conclude that the evidence was sufficient and remand the cause for a new trial.

II. BACKGROUND

1. Trial Testimony

(a) State Witnesses

The State's theory of the case against the defendant was that Clinton and the defendant were drug dealers in the projects and that they were upset with the victim for taking away some of their business. The victim was not from the projects, but often stayed there with his girl friend, who lived in the apartment where the shooting occurred. Under the "unwritten rules" of the projects, if one was not from the projects, then one needed special permission from someone like the defendant in order to sell drugs to project residents.

Late in the evening of September 5, 2003, Clinton and two friends, Dontavious Valentine and "Dreds," went to confront the victim. According to Clinton's testimony, they had only heard that the victim was dealing in the projects and they went to settle the issue and serve an "eviction notice" if, in fact, the victim was selling drugs. The evidence is unclear as to the defendant's involvement in planning the confrontation of the victim, but it is undisputed that at some point after Clinton, Valentine, and Dreds began their confrontation of the victim at the apartment, the defendant joined them.

Prosecution witness Gayla McSpadden witnessed the confrontation from outside the apartment, while witnesses Michael Rafael Hill (Rafael) and Kevin F. McIntyre were inside the apartment when Valentine knocked on the door and called the victim outside. The confrontation ultimately developed into Clinton's threatening the victim with a gun and demanding a

"pocket check." McSpadden, Valentine, and Clinton testified that Clinton obtained the gun from the defendant, who handed it to Clinton either immediately prior or subsequent to his demands for a "pocket check." According to Valentine, when the defendant handed Clinton the gun, the defendant told Clinton to "handle his business." Rafael did not see the moment when Clinton obtained the gun, but testified that the gun he saw Clinton use to threaten the victim belonged to the defendant. Rafael had seen the gun some days before, when the defendant was talking about how he had bought it to pass out "eviction notices."

According to Clinton, the "pocket check" was to see if the victim had any drugs on him. Clinton claimed he was not trying to rob the victim, but only trying to discover whether the victim was selling drugs. Clinton admitted, however, that if the victim had turned any drugs out of his pockets, then Clinton would have taken the drugs and either "stomp[ed]" them or let "a crackhead lady" smoke it all in front of the victim. McSpadden explained that a "pocket check" meant generally to "[g]ive up" what one had.

Valentine described Clinton as demanding that the victim " '[G]ive it up, or I [will] kill you.' " Rafael testified that Clinton was "robbing" the victim, and he described how the victim told Clinton and the defendant, " 'You all going to have to do what you got to do. I ain't about to give you all my shit.' " The defendant responded to the victim, " 'Fuck that. Come on, get up off of it.' " According to Rafael, as Clinton was demanding the "pocket check," the defendant was telling Clinton to " 'do what you got to do' " and was saying that this was an "eviction notice" and that they were tired of " 'mother fuckers being down in their neighborhood.' "

When the victim refused the "pocket check," Clinton fired the gun into the ground. At that point, McSpadden yelled "one time," which meant that the police were coming. Everyone started to run away, and the victim tried to retreat to the apartment. According to the testimony of Valentine, Clinton, and Rafael, the defendant checked and saw that the police were not really coming and called Clinton and the others back. According to Rafael, the defendant announced, " 'The mother fuckin' police

ain't coming. Come back here and do what you came here to do. Finish the shit off.' "

The victim did not quite get the door of the apartment closed, and there was some dispute among the prosecution witnesses whether the defendant forced the door open, insisted that the occupants not shut the door on him, or merely knocked. It is clear, however, that Clinton entered the apartment and continued the confrontation with the victim. The defendant either entered the apartment or remained nearby in the doorway or on the front stoop.

Clinton again began demanding a "pocket check." The witnesses described that the defendant was encouraging Clinton and again told Clinton to "handle his business." According to Valentine, the defendant was "boosting up [Clinton's] ego because everybody hear Clinton tell [the victim] he don't want to do it to [the victim]." Clinton described that when the victim had "his back up against the wall," saying, " '[m]an, this ain't for us,' " Valentine and the defendant were telling Clinton to " 'forget what he's talking about, man, handle that.' " Clinton testified that he understood the defendant to be telling him that "[i]f you don't come off something, take some type of action," meaning to shoot the victim.

When the victim heard the defendant's remark, the victim grabbed for the pistol, and Clinton described that "it just went off." Other witnesses described a scuffle culminating in Clinton's getting the victim into a headlock and shooting him. The victim stumbled out the front door and fell to the ground. According to Clinton, the defendant took back the gun and they all fled. The evidence from the scene of the crime showed that the victim had approximately $188 in cash, gold chains, and numerous business cards and telephone numbers in his pockets.

(b) Defense Witnesses

The defense's theory of the case was that the defendant was not there when the shooting of the victim took place or that, if there, the defendant was an innocent bystander to the crime. Defense witnesses Marquita Michelle Johnson and Mark Terry Eugene Harrison Morris (Harrison) testified that on the night in question, they were sitting outside on the front stoop of a

residence a few doors down from the apartment where the shooting occurred. They saw Clinton, Valentine, and Dreds walk toward the apartment and testified that Clinton already had a gun when he walked by. According to Harrison and Johnson, the defendant did not arrive at the apartment until it was "already too late" and the victim had been shot. According to Johnson, when the defendant arrived and saw that the victim was shot, he said, " 'oh, shit, fuck, man.' "

The defense also called Marquita Russell, who was inside the apartment the night the victim was killed. Russell testified that she first saw the defendant when the victim stepped outside after Valentine knocked on the door. The defense pointed out that in statements she had made to the police, Russell said she " 'could have swore [Clinton] pulled [the gun] from his self,' " and did not get it from the defendant. However, at trial, Russell testified that she actually had not seen how Clinton had gotten the gun. Russell testified that she did not hear the defendant say anything to Clinton during his confrontation with the victim.

2. Closing Argument

Two themes ran through the State's closing argument. First, the prosecutor described the defendant as a ruler and bully of everyone in the projects. Second, he emphasized the courage of the witnesses who testified against the defendant, stating, "Do you have any idea the courage that it takes to come in here and testify against [the defendant]?"

The State then used vivid imagery to help explain how the defendant played such an important part in not only providing the murder weapon, but in pressuring Clinton to use it. The State described the defendant as a 36-year-old "holding onto the last vestiges of his reign" in the "young man's game" of "[s]linging dope." The State argued: "You see, [the defendant] is the king of the . . . Projects, not a kind and benevolent ruler, but a vicious dictator who rules with intimidation and tyranny like a two-headed hydra." No one was "slinging dope in this hood without the express approval of [the defendant] because [the defendant] decides who can come and go in the projects."

The State argued that the defendant ordered the robbery of the victim "to establish that he's still got it." Had they succeeded

in getting the "booty" from the victim's pockets, there was no doubt that the defendant would have "claimed the prize." The State again described the defendant as "[t]his man, this tower of terror, monster of mayhem, this king of killers . . . ." The State pointed out the enormous "strength of the human spirit" present in those testifying against such a "monster."

In the defendant's closing argument, defense counsel described Clinton as lying and generally described inconsistencies amongst the witnesses as generated by lies. Defense counsel then described how, reflecting upon how everyone was lying, he had gone to a dictionary to look up the word "lie." Defense counsel proceeded to state for the jury the definition of "lie." Counsel then reiterated how perhaps Valentine "had to go with a particular theme to make sure he's not sitting at that table with the other defendants in this case."

Defense counsel argued that the jury should discredit most of the prosecution's witnesses and that the jury should instead focus on the police summations of Russell's and Rafael's statements that they had seen Clinton with the gun before the defendant had arrived.

When the prosecutor began the State's rebuttal argument, the first thing he said to the jury was as follows:

> You know, in 20 years as a prosecutor the hardest thing I think I've had to do is sit there with a straight face when a criminal defense lawyer had to look up the definition of "lie" in a dictionary. Why, I thought that was printed on the back of their business cards.

The State went on to describe that "what we should be looking up is the definition of a white lie." The State examined the inconsistencies in various witness testimony. In the State's argument to the jury, it accused the defense and the defense witnesses of "half-truths and white lies":

> They're trying to make this look like Marquita Russell saved the day for [the defendant]. Give me a break. . . . We got Marquita Russell who never waivered [sic]. We got a police report that is incorrect. Shoot him. He made a mistake. . . .
>
> This body of justice, give me a break. We're going to take that from them? That's going to give you a reasonable

> doubt? Then walk him. Walk him, with a gold watch and a parade on the way out the door. Don't be insulted. Do not take smoke and mirrors for evidence, folks. This is incredible what they're trying to get you to believe. Incredible.

The State went on to deny that Valentine was given any deal, and described as "smoke and mirrors" an argument by defense counsel that Clinton could be out on parole within 10 years if he were sentenced to only the minimum of the sentence for his plea.

The jury deliberated and returned a verdict against the defendant of guilty on all counts. The trial court denied the defendant's motion for new trial, and the defendant appeals.

III. ASSIGNMENTS OF ERROR

The defendant assigns that the trial court erred in (1) accepting the jury's verdict finding the defendant guilty of felony murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon; (2) not permitting a witness for the defense to be declared unavailable and her deposition read into the record; (3) failing to include an instruction, pursuant to Neb. Rev. Stat. § 29-1928 (Cum. Supp. 2004), regarding the reliability of the testimony of jailhouse informants; and (4) denying the defendant's motion for new trial.

IV. STANDARD OF REVIEW

[1] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. See, *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999); *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997); *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992).

[2] 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).

V. ANALYSIS

1. Prosecutorial Misconduct

We first address the defendant's allegation that prosecutorial misconduct denied him a fair trial. Because the defendant did not object to the challenged comments, we review this issue for plain error. See, *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); *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997) (addressing whether prosecutorial misconduct constituted plain error where defendant failed to make timely motion for mistrial thereon). Plain error may be found on appeal when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. See, *State v. Bartholomew, supra*; *State v. Kula, supra*; *State v. Wilcox, supra*. As described by the U.S. Supreme Court, "the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

[3] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. See, e.g., *U.S. v. Rivera*, 153 F.3d 809 (7th Cir. 1998); *United States v. Hernandez*, 779 F.2d 456 (8th Cir. 1985); *Judge v. State*, 539 S.W.2d 340 (Tenn. Crim. App. 1976).

We turn now to the specific instances of misconduct asserted here. The defendant complains that the State committed prosecutorial misconduct in (1) its hyperbolic description, by various terms, of the defendant as a monster and (2) its reference to defense attorneys as having the definition of "lie" written on the backs of their business cards. In both respects, we find that the prosecutor's comments were clearly improper. Indeed, the State

does not take issue with the fact that the prosecutor's remarks were improper. Regarding the prosecutor's remark that defense attorneys have "lie" written on the backs of their business cards, the State's attorney during oral argument conceded, "Improper? Yes, absolutely. I can't even pretend to make an argument that it's not." The State asserts only that the misconduct in this case does not demand reversal under the plain error doctrine.

[4-6] Public prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial. Prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused. See, *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989); *State v. Davis*, 185 Neb. 433, 176 N.W.2d 657 (1970); *Pierce v. State*, 173 Neb. 319, 113 N.W.2d 333 (1962); *Garcia v. State*, 159 Neb. 571, 68 N.W.2d 151 (1955). As explained by the U.S. Supreme Court in *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935), a prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Accordingly, "[i]t is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.* Because the "average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed," "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id*. As this court has further pointed out, a prosecution solidly based upon the law and the facts and supported by sound reasoning does not require bolstering by appeals to passion and prejudice. *State v. Casados*, 188 Neb. 91, 195 N.W.2d 210 (1972).

As reflected above, in its closing argument, the State referred to the defendant in turn as a "vicious dictator," a "two-headed hydra," a "tower of terror," a "monster of mayhem," and a "king of killers." In *Kellogg v. Skon*, 176 F.3d 447, 451-52 (8th Cir.

1999), the prosecutor similarly referred to the defendant as a " 'monster,' " a " 'sexual deviant,' " and a " 'liar.' " The court concluded that "[n]ot only are these comments an improper 'personal expression of [the] defendant's culpability,' . . . but the 'monster' and 'sexual deviant' comments also create inflammatory prejudice." *Id.* at 451-52. The court stated that such comments had "no place in a courtroom." *Id*. at 452.

In *State v. Casados, supra*, we considered the prosecutor's remarks in closing argument referring to the defendant as a " 'despicable' " person, "the most lowly person the jury would have occasion to judge," and "a pimp." *Id.* at 96, 195 N.W.2d at 214. We noted that the trial judge, in response to these remarks, did not issue a severe rebuke, but merely directed the jury to disregard any statements not supported by the evidence. We further observed that the evidence presented against the defendant was not overwhelming. We concluded that under the particular circumstances presented, the inflammatory remarks which focused on other crimes and not the offense with which the defendant was charged, were sufficiently prejudicial to warrant reversal of the defendant's conviction. See *id.*

We explained that the prosecutor's argument clearly violated one or more of the subparagraphs of Standard 3-5.8, currently found at the American Bar Association Standards for Criminal Justice Prosecution Function, and Defense Function (3d ed. 1993). Part III of the Standards, and especially Standards 3-5.1 to 3-5.10 inclusive, are "appropriate and proper standards and should be complied with by prosecutors in the trial of criminal cases." See *State v. Casados*, 188 Neb. at 97-98, 195 N.W.2d at 214-15. Subparagraph (c) of Standard 3-5.8 provides that during argument to the jury, "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury." Similarly, subparagraph (d) states: "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."

Regarding the extent to which this type of inappropriate comment is generally considered to have denied a defendant a fair trial, we recognize that "[h]yperbole in closing arguments is hardly rare, and juries should be given credit for the ability to filter out oratorical flourishes." *Com. v. Griffith*, 45 Mass. App.

784, 787, 702 N.E.2d 17, 19 (1998). See, also, *State v. Casados, supra*. We need not delve, however, into whether the hyperbolic comments against the defendant in this case, considered alone, would warrant reversal under the plain error standard. As the defendant points out, the prosecutor did not stop there.

During rebuttal, the prosecutor's first statement to the jury was as follows:

> You know, in 20 years as a prosecutor the hardest thing I think I've had to do is sit there with a straight face when a criminal defense lawyer had to look up the definition of "lie" in a dictionary. Why, I thought that was printed on the back of their business cards.

In essence, the prosecutor insinuated that defense lawyers are all liars. This is gravely improper. As described by the court in *U.S. v. Linn*, 31 F.3d 987, 993 (10th Cir. 1994):

> [C]omments by prosecutors to the effect that a defense attorney's job is to mislead the jury in order to garner an acquittal for his client is not only distasteful but borders on being unethical. . . . Such comments only serve to denigrate the legal profession in the eyes of the jury and, consequently, the public at large.

See, also, Canon 7, EC 7-37, of the Code of Professional Responsibility (lawyer should not make unfair or derogatory personal reference to opposing counsel).

In *State v. Wade*, 7 Neb. App. 169, 581 N.W.2d 906 (1998), the Nebraska Court of Appeals reversed the defendant's conviction and remanded for a new trial because the prosecutor suggested to the jury during closing argument that defense counsel was able to obtain acquittals for guilty defendants. The court explained that such a statement "strikes against the underpinnings of our system of criminal jurisprudence" wherein prosecuting attorneys have a duty to conduct trials in a fair and impartial manner. *Id.* at 180, 581 N.W.2d at 914.

In *State v. Lockhart*, 24 Kan. App. 2d 488, 947 P.2d 461 (1997), the court found that the prosecutor's comments during closing arguments referring to the defendant and defense counsel as "liars" denied the defendant a fair trial, and the court reversed the conviction. The court explained that "[j]uries must be given an opportunity to exercise reason and sound judgment in

deciding the facts of a case, free from passion and prejudice." *Id.* at 492, 947 P.2d at 465. "Trials cannot be allowed to degenerate into name-calling contests." *Id.*

The court in *State v. Pham*, 27 Kan. App. 2d 996, 1001, 10 P.3d 780, 785 (2000), reversed the defendant's conviction after considering the prosecutor's remarks during closing argument that defense counsel's " 'job is to defend his client. They don't care about the truth.' " Although defense counsel had failed to object as to the inflammatory nature of the remarks, on appeal, the court found the remarks constituted plain error. The court explained that, in essence, the prosecutor had called defense counsel a liar. The court further explained that the prosecutor's comments "reflect an ill will toward the defendant and opposing counsel that is destructive to the professionalism on which the bar prides itself." *Id.* at 1005, 10 P.3d at 787. The remarks "constituted gross and flagrant misconduct that denied the defendant a fair trial." *Id.* at 1005, 10 P.3d at 787-88. The prosecutor had simply "crossed the line." *Id.* at 1006, 10 P.3d at 788.

Considering the cumulative effect and the egregious nature of the prosecutor's comments presented here, we similarly conclude that to leave such conduct uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. We again emphasize that the remarks made by the prosecutor, especially the prosecutor's statement to the effect that defense lawyers are liars, are of a very serious nature. In addition, the prosecutor's unacceptable remarks do not reflect a single, isolated instance, but were numerous. Moreover, because the disparaging remark as to defense attorneys was made during rebuttal, defense counsel had no opportunity to respond to and mitigate the last impression left with the jury before deliberations: that defense counsel, like all defense lawyers, was a liar.

In an analogous case, the court in *U.S. v. Rodrigues*, 159 F.3d 439 (9th Cir. 1998), reversed the conviction on certain counts against the defendant where the prosecutor told the jury in closing that defense counsel was trying to deceive them as to what proof was required to convict the defendant on those counts. Although the jury was instructed as to the proper elements of proof on the counts, the court still could not dismiss as harmless the prosecutor's improper remarks when immediately after

the prosecutor's closing, the jury went home for the night and defense counsel did not object or move for a mistrial until the following morning. The court explained:

> The last thing the jurors heard as they went home for the night and thought about the case they would have to decide the next day was that the representative of the United States held defense counsel to be a liar who from the beginning of the case had set out to mislead them. The representative of the United States does not speak as a mere partisan. He speaks on behalf of a government interested in doing justice. When he says the defendant's counsel is responsible for lying and deceiving, his accusations cannot fail to leave an imprint on the jurors' minds. And when no rebuke of such false accusations is made by the court, when no response is allowed the vilified lawyer, when no curative instruction is given, the jurors must necessarily think that the false accusations had a basis in fact. The trial process is distorted.

Id. at 451.

While it could be argued here that defense counsel invited the rebuttal remark by calling the State's witnesses liars, we draw a distinction between overzealous attacks on witness credibility and what amounts to an attack on the personal integrity of defense counsel. See *State v. Smith*, 14 Ohio St. 3d 13, 470 N.E.2d 883 (1984) (frustration of prosecutor does not justify improper comments, especially where defense did not make similar personal attacks). Finally, we note that although, as determined below, the evidence was sufficient to support the judgment, it cannot be said that the evidence was overwhelming against the defendant. Conflicting evidence was presented as to whether there had been an attempted robbery and as to the extent of the defendant's involvement. The credibility of the witnesses was a key factor, and the implication that defense counsel was a liar, and by extension was willing to suborn perjury, was highly prejudicial when viewed in that context.

Considering the context of the prosecutor's remarks and the trial as a whole, we find this to be a rare instance in which unobjected-to prosecutorial misconduct constitutes plain error demanding a retrial.

2. Sufficiency of Evidence

[7,8] We next address the defendant's assertion that the evidence was insufficient to support a conviction on any of the counts charged. Upon finding error in a criminal trial, the reviewing court must determine whether the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006). Although the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction. *Id.*; *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

[9] 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). An appellate court will not set aside a finding of guilty in a criminal case where the finding is supported by relevant evidence, and only where the evidence lacks sufficient probative force as a matter of law may the appellate court set aside a finding of guilty as unsupported by the evidence beyond a reasonable doubt. *State v. Walton*, 246 Neb. 893, 523 N.W.2d 699 (1994).

The defendant first argues that the evidence was insufficient on the felony murder and use of a deadly weapon charges because the prosecution failed to prove (1) that the defendant encouraged or intentionally helped Clinton commit the crime of attempted robbery, (2) that the defendant knew Clinton intended to commit the crime of attempted robbery or expected Clinton to commit the crime of attempted robbery, or (3) that the crime of attempted robbery was ever committed by Clinton. In essence, the defendant asserts that there was insufficient proof of the underlying felony of attempted robbery and that even if an attempted robbery occurred, the defendant was not an aider

and abettor of that crime. The evidence is undisputed that if a crime of attempted robbery occurred, it was carried out with a deadly weapon. But if there was not attempted robbery, then the use of a deadly weapon charge fails as well.

(a) Evidence of Robbery

We find that the evidence was sufficient to prove that Clinton committed the crime of attempted robbery. Under Neb. Rev. Stat. § 28-324 (Reissue 1995), a person commits robbery if, with the intent to steal, he or she forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever. Pursuant to Neb. Rev. Stat. § 28-201(1) (Cum. Supp. 2004), a person is guilty of an attempt to commit a crime if he or she:

> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

In this case, testimony by McSpadden, Valentine, Rafael, Clinton, and even defense witness Harrison, described Clinton's attempts, while threatening the victim with a gun, to take from him whatever he had in his pockets. Clinton, although stating that he demanded a "pocket check" only to ascertain whether the victim was selling drugs, admitted that had the victim complied with that demand and handed over drugs from his pockets, Clinton would have taken the drugs.

[10] Clinton testified that after taking the drugs from the victim, he would not have kept them, but would have destroyed them in the victim's presence or had someone consume them in front of the victim to teach the victim a lesson. Even if Clinton's testimony as to his intentions is to be believed, that evidence would be sufficient to support a conviction on attempted robbery. Section 28-324 requires an intent to "steal" for there to be the commission of the crime of robbery. To "steal" is not specifically defined by the statute. The expression has been commonly described as a "taking without right or leave with intent to keep wrongfully." *State v. Aldaco*, 271 Neb. 160, 170, 710 N.W.2d 101, 110 (2006). Accord *State v. Blotzer*, 188 Neb. 143, 195 N.W.2d 199 (1972). The defendant seems to infer that in order to "steal," the object must be taken *for oneself*. However, the focus of the statute is on the intent to deprive the owner of his or her property permanently, to keep it *from* him or her.

[11] The victim has his or her property stolen regardless of whether the thief thereafter uses it for selfish gain, destroys it, abandons it, or gifts it to another. See, e.g., *State v. Roberts*, 110 Ohio St. 3d 71, 850 N.E.2d 1168 (2006) (rejecting claim that taking of car from victim to escape and then abandoning it was not theft). To "steal" is to "take (another person's property) without permission or legal right and without intending to return it." Concise Oxford American Dictionary 887 (2006). The evidence viewed in a light most favorable to the State shows that, for whatever purpose, Clinton intended, through force and intimidation, to take the victim's personal property from him.

(b) Evidence of Aiding and Abetting Felony Murder

[12,13] We also find the evidence sufficient to sustain the jury's finding that the defendant was an aider and abettor to Clinton's attempted robbery. The aiding and abetting statute, Neb. Rev. Stat. § 28-206 (Reissue 1995), provides that "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or

that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if the aider or abettor knew that the perpetrator of the act possessed the required intent or that the aider or abettor himself or herself possessed the required intent. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

McSpadden's testimony indicated that the defendant was present and heard Clinton demanding a "pocket check," which she described as telling the victim to give him everything in his pockets. Then, when Clinton was unsuccessful in his attempts to get the victim to "give up" what he had, the defendant handed Clinton the gun. Valentine and Clinton, in contrast, indicated that the demands for a "pocket check" did not start until after the defendant handed Clinton a gun, but they also described that the defendant remained there after giving Clinton the gun and verbally encouraged Clinton to carry through with the "pocket check."

After Clinton fired the first shot in furtherance of the robbery and they had dispersed for fear of the arrival of the police, Valentine, Clinton, and Rafael all testified that it was the defendant who called them back. To varying degrees, McSpadden, Valentine, Clinton, Rafael, McIntyre, and even defense witness Russell, testified that the defendant assisted Clinton's entry into the apartment in Clinton's continued pursuit of the victim. As the victim refused to give in to Clinton's demands, Valentine, Clinton, and Rafael's testimony was that the defendant encouraged Clinton not to back down. Instead, the defendant told Clinton to "take care of his business."

As described by Rafael, the victim himself recognized that the defendant was a participant in the attempted robbery when he directed his refusals to "give you all my shit" to both the defendant and to Clinton. Only the testimony of Harrison and Johnson described the defendant as arriving innocently at the scene after the attempted robbery and the shooting had occurred.

[14] The defendant does not, in fact, deny the evidence discussed above. Instead, his real argument seems to be that the evidence was insufficient because any testimony supporting felony

murder in this case was from biased witnesses, while the testimony contrary to a finding of felony murder was from allegedly disinterested witnesses. This argument has no merit. In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). The jury's decision to credit the State's witnesses will not be revisited by this court.

The defendant also argues that the evidence was insufficient on these counts because the State failed to prove beyond a reasonable doubt that the defendant's conduct proximately caused the commission of the attempted robbery and the victim's death. The defendant explains that taking the evidence in the light most favorable to the State, "one might argue that there was evidence presented that the jury tended to believe that indicated that [the defendant] handed a firearm to Clinton." Brief for appellant at 34. However, the defendant asserts that there was an efficient intervening cause. The defendant explains that after the defendant allegedly handed Clinton the firearm, Clinton shot at the ground, there was more posturing, the parties dispersed, and then regrouped at which point a struggle occurred and Clinton shot the victim. This, he asserts, precludes proximate cause.

[15] Insofar as defendant can be construed as arguing that an aider and abettor must proximately cause the underlying crime in order to be found guilty, such argument is in error. An aider and abettor is accountable for that which is proximately caused by the principal's conduct regardless of whether the crime would have occurred without the aider and abettor's participation. Generally, the element of proximate cause is met by the perpetrator's act, not by the actions of the aider and abettor. See, § 28-206; *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004); *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). Here, there is no dispute that the victim's death was proximately caused by Clinton's shooting the victim. The evidence is sufficient to show that this shooting flowed from the course of an attempted robbery and that the defendant was an

aider and abettor to that crime. There is no deficiency of proof as to the element of proximate cause.

Inasmuch as the defendant's argument can be construed as asserting that the crime of attempted robbery which the defendant aided and abetted had somehow ceased before the fatal shooting, and thus the shooting flowed from a new and separate attempted robbery in which the defendant did not participate, it is contrary to the facts presented at trial. As outlined above, the defendant, during the alleged intervening cause of dispersing and regrouping, as well as the events that took place thereafter, continued to aid and abet the crimes that Clinton committed.

(c) Evidence of Possession of Deadly Weapon

Finally, we consider the defendant's assertion that there was insufficient evidence to support a conviction of being a felon in possession of a firearm. The defendant's assertion is that the evidence at trial was sufficient, if at all, only to show that the defendant was in possession of a firearm some days prior to the date of possession for which he was charged.

Because there was sufficient evidence that the defendant was in possession of a firearm on September 6, 2003, we need not determine whether, considered alone, the evidence of the defendant's possession of a firearm 2 to 3 days prior to the shooting would be sufficient under an indictment charging him with possession "on or about" that date. McSpadden, Valentine, and Clinton all testified that they saw the defendant give Clinton the gun on the night of the shooting. Other witnesses' testimony that a few days before the shooting, the defendant was in possession of the gun, lends support to the testimony of McSpadden, Valentine, and Clinton. Again, we do not pass on the credibility of the testimony. The evidence was clearly sufficient to support the jury's verdict that the defendant was guilty of being in possession of a deadly weapon on or about September 6.

In conclusion, we find the evidence, viewed in a light most favorable to the State, to be sufficient to support the jury's finding on each count upon which the defendant was convicted. Having reversed the defendant's convictions and remanded the cause for a new trial on the basis of prosecutorial misconduct, we need not address the defendant's remaining assignments of error.

VI. CONCLUSION

For the reasons stated above, we reverse the defendant's convictions and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM J. LASSEK, JR., APPELLANT.

723 N.W.2d 320

Filed November 3, 2006. No. S-05-1024.

1. **Courts: Trial: Mental Competency.** The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court.
2. **Mental Competency: Appeal and Error.** If there is sufficient evidence in the record to support factual findings relating to competency, such factual findings will not be disturbed on appeal.
3. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.
4. ____: ____: ____. The test of mental capacity to plead is the same as that required to stand trial.
5. **Courts: Mental Competency.** The means to be employed to determine competency or the substantial probability of competency within the foreseeable future are discretionary with the district court, and the court may cause such medical, psychiatric, or psychological examination of the accused to be made as the court deems necessary in order to make such a determination.
6. **Pleas.** A plea of no contest is equivalent to a plea of guilty.
7. ____. To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
8. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.
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. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
11. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
12. **Trial: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
13. **Trial: Mental Competency.** A proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995), and an order finding the accused incompetent to stand trial and ordering the accused confined until such time as he or she is competent is a final order from which an appeal may be taken under Neb. Rev. Stat. § 25-1911 (Reissue 1995).

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY and GREGORY M. SCHATZ, Judges. Affirmed.

Gregory A. Pivovar for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

William J. Lassek, Jr., was originally charged by a two-count information with the crimes of first degree murder and use of a firearm to commit a felony. He later entered pleas of no contest to an amended information charging him with second degree murder and use of a firearm to commit a felony. Lassek's primary claim on appeal is that he was not competent to enter his pleas.

SCOPE OF REVIEW

[1,2] The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000). If there is sufficient evidence in the record to support factual findings relating to competency, such factual findings will not be disturbed on appeal. *Id.*

FACTS

The factual basis for Lassek's pleas established that on the afternoon of October 7, 2002, Lassek shot and killed Jim Garnett in Omaha, Nebraska. Lassek confessed to the police that he had gone to Garnett's residence with the intent to rob Garnett of money, drugs, or both. Lassek told the police that although he went to Garnett's residence with other people, he was the one who entered the house and fired shots. Garnett died from multiple gunshot wounds to the chest.

Lassek was charged by information on April 10, 2003, with first degree murder and use of a firearm to commit a felony in the murder and robbery of Garnett. At a hearing on June 12, Lassek agreed to waive his right to a speedy trial and indicated that he planned to file a motion for a psychological examination to determine his competency to stand trial.

Lassek was examined by Dr. Louis C. Martin, a psychiatrist at the Lincoln Regional Center (LRC). Martin's evaluation of Lassek's competency was received into evidence at a hearing on November 20, 2003. Based on Martin's report that Lassek was not competent, the Douglas County District Court found that Lassek was not competent to stand trial. Counsel requested that Lassek be transferred to the LRC for treatment as recommended in the report and that the court set a date for review. The State had no objection.

At the hearing to review Lassek's competency, the court received into evidence a report from Martin dated March 19, 2004. Martin opined that Lassek had attained at least the minimal standard for competency to stand trial in Nebraska. In response, Lassek's counsel asked for an independent evaluation. With the agreement of the State, the court appointed Dr. Terry A. Davis to evaluate Lassek's competency to stand trial.

In a report dated September 28, 2004, Davis opined that Lassek was malingering and was competent to stand trial. The court then entered an order finding Lassek competent to stand trial. An amended information was filed on December 14, charging Lassek with second degree murder and use of a firearm to commit a felony.

At a hearing on May 16, 2005, Lassek was given leave to withdraw his previous pleas of not guilty. Through his attorney,

Lassek stated that he wanted to plead no contest. The court examined Lassek concerning his understanding of his rights with regard to the entry of a plea of no contest. The court found beyond a reasonable doubt that Lassek understood the nature of the charges against him; that he understood the possible sentences; that his pleas were made freely, intelligently, voluntarily, and understandingly; that there was a factual basis for the pleas; and that the pleas were accurate. The court accepted the pleas and found Lassek guilty of the charges.

Lassek subsequently requested to withdraw his pleas and that he be appointed new counsel. The court denied both motions and found that Lassek was properly informed of his rights, that the pleas were properly accepted, and that Lassek was competent to enter a plea at the time.

Lassek was sentenced on August 4, 2005, to 45 years to life in prison for second degree murder and to 15 to 20 years in prison for the firearm charge, to be served consecutively to the sentence for second degree murder. He was given credit for time served of 878 days.

ASSIGNMENTS OF ERROR

In summary, Lassek assigns the following errors: The district court erred (1) in finding Lassek competent; (2) in finding that Lassek freely, intelligently, voluntarily, and understandingly entered his pleas and in not allowing him 24 hours between the amendment of the information and the entry of the pleas; and (3) in imposing excessive sentences. Lassek also claims that he was denied effective assistance of counsel.

ANALYSIS

Competency to Stand Trial

Lassek claims he was not competent to enter his pleas of no contest. The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000). If there is sufficient evidence in the record to support factual findings relating to competency, such factual findings will not be disturbed on appeal. *Id.*

[3,4] The determination of Lassek's competency was based upon the medical opinions of two psychiatrists, Martin and Davis. Martin was a psychiatrist at the LRC, and Davis was appointed by the court to evaluate Lassek's competency. A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense. *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). The test of mental capacity to plead is the same as that required to stand trial. See, *State v. Beans*, 212 Neb. 31, 321 N.W.2d 72 (1982); *State v. Wead*, 9 Neb. App. 177, 609 N.W.2d 64 (2000).

When Lassek was first evaluated by Martin on November 5, 2003, Martin concluded that Lassek did not meet the standard for competency to stand trial in Nebraska. After Lassek was committed to the LRC, Martin reported that Lassek had become more communicative and in contact with reality. In a subsequent report by Martin dated March 19, 2004, he concluded that Lassek currently met the basic standard for competency to stand trial. Martin stated that the standard for trial competency was whether the defendant had the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.

Martin concluded Lassek generally understood which crimes he had been charged with and that if he was found guilty, he could be sent to prison for a significant period of time. Martin found that Lassek understood the trial process in a satisfactory way, knew there would be a judge whose responsibility would be to run the trial and make certain essential decisions, knew a defense attorney and a prosecuting attorney would be present, and knew what each person's responsibility would be. Martin found that Lassek had adequate understanding of what the witnesses' testimony would be, that he understood what was meant by taking an oath, and that Lassek understood that lying under oath would constitute a new crime of perjury.

Martin found that Lassek could, if necessary, testify in his own behalf and would hold up under the stress of trial without a

high likelihood of decompensating. According to Martin, Lassek understood that either a judge or a jury would make a decision as to his guilt or innocence based on the evidence presented, and Lassek had "no paranoid desire for unreasonable punishment by the community." Martin opined that Lassek did not currently suffer from any mental defect or disorder which would preclude him from working with his attorney in the preparation and presentation of a rational defense. It was Martin's opinion that Lassek had attained, at least minimally, the standard for competency to stand trial in Nebraska.

The court granted Lassek's request for a second, independent examination because Martin's second report conflicted with his first. Lassek was evaluated by Davis on August 17, 2004, and his report was submitted to the court by Lassek's counsel on December 10. The purpose of Davis' evaluation was to determine whether Lassek was competent to stand trial, determine his mental status at the time of the alleged offenses, and determine what psychiatric treatment Lassek needed, if any.

In evaluating Lassek, Davis focused on whether he suffered from any mental illness or other psychiatric or emotional condition. He considered whether Lassek was competent to stand trial and whether he knew, understood, and appreciated the nature, quality, willfulness, and consequences of his actions on October 7, 2002. He considered whether as a result of any mental disease or defect, Lassek was unable to know, understand, or appreciate the nature, quality, wrongfulness, or consequences of his actions on the date in question and whether he needed any psychiatric treatment.

In his report, Davis noted that at the outset, Lassek was evasive and gave irrelevant answers. In order to assess Lassek's competency to stand trial, Davis asked Lassek a series of questions to determine whether he knew and understood the nature and substance of the charges and proceedings against him, the roles of the various participants in the courtroom process, and his constitutional rights. Davis also tried to assess Lassek's ability to assist in his defense (whether he was able to consult with his attorney) with a reasonable degree of understanding and whether he had a rational as well as factual understanding of the proceedings against him.

It was Davis' opinion that Lassek, at the time of the alleged offenses, did not suffer from any mental disorder, mental abnormality, mental disease, or mental defect that would adversely affect his ability to know, understand, or appreciate the nature, quality, wrongfulness, or consequences of his actions on October 7, 2002. Davis concluded that Lassek's claimed symptoms were under voluntary control, were not genuine, and did not render him incompetent. Davis was of the opinion that Lassek did not suffer from any condition that could serve as a basis for an insanity defense. He concluded that Lassek did not have any mental disorder other than an antisocial personality disorder and a history of polysubstance dependence. According to Davis, Lassek did not require any psychiatric treatment at that time.

Neb. Rev. Stat. § 29-1823(1) (Cum. Supp. 2004) provides in part:

> If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or by any person for the accused. The judge of the district court of the county where the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial. The district judge may also cause such medical, psychiatric, or psychological examination of the accused to be made as he or she deems warranted and hold such hearing as he or she deems necessary.

[5] On December 13, 2004, the court entered an order finding that Lassek was competent to stand trial. The means to be employed to determine competency or the substantial probability of competency within the foreseeable future are discretionary with the district court, and the court may cause such medical, psychiatric, or psychological examination of the accused to be made as the court deems necessary in order to make such a determination. *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000). If there is sufficient evidence in the record to support factual findings relating to competency, such factual findings will not be disturbed on appeal. *Id*. The evidence in the record is sufficient to support the court's findings that Lassek was competent to stand trial, and we will not disturb those findings.

No Contest Pleas

Lassek argues that his no contest pleas were not freely, intelligently, voluntarily, and understandingly made. The argument in Lassek's brief related to this alleged error includes his argument that the court erred in failing to allow him 24 hours between the amendment of the information and the entry of the pleas.

Lassek was found competent to stand trial on December 13, 2004, and an amended information was filed on December 14. Apparently, the State did not ask the court for leave to amend the information until the plea hearing on May 16, 2005; however, Lassek made no objection to the motion for leave to amend. Lassek was then given leave to withdraw his previous pleas of not guilty. There is no question that Lassek had more than 24 hours' notice of the amended information prior to the hearing at which he entered his pleas, and his assigned error related to notice has no merit. Having made this determination, we turn to the facts related to whether Lassek's pleas were made freely, intelligently, voluntarily, and understandingly.

At the May 16, 2005, hearing, counsel stated that Lassek wished to plead no contest. In a colloquy with Lassek, the court inquired concerning Lassek's understanding of his right to a public and speedy trial, the right to confront witnesses, the right to require witnesses to appear and testify on his behalf, the right to remain silent, the right to appeal, and the right to be represented by an attorney. Lassek indicated that he understood he would be giving up these rights by pleading no contest.

The court asked Lassek if he had ever been treated for any mental illness or whether he suffered from any mental or emotional disability. Lassek responded that he had previously been treated for "schizophrenic and bipolar and stuff like that." The court asked if Lassek was presently taking any medication for those conditions, and Lassek stated, "I'm at the County, and they won't give it to me over there." The court asked Lassek if he felt that "the schizophrenia and . . . bipolar" affected his understanding of the court proceedings. Lassek responded, "Not today," and indicated that he wanted to proceed. Lassek said he was not under the influence of any alcohol or drugs and that no promises, threats, or inducements had been made to him to

obtain the pleas. Lassek said he believed the pleas were his own free and voluntary act.

The court asked Lassek if he had any questions about what had occurred that day or at any time since his arrest, and Lassek indicated that he had none. Lassek's attorney stated that Lassek's pleas were consistent with the law and the facts and were in his best interests. The court found beyond a reasonable doubt that Lassek understood the nature of the charges against him; that he understood the possible sentences; that his pleas were made freely, intelligently, voluntarily, and understandingly; that there was a factual basis for the pleas; and that the pleas were accurate. The court accepted the pleas and found Lassek guilty of second degree murder and use of a firearm to commit a felony.

Approximately 5 weeks after the plea hearing, Lassek requested that he be allowed to withdraw his pleas and that he be appointed new counsel. The court denied both motions, finding that Lassek was properly informed of his rights, that the pleas were properly accepted, and that Lassek was competent to enter a plea at the time.

[6-8] A plea of no contest is equivalent to a plea of guilty. *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004). The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *Id*. A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion. *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004).

The record demonstrates that the court adequately informed Lassek of his rights, that a factual basis for the pleas was established, and that Lassek was informed of the range of penalties for the crimes charged. We find no abuse of discretion in the court's acceptance of the pleas, and this assignment of error has no merit.

Excessive Sentences

Lassek claims that the court imposed excessive sentences. He was sentenced to 45 years to life in prison for second degree murder and to a consecutive term of 15 to 20 years in prison for use of a firearm to commit a felony. The court stated that Lassek would be given credit for time served of 878 days.

[9-11] Lassek appears to argue that the court failed to take into consideration his multiple psychiatric problems and social and cultural background in determining his sentences. We have frequently defined the factors a judge should consider in imposing a sentence, stating that a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006). However, we have also held that in considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006). "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*. at 171, 710 N.W.2d at 110-11.

Lassek was convicted of second degree murder and use of a firearm to commit a felony. Second degree murder is a Class IB felony, which is punishable by a term of 20 years to life in prison. See Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2004) and 28-304 (Reissue 1995). Use of a firearm to commit a felony is a Class II felony, which is punishable by a term of 1 to 50 years in prison, to be served consecutively to the sentence for the underlying crime. See § 28-105 and Neb. Rev. Stat. § 28-1205 (Reissue 1995).

The sentences imposed on Lassek were within the statutory limits, and when sentences imposed within statutory limits are alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the above-listed factors as well as any

applicable legal principles in determining the sentences to be imposed. See *State v. Vasquez, supra*. There is no support for an argument that the court abused its discretion in determining Lassek's sentences.

Ineffective Assistance of Counsel

Lassek claims trial counsel was ineffective in failing to "demand" a full and complete hearing on Lassek's competency and in failing to prosecute an appeal from the finding that he was competent to stand trial. See brief for appellant at 22.

[12] To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005).

Lassek's counsel discharged his duty by requesting that Lassek be evaluated for competency and by requesting a second evaluation concerning competency after Martin concluded that Lassek was competent to stand trial. The law requires counsel to be a lawyer with ordinary training and skill in criminal law, and Lassek's counsel met this standard. There is no basis to find that counsel provided ineffective assistance in failing to demand a full competency hearing.

[13] Lassek also claims his counsel should have filed a direct appeal after Lassek was determined to be competent to stand trial. A proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995), and an order finding the accused incompetent to stand trial and ordering the accused confined until such time as he or she is competent is a final order from which an appeal may be taken under Neb. Rev. Stat. § 25-1911 (Reissue 1995). *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000). However, the order finding Lassek competent to stand trial was not an appealable order.

In *State v. Guatney*, 207 Neb. 501, 508, 299 N.W.2d 538, 543 (1980), we stated:

> Had the trial court found the appellant competent and ordered him to trial, an entirely different situation would exist. Upon the conclusion of the case on its merits, should the accused be found guilty, he would have a means of bringing the issue of his competency to this court for review.

This is the situation in the case at bar. Lassek had a means to bring the issue of his competency to this court for review in the present appeal. Counsel was not ineffective for failing to appeal from the court's order finding Lassek to be competent.

CONCLUSION

There is no merit to any of Lassek's assigned errors. The judgment of the district court is affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

GAIL ANN LIMING, APPELLANT, V.
LONNIE LEE LIMING, APPELLEE.

723 N.W.2d 89

Filed November 3, 2006. No. S-06-015.

1. **Supreme Court: Appeal and Error.** Regarding a question of law, the Nebraska Supreme Court reaches a conclusion independent of the determination reached by the Nebraska Court of Appeals.
2. **Property Division: Appeal and Error.** The division of property is entrusted to the discretion of the trial judge and will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion.
3. **Judgments: Appeal and Error.** An appellant may not voluntarily accept the benefits of part of a judgment in the appellant's favor and afterward prosecute an appeal or error proceeding from the part that is against the appellant.
4. ____: ____. An exception to the acceptance of benefits rule exists where the right to the benefit accepted is absolute and cannot possibly be affected by reversal of the judgment.
5. ____: ____. The acceptance of benefits rule has no application where one is shown to be so absolutely entitled to the sum collected or accepted that reversal of the judgment or decree will not affect his or her right to it, as in the case of a collection of an admitted or uncontroverted part of his or her demand.
6. ____: ____. The acceptance of benefits rule does not apply when the appellant is conceded to be entitled to the thing he or she has accepted and where the appeal relates only to an additional claim on his or her part.
7. **Divorce: Judgments: Waiver: Appeal and Error.** A spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances

where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review.

8. **Divorce: Judgments: Case Disapproved: Appeal and Error.** To the extent that *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992), and *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993), limit the exceptions to the acceptance of benefits rule in a dissolution of marriage action to issues affecting the interests and welfare of children, they are disapproved.
9. **Judgments: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct merely because it may disagree with the reasoning employed by the Court of Appeals.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, CARLSON, and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge. Judgment of Court of Appeals affirmed.

Steffanie J. Garner Kotik, of Kleveland Law Offices, for appellant.

Paul M. Conley for appellee.

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

GERRARD, J.

Gail Ann Liming and Lonnie Lee Liming were divorced in district court, and Gail appealed the property division and alimony award. The primary issue presented in this appeal is whether Gail waived appellate review of the property division by accepting the benefits of the alimony award while her appeal was pending.

BACKGROUND

Gail and Lonnie were married in 1969. Gail filed a petition for dissolution in the district court on November 24, 2004. The parties had no children, but the case went to trial on the issues of property division and alimony.

At the time of trial, Gail worked full time at a university as a library assistant and earned approximately $10.55 per hour. Lonnie was not employed, but drew $959.70 per month from a postal service retirement benefit and $2,513 per month from

a military disability benefit. The primary assets of the marital estate were Gail's retirement account and a house in Lincoln. The value of Gail's retirement account was $62,111.53. There is no dispute that Gail's retirement account was a marital asset.

Gail valued the family house at $160,000, subject to a $60,000 debt. Lonnie valued the house at $155,000, subject to an $80,954 debt. According to Gail, the purchase price of the house had been $157,000, which the parties financed in part with $115,000 that were the proceeds from the sale of the parties' previous residence. Lonnie testified that there had been debt on the previous residence, before Lonnie paid the debt with the $21,000 net proceeds of a winning lottery ticket. Lonnie was still married to Gail when he purchased the lottery ticket, in March 1997.

Also included in the marital estate were a car valued by Gail at $3,000, a motorcycle Gail valued at $20,000, a truck Gail valued at $8,200, a camper Gail valued at $14,000, and a mower Gail valued at $500. Lonnie valued the motorcycle at $12,000, but also claimed secured indebtedness for the motorcycle of $12,461. Similarly, Lonnie valued the camper at $12,000, but claimed secured indebtedness for the camper of $10,845. Gail did not deny Lonnie's evidence of the debts owed on the motorcycle and camper.

The primary issue at trial was the valuation of the family house. Lonnie and Gail each proposed that Lonnie be awarded the house and that Gail be awarded her retirement account. Gail contended that there was $100,000 of equity in the house, based on a $160,000 valuation and $60,000 debt. Thus, Gail proposed that Lonnie be ordered to pay Gail $22,444.50 to equalize what Gail believed to be the difference in the value of the property to be awarded to each party. Lonnie, on the other hand, calculated that there was $53,046 of equity in the house. Lonnie valued the house at $155,000 and subtracted $80,954 of indebtedness. Since Lonnie used his lottery winnings to pay off the parties' previous residence, and the proceeds from the sale of the previous residence were used to purchase the house at issue in this case, Lonnie also subtracted $21,000 in lottery proceeds from the house's equity. Lonnie proposed that the equity in the house would roughly offset the value of the retirement account, without an equalization payment. The parties did not adduce

documentation to substantiate their arguments regarding the value of the property, instead relying on their own testimony and the worksheets prepared for trial to establish the basis for their calculations.

The court awarded the house to Lonnie and the retirement account to Gail. No equalization payment was ordered. The court did not make any express finding as to the value of the house, the equity in the house, or how the lottery proceeds might have been considered in such a calculation. The court awarded the motorcycle and a trailer to Lonnie without making specific findings as to their value or equity. The court also awarded the parties the personal property already in their possession, which had the effect of awarding Lonnie the truck and mower, and Gail the car, again without specific findings as to the value of the property. Lonnie was ordered to pay alimony, in the amount of $300 per month for 18 months.

Gail appealed to the Nebraska Court of Appeals, assigning that the district court erred in (1) distributing the parties' marital property in an unequal and inequitable manner and (2) limiting Gail's alimony award to 18 months. In support of her first assignment of error, Gail argued that the property division was inequitable because the $21,000 in lottery proceeds should have been included in the marital estate.

Lonnie filed a motion for summary affirmance on the basis that Lonnie had paid the alimony to the clerk of the district court in a lump sum of $5,400 and Gail had cashed the check issued to her in that amount. Lonnie argued that pursuant to the acceptance of benefits rule as explained in this court's decision in *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993), Gail waived her arguments with respect to the property division and alimony award by accepting the alimony. The Court of Appeals granted Lonnie's motion for summary affirmance, citing *Giese, supra*, and we sustained Gail's petition for further review.

ASSIGNMENT OF ERROR

Gail assigns, restated, that the Court of Appeals erred in summarily affirming the judgment of the district court. In sustaining Gail's petition for further review, we directed the parties to file supplemental briefs addressing whether Gail waived her right to

argue the issues of property division and alimony by accepting a portion of the district court judgment.

STANDARD OF REVIEW

[1] Whether the Court of Appeals correctly concluded that Gail waived her right to appellate review is a question of law, regarding which we reach a conclusion independent of the determination reached by the Court of Appeals. See *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004).

[2] The division of property is entrusted to the discretion of the trial judge and will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. See *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006).

ANALYSIS

Acceptance of Benefits Rule

In her supplemental brief, Gail waives her appellate argument with respect to alimony but contends that the Court of Appeals should still have considered the issue she raised with respect to the property division. Because Gail does not take issue with the Court of Appeals' refusal to consider her argument with respect to alimony, we do not consider whether Gail's acceptance of Lonnie's lump-sum alimony payment required her to waive her appellate argument that the alimony award should have been for a longer period of time. Instead, the first issue we address is limited to whether Gail was permitted to accept the lump-sum alimony payment, yet still appeal the division of the marital estate.

[3] The Court of Appeals concluded that Gail waived her appellate arguments based on our decision in *Giese, supra*. *Giese*, however, was based in the well-established, more general acceptance of benefits rule: that an appellant may not voluntarily accept the benefits of part of a judgment in the appellant's favor and afterward prosecute an appeal or error proceeding from the part that is against the appellant. See, e.g., *Dovel v. School Dist. No. 23*, 166 Neb. 548, 90 N.W.2d 58 (1958); *State ex rel. Heintze v. County of Adams*, 162 Neb. 127, 75 N.W.2d 539 (1956); *Nuss v. Nuss*, 148 Neb. 417, 27 N.W.2d 624 (1947); *Hoesly v. Department of Roads and Irrigation*, 143 Neb. 387, 9 N.W.2d 523 (1943) (on rehearing); *Larabee v. Larabee*, 128 Neb. 560, 259 N.W. 520

(1935); *McKee v. Goodrich*, 84 Neb. 479, 121 N.W. 577 (1909); *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385, 109 N.W. 391 (1906); *Weston v. Falk*, 66 Neb. 198, 93 N.W. 131 (1903) (on denial of rehearing); *Harte v. Castetter*, 38 Neb. 571, 57 N.W. 381 (1894); *Saxon v. Cain*, 19 Neb. 488, 26 N.W. 385 (1886); *Gray v. Smith*, 17 Neb. 682, 24 N.W. 340 (1885); *Hamilton County v. Bailey*, 12 Neb. 56, 10 N.W. 539 (1881).

[4] The acceptance of benefits rule, however, has exceptions. An exception to the acceptance of benefits rule exists where the right to the benefit accepted is absolute and cannot possibly be affected by reversal of the judgment. It is the possibility that appeal may lead to a result showing that the party was not entitled to what was received under the judgment appealed from that defeats the right of appeal. See, *Dovel, supra*; *Hoesly, supra*; *Irwin, supra*; *Weston, supra*. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from. *Dovel, supra*.

[5,6] Thus, the acceptance of benefits rule has no application where one is shown to be so absolutely entitled to the sum collected or accepted that reversal of the judgment or decree will not affect his or her right to it, as in the case of a collection of an admitted or uncontroverted part of his or her demand. See *State ex rel. Heintze, supra*. See, also, *Dovel, supra*. The rule does not apply when the appellant is conceded to be entitled to the thing he or she has accepted and where the appeal relates only to an additional claim on his or her part. See *id*.

In *Kassebaum v. Kassebaum*, 178 Neb. 812, 135 N.W.2d 704 (1965), we considered the application of the acceptance of benefits rule where the appellant had, after a decree of dissolution was entered, withdrawn $200 from what had been the parties' joint checking account. The appeal challenged the property division and alimony award, and the appellee argued that the appeal was estopped by the appellant's acceptance of the benefits of the property settlement. We rejected that argument, stating that " '[i]f the outcome of the appeal could have no effect on the appellant's right to the benefit accepted, its acceptance does not preclude the appeal.' " *Id*. at 815, 135 N.W.2d at 706. We explained that " '[t]here is no acceptance of benefits under a judgment, and hence no waiver of rights of appeal, where a party exercises a

right which existed prior to the judgment and which, though recognized or confirmed by the judgment, is not merged in it.' " *Id*. We went on to quote a South Dakota case which stated:

> "Appellant is in this court asking for relief in addition to that awarded her by the trial court. The property which she is alleged to have accepted under the decree is personal property only, and is not in such an amount that it is probable that less might be awarded to her. Appellant, therefore, by using or accepting this property which under the decree was awarded to her has done nothing inconsistent with her present position."

Id.

In *Reynek v. Reynek*, 193 Neb. 404, 227 N.W.2d 578 (1975), we reaffirmed the acceptance of benefits rule, but adopted another exception to it where the interests of children were involved. Thus, we considered an appellate challenge to the trial court's child custody order even though the appellant had accepted the benefits of the property settlement. See *id.* See, also, *Hicklin v. Hicklin*, 244 Neb. 895, 509 N.W.2d 627 (1994) (in action for dissolution or annulment, parent may accept child support yet appeal other issues in decree); *Fletcher v. Fletcher*, 227 Neb. 179, 416 N.W.2d 570 (1987) (declining to consider appeal from order modifying alimony because appellant accepted alimony payments under modified award); *Berigan v. Berigan*, 194 Neb. 185, 231 N.W.2d 131 (1975) (acceptance of benefits rule applies except as to interests and welfare of children; proper procedure where appeal is contemplated is to apply to trial court for temporary allowances pending appeal).

But this court departed from *Kassebaum* in *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992). In *Shiers*, the appellant accepted a cash award intended to equalize the property distribution, but challenged the alimony and child support awards on appeal. This court considered the line of cases discussed above, characterizing *Kassebaum* as a case in which we "held that the payment of costs, attorney fees, and child support did not deprive one of the right to appeal." *Shiers*, 240 Neb. at 858, 485 N.W.2d at 575, citing *Kassebaum v. Kassebaum*, 178 Neb. 812, 135 N.W.2d 704 (1965). This court asserted that the reason the acceptance of benefits rule was not applied in *Kassebaum* was

that the appellant in *Kassebaum* "had accepted no benefit conferred upon him, but, rather, had merely discharged, pending the outcome of the appeal, the obligations imposed upon him." *Shiers*, 240 Neb. at 859, 485 N.W.2d at 576. This court concluded:

> The rule distilled from the foregoing cases is that in a dissolution of marriage action, one who accepts any part of a judgment in her or his favor forfeits the right to challenge by appeal any issue but those affecting the interests and welfare of such children as may be involved.

Id. at 860, 485 N.W.2d at 576. Accord *Hicklin, supra*. Thus, this court concluded that the appellant had waived her alimony argument by accepting the cash property distribution. See *id*.

This court then confronted the above characterization of *Kassebaum* in *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993). In *Giese*, the marital estate included a business that was awarded to the appellant. On appeal, the appellant argued that the trial court had erred in, inter alia, its determination of the extent to which the parties had reduced the appellant's premarital indebtedness during the marriage, and that the court had thus erred in crediting the appellee for her share of that reduction. The appellee argued that the appellant had waived his appellate arguments because he had accepted several other aspects of the property settlement and had taken possession of the business and used its funds to pay personal expenses and satisfy other aspects of the decree. We restated the rule announced in *Shiers*, but acknowledged that in *Kassebaum*, we had recognized an exception to the general acceptance of benefits rule. This court acknowledged that the appellant's division of joint assets was permitted by *Kassebaum*, as it did not confer any right that did not exist prior to the judgment. However, we concluded that the appellant had accepted the benefit of the decree by taking sole possession of the business and using its assets, since it had been a joint asset during the marriage, and had thus waived his arguments aside from child support. See *Giese, supra*.

This court has not revisited *Giese* or *Shiers* as a basis for applying the acceptance of benefits rule in a dissolution proceeding since those cases were decided. However, in *Paulsen v. Paulsen*, 11 Neb. App. 362, 650 N.W.2d 497 (2002), the Court of Appeals permitted an appellant to challenge an alimony

award even though the appellant had accepted the benefits of the property settlement. The court relied on the exception that " ' "[i]f the outcome of the appeal could have no effect on the appellant's right to the benefit accepted, its acceptance does not preclude the appeal." ' " *Id*. at 366, 650 N.W.2d at 501, quoting *Kassebaum v. Kassebaum*, 178 Neb. 812, 135 N.W.2d 704 (1965). See, also, *Thulin v. Thulin*, No. A-99-990, 2000 WL 1207141 (Neb. App. Aug. 22, 2000) (not designated for permanent publication); *Shafer v. Shafer*, 96 NCA No. 33, No. A-95-334 (Neb. App. Aug. 13, 1996) (not designated for permanent publication) (*Kassebaum* exception applied because appellant had not invaded principal of property awarded); *Priest v. Priest*, 96 NCA No. 4, No. A-94-222 (Neb. App. Jan. 23, 1996) (not designated for permanent publication); *Kelly v. Kelly*, 95 NCA No. 28, No. A-93-804 (Neb. App. July 18, 1995) (not designated for permanent publication) (*Kassebaum* exception permitted appellant to challenge qualified domestic relations order despite taking personal property awarded). But see, *Heine v. Heine*, No. A-98-109, 1998 WL 826958 (Neb. App. Nov. 24, 1998) (not designated for permanent publication); *Peterson v. Peterson*, 95 NCA No. 30, No. A-93-919 (Neb. App. Aug. 1, 1995) (not designated for permanent publication).

The Court of Appeals' difficulty in applying our case law reflects the tension apparent among our decisions in *Kassebaum, supra*; *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992); and *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993). However, our opinion in *Kassebaum* correctly articulated the exceptions to the acceptance of benefits rule that we first adopted in *Hamilton County v. Bailey*, 12 Neb. 56, 10 N.W. 539 (1881). When there is no possibility that an appeal may lead to a result showing that the appellant was not entitled to what was received under the judgment appealed from, the right to appeal is unimpaired by the acceptance of benefits. See *Dovel v. School Dist. No. 23*, 166 Neb. 548, 90 N.W.2d 58 (1958). See, also, *United States v. Hougham*, 364 U.S. 310, 312, 81 S. Ct. 13, 5 L. Ed. 2d 8 (1960) ("where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim"). See,

generally, 5 Am. Jur. 2d *Appellate Review* § 633 (1995) (exception to acceptance of benefits rule has been recognized where, on appeal, one may obtain more favorable judgment without risk of less favorable judgment).

Our holding in *Kassebaum* is also supported by the weight of authority from other jurisdictions that have addressed the operation of the acceptance of benefits rule in the context of dissolution proceedings. As a general rule, a spouse who accepts payments under the alimony or property settlement provisions of a divorce judgment does not waive the right to appellate review where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to alimony or a share of the marital estate such that the outcome of the appeal could have no effect on the right to the payment accepted, or the payment accepted is under a separable award which will not be subject to further review. See, generally, Annot., Spouse's Acceptance of Payments Under Alimony or Property Settlement or Child Support Provisions of Divorce Judgment as Precluding Appeal Therefrom, 29 A.L.R.3d 1184 (Supp. 2006) (collecting cases). See, also, generally, 5 Am. Jur. 2d, *supra*, § 636.

The reasoning for these exceptions is that to preclude appeal by the acceptance of the benefits of a divorce judgment, the acceptance of benefits must be of such a nature as to clearly indicate an intention to be bound by the divorce decree. *Anderson v. Anderson*, 72 Wis. 2d 631, 242 N.W.2d 165 (1976). See, also, *Sommers v. Sommers*, 660 N.W.2d 586 (N.D. 2003); *Dietz v. Dietz*, 351 Md. 683, 720 A.2d 298 (1998); *Amplatz v. Amplatz*, 289 N.W.2d 164 (Minn. 1980); *In re Marriage of Fonstein*, 17 Cal. 3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976); *Gordon v. Gordon*, 218 Kan. 686, 545 P.2d 328 (1976); *Simon v. Simon*, 148 N.J. Super. 40, 371 A.2d 818 (1977). There must be unusual circumstances, demonstrating prejudice to the appellee, or a very clear intent to accept the judgment and waive the right to appeal, to keep an appellate court from reaching the merits of the appeal. See, *Sommers, supra*; *Gordon, supra*; *In re Marriage of Reib*, 114 Ill. App. 3d 993, 449 N.E.2d 919, 70 Ill. Dec. 572 (1983); *Bailey v. Bailey*, 345 So. 2d 304 (Ala. Civ. App. 1977).

Thus, the overwhelming majority rule is that when an appellant in a dissolution action accepts only that which the appellee

concedes, or is bound to concede, to be due to the appellant under the decree, the appellant is not barred from prosecution of an appeal which involves only the appellant's right to a future recovery. Acceptance of part of the award in such circumstances is not inconsistent with the appellant's claim that the award should have been larger. *In re Marriage of Abild*, 243 N.W.2d 541 (Iowa 1976). See, e.g., *Dietz, supra*; *Shafmaster v. Shafmaster*, 138 N.H. 460, 642 A.2d 1361 (1994); *Davis v. Davis*, 458 N.W.2d 309 (N.D. 1990); *Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989); *Boyce v. Boyce*, 541 A.2d 614 (D.C. 1988); *Connelly v. Connelly*, 374 N.W.2d 633 (S.D. 1985); *Nickerson v. Nickerson*, 296 Or. 516, 678 P.2d 730 (1984); *In re Marriage of Jones*, 627 P.2d 248 (Colo. 1981); *In re Marriage of Hadley*, 88 Wash. 2d 649, 565 P.2d 790 (1977) (en banc); *In re Marriage of Fonstein, supra*; *Anderson, supra*; *Gordon, supra*; *Marshall v. Marshall*, 364 P.2d 891 (Okla. 1961); *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002 (1950); *Bailey, supra*; *Simon, supra*; *Finck v. Finck*, 9 Ariz. App. 382, 452 P.2d 709 (1969).

Where the reversal of the judgment cannot possibly affect the appellant's right to the benefit he or she has secured under the judgment, an appeal may be taken despite the fact that the appellant has sought and secured such benefit. *Davis, supra*. See, e.g., *Ford, supra*; *Connelly, supra*; *Nickerson, supra*; *In re Marriage of Hadley, supra*; *Marshall, supra*; *Carle, supra*; *Bailey, supra*; *Simon, supra*. For instance, when a case has several independent issues, and a review is sought of a portion of that judgment while the acceptance of benefits is as to a severable issue which is not raised for appellate review, the appellant may accept the benefits and nevertheless appeal regarding the separate, independent issue. See, *In re Marriage of Fonstein, supra*; *Finck, supra*. See, also, *In re Marriage of Jones, supra*; *Alderson v. Alderson*, 258 Ind. 328, 281 N.E.2d 82 (1972).

[7,8] We agree with these general rules and conclude that they are consistent with Nebraska law as articulated in *Kassebaum v. Kassebaum*, 178 Neb. 812, 135 N.W.2d 704 (1965), and the cases that preceded it. We hold that a spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse

was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review. To the extent that *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992), and *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993), limit the exceptions to the acceptance of benefits rule in a dissolution of marriage action to issues affecting the interests and welfare of children, they were inconsistent with *Kassebaum, supra*, and are hereby disapproved.

In this case, it is clear that Gail's acceptance of the benefits of the alimony award is not inconsistent with her appellate argument regarding the property division, and appellate disposition of that appellate argument could not affect the alimony award entered by the district court. Thus, although its error was understandable, the Court of Appeals erred in concluding that Gail waived her argument with respect to property division. This court's decision in *Kassebaum, supra*, and the Court of Appeals' own decision in *Paulsen v. Paulsen*, 11 Neb. App. 362, 650 N.W.2d 497 (2002), represented the correct application of the acceptance of benefits rule under these circumstances.

Division of Marital Estate

[9] Upon further review from a judgment of the Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct merely because it may disagree with the reasoning employed by the Court of Appeals. *Newman v. Rehr*, 263 Neb. 111, 638 N.W.2d 863 (2002). While the Court of Appeals should not have summarily affirmed the judgment of the district court based on the acceptance of benefits rule, we conclude that the district court did not abuse its discretion in dividing the marital estate.

Gail's argument, as we understand it, is that Lonnie's $21,000 lottery winnings should have been considered part of the marital estate. However, there is no indication from the court's order that the lottery winnings were set aside, or otherwise credited to Lonnie. The only asset of the marital estate for which the court set a value certain was Gail's retirement account, valued at $62,111.53 and awarded to Gail. The court awarded the house,

motorcycle, and trailer to Lonnie without making specific findings as to their value or equity. The court also awarded Lonnie the truck and mower, and Gail the car, without specific findings as to their value. Nor did the court include any findings or calculations with respect to the overall value of the property awarded to the parties.

In Gail's appellate brief, she narrows the claims she advanced at trial about the valuation of the property in the marital estate. Gail concedes that the trailer had an equity of $1,155 and the motorcycle had a debt of $461. She also concedes that the house did not have $100,000 in equity, instead accepting Lonnie's figures for the equity in the house, except for the setoff of the lottery proceeds. Thus, Gail's appellate argument is limited to a contention that the house should have been found to have equity of $74,046, instead of the figure of $53,046 advanced by Lonnie.

As noted above, in their proposals to the court, Gail sought a payment of $22,444.50 to equalize what she believed to be the difference in the value of the property to be awarded, while Lonnie, apparently relying on a setoff of the lottery proceeds, argued against such a payment. But since the court made no specific finding, we do not know what value, if any, the court established for the equity in the house. The only findings we have before us are those awarding the various items in the marital estate to the parties.

It would have been helpful had the court made more specific findings about the value of the property, especially after the parties contested that issue at trial. Of course, it might also have been helpful to the court had the parties provided it with a more substantial basis for making such findings than the "he said, she said" evidence they adduced. Gail seems to be assuming that because the court did not order an equalization payment, the court must have adopted Lonnie's valuation of the house. The record, however, does not support that assumption. Instead, the question presented to us given the state of the record is whether, in the context of the property division as a whole, the court's award of the house without an equalization payment was an abuse of judicial discretion. See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

Gail's own calculations, as stated in her appellate brief, would have us conclude that "[Lonnie] was awarded property with a value of $82,940, while [Gail] was only awarded $64,011.53." Brief for appellant at 9. 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. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). Here, by her own calculations, Gail was awarded approximately 44 percent of the marital estate. Gail also received alimony of $5,400. Although alimony and distribution of property have different purposes in marriage dissolution proceedings, they are closely related and circumstances may require that they be considered together. *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993).

Having reviewed the record, we find no abuse of discretion in the district court's division of the marital estate. Thus, although our reasoning differs from that of the Court of Appeals, we reject Gail's assignment of error.

CONCLUSION

The judgment of the Court of Appeals, affirming the judgment of the district court, is itself affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ANDREW TOMPKINS, APPELLANT.

723 N.W.2d 344

Filed November 9, 2006. No. S-05-212.

1. **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.
2. **Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence: Search and Seizure.** The good faith exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized under the warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant.
3. **Search Warrants: Affidavits: Police Officers and Sheriffs: Appeal and Error.** In assessing an officer's good faith in conducting a search under a warrant, an appellate

court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.

4. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence.** Evidence may be suppressed if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.
5. **Search and Seizure: Appeal and Error.** An appellate court on its own motion cannot consider the good faith exception.
6. **Search Warrants: Probable Cause: Proof.** While a defendant has the burden of showing that there was not probable cause to support the issuance of a search warrant, the State has the burden to show that the good faith exception applies.
7. **Search Warrants: Police Officers and Sheriffs.** When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Scotts Bluff County, RANDALL L. LIPPSTREU, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Brian J. Lockwood, Deputy Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

CONNOLLY, J.

We granted appellant's petition for further review. The Nebraska Court of Appeals determined that the police officer's supporting affidavit did not support the issuance of a search warrant. Nevertheless, on its own motion, without the issue being raised in the trial court, the Court of Appeals determined that the search was valid under the good faith exception set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). This case presents the question whether an

appellate court can reach the *Leon* good faith exception without the State's having raised the issue. We hold for policy reasons that the State waives the good faith exception when it fails to raise it. Thus, an appellate court cannot reach the good faith exception on its own motion. We reverse, and remand.

BACKGROUND

A search warrant was issued to search Andrew Tompkins' residence. During the execution of the warrant, police found drug paraphernalia, a firearm, and marijuana. Tompkins filed a supplemental motion to suppress, contending that the affidavit was insufficient to support the issuance of the warrant. The district court denied the motion and ultimately convicted Tompkins of distribution of a controlled substance on or near a school, possession of a firearm while in violation of Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2004), and possession of drug paraphernalia. The district court sentenced Tompkins to 24 to 48 months' imprisonment on the distribution conviction and 6 to 12 months' imprisonment on the firearm conviction, to be served consecutively. The court imposed a $100 fine on the paraphernalia conviction.

Following his convictions and sentencing, Tompkins appealed, alleging that the district court erred in denying his supplemental motion to suppress and his motion for new trial. The Court of Appeals held that the affidavit did not support the issuance of the warrant. But it determined that the search was valid under the good faith exception as set forth in *United States v. Leon, supra*. In addressing the issue, the Court of Appeals noted that "[t]he parties did not argue whether the police acted in good faith . . . but we, sua sponte, address this issue . . . ." *State v. Tompkins*, 14 Neb. App. 526, 540, 710 N.W.2d 654, 666 (2006).

Tompkins petitioned for further review, arguing that the Court of Appeals erred in reaching the good faith exception on its own motion. We granted the petition.

ASSIGNMENT OF ERROR

Tompkins assigns that the Court of Appeals erred in reaching the good faith issue on its own motion.

STANDARD OF REVIEW

[1] 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. Keen, ante* p. 123, 718 N.W.2d 494 (2006).

ANALYSIS

In his sole assignment of error, Tompkins argues that the Court of Appeals erred in addressing the good faith exception to the warrant requirement on its own motion. The State does not take issue with the Court of Appeals' conclusion that the affidavit in support of the search warrant did not support the issuance of the warrant. Thus, the only issue presented for further review is whether the Court of Appeals properly reached the good faith issue when the State failed to raise it on appeal.

[2-4] The good faith exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized under the warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). See, also, *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In assessing an officer's good faith in conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit. See *State v. Davidson, supra*. Evidence may be suppressed if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid. *State v. Johnson, supra*.

[5] We have found very little case law directly on point regarding how the good faith exception may be raised; however, one

case is instructive. In *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999), after finding no probable cause for the issuance of a warrant, we explicitly stated that we would not address the *Leon* good faith exception as it was not raised by the State. However, we did not explain the reason for our decision. We now follow our ruling in *Ortiz* and provide an explanation for why an appellate court on its own motion cannot consider the good faith exception.

First, when the State fails to raise *Leon*, the defendant lacks sufficient opportunity to defend against application of the exception. We find some guidance on this point in *U.S. v. Hahn*, 922 F.2d 243 (5th Cir. 1991). There, the government urged the court to apply the good faith exception when it failed to raise the issue before the district court. In refusing to apply the exception, the appellate court reasoned, in part, that the defendant did not have a "fair opportunity to factually respond to assertions of 'good faith.' " *Id.* at 248. We note that in *Hahn*, the government raised the good faith issue on appeal. In contrast, Tompkins received no notice that he would have to confront the good faith exception. This deprived him of the opportunity to argue why the good faith exception did not apply. The Court of Appeals determined that none of the circumstances cited in *Leon* regarding when suppression would still be appropriate applied. However, Tompkins should have had the benefit of arguing that one of these "exceptions to the exception" did apply. If he had, he could have possibly persuaded the court otherwise. Because raising good faith on the court's own motion deprives a defendant of the opportunity to fully defend himself, we hold that it was error for the court to do so.

[6] Moreover, while a defendant has the burden of showing that there was not probable cause to support the issuance of a search warrant, *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003), the State has the burden to show that the good faith exception applies. See, *United States v. Leon*, 468 U.S. 897, 924, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) ("[w]hen officers have acted pursuant to a warrant, the *prosecution* should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time") (emphasis supplied)); *United States v. Gant*, 759 F.2d 484, 487 (5th Cir. 1985) ("[o]nce the defendants

convinced the district court that probable cause was lacking, the government was required to prove that the evidence seized during the search was nevertheless admissible because of the officers' objectively reasonable reliance on the warrant"); *U.S. v. Conner*, 948 F. Supp. 821, 852 (N.D. Iowa 1996) ("[t]he government bears the burden of establishing that the good-faith exception to the federal exclusionary rule should apply in a particular case"). When an appellate court reaches the good faith issue on its own motion, a criminal defendant is forced to argue that not only was the warrant not supported by probable cause, but also that the officers did not act in good faith.

In support of the Court of Appeals' action in reaching the good faith issue, the State cites *U.S. v. Chambers*, 987 F.2d 1331 (8th Cir. 1993), and *U.S. v. Frangenberg*, 15 F.3d 100 (8th Cir. 1994). Relying on these cases, the State argues that an appellate court can reach the good faith exception on appeal. In both *Chambers* and *Frangenberg*, as well as in other decisions, the Court of Appeals for the Eighth Circuit first reviewed the question whether the officers acted in good faith and noted that it would reach the issue of probable cause only if necessary. Such an approach is approved under *Leon*, which allows courts to first decide whether officers' conduct manifested objective good faith or, alternatively, to decide whether the Fourth Amendment had been violated.

The State's reliance on *Chambers* and *Frangenberg* is not helpful. The proposition cited in those cases goes to the order in which an appellate court reaches the good faith issue; it does not answer the question whether an appellate court can reach good faith when the State fails to raise the issue. In fact, the government clearly raised the good faith issue on appeal before the *Chambers* court. *Chambers* and *Frangenberg* are irrelevant.

The State also argues that because the district court found that the issuance of the search warrant was supported by probable cause, there was neither "need nor opportunity" for the State to argue *Leon* at trial. Brief for appellee in support of petition for further review at 10. We do not decide whether this argument has merit regarding the State's failure to argue *Leon* at the trial level. We find, however, that at the appellate level, the State has ample opportunity to raise the *Leon* good faith exception.

In his brief on appeal, Tompkins challenged the sufficiency of the affidavit used to obtain the search warrant. Thus, Tompkins put the State on notice that the Court of Appeals might determine the warrant invalid. Despite Tompkins' red flag, the State argued only that the affidavit provided probable cause for issuing the warrant. The State did not alternatively argue that even if the warrant was invalid, the search would still be valid under the good faith exception.

[7] Also, requiring the State to raise the good faith issue at the appellate level does not place an onerous burden on the State. As the U.S. Supreme Court stated in *Leon*, "[w]hen officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *United States v. Leon*, 468 U.S. 897, 924, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In fact, the inquiry into good faith normally involves an examination of the same facts as the probable cause inquiry. See *United States v. Gant*, 759 F.2d 484, 487-88 (5th Cir. 1985) ("the determination of good faith will ordinarily depend on an examination of the affidavit"). Therefore, the State would have to do little more than assert good faith to have it considered by the appellate court. But as discussed above, the State's failure to present the good faith theory deprives a defendant of the opportunity to respond.

Finally, in *Leon*, the government raised the good faith issue; the Court did not raise the issue on its own motion. In contrast, the Court declined to hear the issue in an earlier case where it had not been presented by the state. See *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). In *Gates*, the Illinois Supreme Court affirmed the decisions of lower state courts granting the defendants' motion to suppress evidence. The Illinois court held that the affidavit supporting the search warrant had been inadequate. The U.S. Supreme Court granted certiorari. The Court then requested that the parties brief an additional issue: whether the exclusionary rule should be modified to not require exclusion where there was a reasonable belief that the search was consistent with the Fourth Amendment. In its opinion, however, the Court decided "with apologies to all"

that the issue was not presented in the Illinois courts and, therefore, declined to address it. *Illinois v. Gates*, 462 U.S. at 217.

CONCLUSION

Because the State waived the *Leon* good faith exception by failing to raise it, the Court of Appeals erred in raising the issue on its own motion. We reverse the decision of the Court of Appeals and remand the cause to that court with directions to reverse the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.

ROSEMARY POGGE AND PHILIP H. POGGE, APPELLANTS, V. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, A MEMBER OF THE AMERICAN FAMILY INSURANCE GROUP, APPELLEE.

723 N.W.2d 334

Filed November 9, 2006. No. S-05-714.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Insurance: Proof.** Where insurance coverage is denied, the burden of proving coverage under a policy is upon the insured.
4. **Compromise and Settlement: Proof.** Under Nebraska law, evidence of settlement is not admissible to prove liability for the settled claim.
5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
6. ____: ____. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded for further proceedings.

Joseph C. Byam, of Byam & Hoarty, for appellants.

Eugene L. Hillman and Patricia McCormack, of Hillman, Forman, Nelsen, Childers & McCormack, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant Rosemary Pogge sustained injuries in a three-car accident in Omaha, Nebraska. Rosemary and her husband, appellant Philip H. Pogge, filed a lawsuit distinct from the instant appeal generally alleging negligence against the drivers of the other two vehicles. The Pogges reached settlements with the two drivers and their insurers and subsequently dismissed the negligence suit. With respect to the first driver, Lois Sisson, the Pogges settled for the full amount of her liability policy. With respect to the second driver, Nathan Mandell, the Pogges settled for $75,000, which was $25,000 less than his liability policy limit.

Following these settlements, the Pogges brought a declaratory judgment action in the district court for Douglas County. This declaratory judgment action gives rise to the instant appeal. In their declaratory judgment action filed against their insurer American Family Mutual Insurance Company (American Family), appellee, the Pogges sought a determination of the extent of the underinsured motorist coverage available to them under the "Family Car Policy" issued by American Family to the Pogges. Their underinsured motorist coverage contained an exhaustion clause generally providing that benefits could be obtained only after the Pogges exhausted other available insurance. This declaratory judgment case was the subject of a previous appellate decision, *Pogge v. American Fam. Mut. Ins. Co.*, 13 Neb. App. 63, 688 N.W.2d 634 (2004) (*Pogge I*), which resulted in a reversal and remand.

Upon remand to the district court, the Pogges and American Family filed cross-motions for summary judgment. At the evidentiary hearing, the Pogges introduced numerous items of evidence, including Mandell's deposition testimony regarding the

accident. Following the hearing, the district court ruled as a matter of law that "settling with Mandell's insurer for less than the policy's limit precludes [the Pogges] from recovering underinsured motorist benefits under their policy." The district court sustained American Family's motion for summary judgment, overruled the Pogges' motion for summary judgment, and dismissed the Pogges' declaratory judgment action. The Pogges appeal.

We conclude that the district court erred as a matter of law in concluding that the fact of settlement established Mandell's negligence and further determining that settlement with Mandell for less than the policy limit precluded coverage under the Pogges' underinsured motorist insurance. We further conclude, based on the record made on the parties' cross-motions for summary judgment, that because there is no evidence of Mandell's negligence, the Pogges were not required to exhaust Mandell's liability insurance coverage in order to claim underinsured motorist benefits under their American Family policy. Thus, the district court erred in denying the Pogges' motion for summary judgment and further erred in granting American Family's motion for summary judgment and dismissing the case. Accordingly, we reverse the orders relative to the motions for summary judgment and dismissal and remand the cause for further proceedings with respect to damages and attorney fees.

STATEMENT OF FACTS

On January 15, 1999, Rosemary was involved in an automobile accident in Omaha involving two other vehicles. In the accident, Sisson, the driver of the first vehicle, was traveling westbound on Jackson Street and failed to yield to north-south cross-traffic having the right-of-way at the intersection of 114th and Jackson Streets. Sisson's vehicle collided with a second vehicle driven by Nathan Mandell, who was traveling northbound on 114th Street. The impact of the collision between Sisson's and Mandell's vehicles caused Mandell's vehicle to spin in a northwesterly direction and strike Rosemary's car, which was stopped facing east at a stop sign on Meadow Road at the corner of Meadow Road and 114th Street, an intersection slightly north of the 114th and Jackson Streets intersection. Rosemary, who was alone in her vehicle, sustained serious bodily injuries.

At the time of the accident, Sisson's car was insured by Safeco Insurance (Safeco), with a liability limit of $100,000, and Mandell's car was insured by State Farm Mutual Insurance (State Farm), also with a liability limit of $100,000.

The Pogges' car was insured by American Family, and their insurance policy contained underinsured motorist coverage of $100,000, which provided, in relevant part, as follows:

> **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**.
>
> . . . .
>
> **We** will pay under this coverage only after the limits of liability under any **bodily injury** liability . . . policies have been exhausted by payment of judgements [sic] or settlements.

The Pogges filed suit against both Sisson and Mandell, generally alleging negligence and seeking damages resulting from the accident. Thereafter, the Pogges negotiated a settlement with both Sisson's and Mandell's carriers. Sisson's insurer, Safeco, offered Sisson's liability policy limit of $100,000. State Farm, Mandell's insurer, offered $75,000, which was $25,000 less than the policy limit. The Pogges notified American Family that they had reached a tentative settlement of their claims against Sisson and Mandell. In a letter dated January 9, 2001, American Family advised the Pogges that it did not "have any objection to [the settlement or to Sisson and Mandell's receiving] full and complete releases." The letter also stated:

> American Family does not intend to substitute its own funds nor [sic] seek subrogation . . . because it is American Family's position that the underinsured motorist coverage available to the Pogges under their policy with American Family . . . would not be available to the Pogges for this claim in that they are agreeing to settle their claim for less than the full policy limits of all underlying liability policies available for this accident.

The parties to this appeal indicate that the Pogges accepted Safeco's and State Farm's offers and settled the negligence lawsuit. Thereafter, the Pogges made demand upon American Family under their underinsured motorist insurance coverage, claiming that their damages exceeded the $175,000 settlement. American Family refused the demand.

On January 14, 2003, the Pogges filed their "petition" against American Family, which we treat, as did the Nebraska Court of Appeals, as a "complaint" subject to the new rules of notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). The complaint contained two counts. The first count sought a declaratory judgment with regard to the coverage afforded the Pogges under the provisions of their underinsured motorist insurance. The second count alleged that American Family had breached its duty of good faith and fair dealing caused by refusing to pay underinsured motorist benefits. In their complaint, the Pogges noted their respective settlements with Sisson and Mandell and alleged that their damages as a result of the accident exceeded the sum of such settlements and that as such, they were entitled to coverage under their underinsured motorist insurance with American Family. A copy of the policy was attached to the complaint.

American Family filed a motion to dismiss the Pogges' lawsuit under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). American Family asserted that the Pogges' failure to exhaust the policy limits of all of the insurance purportedly available to the Pogges from Sisson's and Mandell's insurance policies precluded benefits under the underinsured provisions of the American Family policy. Relying in part upon this court's decision in *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998), the district court sustained the motion and dismissed the Pogges' lawsuit in its entirety. In *Ploen*, this court was asked to determine, inter alia, in a case where a tort-feasor's liability policy had not been exhausted, whether an underinsured motorist provision that stated that the policy would provide benefits "only after 'the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements' " was void as against public policy. 253 Neb. at 870, 573 N.W.2d at 439. This court determined that the

exhaustion clause in *Ploen* was plain and unambiguous, and after reviewing the law in this state and other jurisdictions, we further determined it was not contrary to public policy.

The Pogges appealed the district court's order sustaining American Family's motion to dismiss to the Court of Appeals. The Court of Appeals reversed the district court's order and remanded the cause for further proceedings. *Pogge I*. In its opinion, the Court of Appeals acknowledged that the enforceability of the American Family exhaustion clause was governed by the *Ploen* decision and that the American Family exhaustion provision was similar to the provision in *Ploen*. The Court of Appeals noted, however, that given the facts, there were "several significant differences between *Ploen* and the instant case" and that dismissal by the district court was error. *Pogge I*, 13 Neb. App. at 69, 688 N.W.2d at 639. Specifically, the Court of Appeals stated that in *Ploen*, there was only one tort-feasor, whereas in the Pogges' case, there were two potential tort-feasors. Moreover, the Court of Appeals stated that with regard to these potential tort-feasors, "Sisson was clearly a negligent party, but whether Mandell was guilty of negligence which proximately caused Rosemary's injury [was] an open question." *Id*. In this regard, the Court of Appeals noted that under Nebraska law, the fact that Mandell had settled with the Pogges did not constitute an admission of liability.

Upon review of the motion to dismiss under rule 12(b)(6), the Court of Appeals determined that it could " 'conjure' up a set of facts" that could be proved that would allow the Pogges to recover under their underinsured motorist insurance with American Family. *Pogge I*, 13 Neb. App. at 71, 688 N.W.2d at 640. In particular, the Court of Appeals determined in effect that if Mandell was not negligent, the Pogges would not be legally entitled to recover from him, and that his liability policy would not be available and in need of exhaustion. Specifically, the Court of Appeals stated:

> [W]e hold that Mandell's policy is not an applicable policy merely because State Farm paid part of its coverage into the settlement; rather, if the policy is applicable or available and must be exhausted, it is because Mandell was guilty of negligence which proximately caused injury to Rosemary.

> However, from the facts of the accident as pleaded, there is a readily imaginable set of facts—Mandell's absence of negligence proximately causing injury—which would make Mandell's policy inapplicable.

Id. at 71, 688 N.W.2d at 640-41.

The Court of Appeals determined that under the principles of notice pleading, the district court erred in dismissing the Pogges' declaratory judgment action on a rule 12(b)(6) motion, "because there [was] a set of facts, which if proved, would make Mandell's State Farm policy inapplicable and therefore not subject to exhaustion." *Pogge I*, 13 Neb. App. at 72, 688 N.W.2d at 641. Accordingly, the Court of Appeals reversed the district court's decision sustaining American Family's motion to dismiss and remanded the cause with directions. Neither party filed a petition for further review. The Court of Appeals' mandate was issued on December 14, 2004, directing the district court to enter judgment "in conformity with the judgment and opinion of [the Court of Appeals]."

On February 2, 2005, following remand, American Family filed its motion for summary judgment. On March 18, the Pogges filed a cross-motion for summary judgment, in effect asserting that Mandell was not negligent and that therefore, they did not need to exhaust his insurance policy in order to receive benefits under their underinsured motorist insurance coverage. An evidentiary hearing on the cross-motions for summary judgment was conducted. Numerous exhibits were received. No witnesses testified live. The Pogges' evidence included a copy of their American Family insurance policy, certain medical records and billing statements, and Mandell's deposition.

The thrust of Mandell's deposition testimony was that at the time of the accident, he was driving slightly below the speed limit. He stated that he saw Sisson's vehicle as she was stopped at a stop sign. Mandell further testified that because he had the right-of-way, he assumed Sisson would wait for his vehicle to pass, but instead, as he reached the intersection, "she shot out." Mandell testified that after Sisson hit him, his vehicle was out of control, "spinning back and forth." Mandell stated that it was while his vehicle was uncontrollably spinning that he hit Rosemary.

The only evidence offered by American Family was the affidavit of a State Farm representative, the significance of which was that State Farm had settled the Pogges' claim against Mandell for $75,000 of Mandell's $100,000 policy limit.

In an order filed May 24, 2005, the district court sustained American Family's motion for summary judgment, overruled the Pogges' motion for summary judgment, and dismissed the case. The district court's order does not reflect consideration of or contain an evaluation of the evidence offered to show Mandell's negligence or absence thereof. Instead, the district court determined that the exhaustion language in the American Family policy was "nearly identical" to that in *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998), and concluded that such language "require[d the Pogges] to exhaust all limits of applicable liability policies. Therefore settling with Mandell's insurer for less than the policy's limit precludes [the Pogges] from recovering underinsured motorist benefits under their policy." The district court also concluded that the second count of the complaint involving the breach of good faith claim was without merit. The district court dismissed the Pogges' complaint with prejudice, and the Pogges appeal.

The Pogges appeal the district court's decision with regard to coverage under their underinsured motorist insurance but make no assignment of error or argument on appeal directed to that part of the district court's order dismissing their breach of good faith claim. Therefore, that claim remains dismissed, and that portion of the district court's order will not be further addressed in this opinion. With respect to the dismissal of the Pogges' declaratory judgment cause of action that had sought a ruling as to the availability of underinsured benefits, we conclude coverage is available to the Pogges, and we reverse, and remand for further proceedings consistent with this opinion.

ASSIGNMENTS OF ERROR

On appeal, the Pogges assign five errors that can be restated as two. The Pogges claim that the district court erred (1) in sustaining American Family's motion for summary judgment with respect to the declaratory judgment cause of action and overruling the Pogges' motion for summary judgment with respect to

the declaratory judgment cause of action and (2) in denying the Pogges their attorney fees sought pursuant to Neb. Rev. Stat. § 44-359 (Reissue 2004). In their brief, the Pogges also seek attorney fees on appeal, but no application has been filed with this court, and we, therefore, do not consider this issue.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Sjuts v. Granville Cemetery Assn., ante* p. 103, 719 N.W.2d 236 (2006). 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. *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

ANALYSIS

On appeal, the Pogges raise several arguments challenging the district court's order sustaining American Family's motion for summary judgment with respect to the declaratory judgment cause of action, overruling their motion for summary judgment as to that cause of action, and dismissing the case. In this opinion, we refer only to those arguments integral to our disposition of the appeal. The Pogges claim that the district court erred in concluding that (1) the fact that the Pogges settled with Mandell's insurer established Mandell's negligence and (2) the fact that Mandell settled for less than the policy limits precluded the Pogges from coverage under their underinsured motorist insurance policy. Moreover, the Pogges note that the district court failed to consider their evidence, which the Pogges claim established an uncontradicted prima facie case that Mandell was not negligent and that therefore, they were not required to exhaust Mandell's insurance limits before they could recover under their underinsured motorist insurance with American Family. In response, American Family argues that Mandell's settlement with the Pogges constitutes, in effect, an admission of liability by

Mandell and that therefore, the district court did not err in determining the Pogges were precluded from recovery under their underinsured motorist coverage due to their failure to exhaust the limits of Mandell's liability insurance policy.

We agree with certain of the Pogges' arguments and conclude that the district court erred as a matter of law when it concluded that the Pogges' settlement with Mandell constituted an admission of liability by Mandell, thus precluding the Pogges from recovering under the provisions of their underinsured motorist policy, when such settlement was for less than Mandell's policy limit. Moreover, we agree with the Pogges that the district court erred by failing to consider the evidence adduced with regard to Mandell's negligence or absence thereof, which consideration bears on the exhaustion issue. Even giving the inferences to American Family, our consideration of the evidence demonstrates that the Pogges are entitled to coverage, and we enter orders accordingly.

Settlement Does Not Preclude Coverage.

[3] The essence of the Pogges' complaint is one seeking coverage under the terms of their underinsured motorist insurance with American Family. We have held that where coverage is denied, the burden of proving coverage under a policy is upon the insured. *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003). Compare *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004) (stating that burden to prove exclusionary clause in insurance policy applies rests upon insurer).

As noted above, in reviewing the adequacy of the Pogges' complaint, the Court of Appeals in *Pogge I* stated as follows:

> [W]e hold that Mandell's policy is not an applicable policy merely because State Farm paid part of its coverage into the settlement; rather, if the policy is applicable or available and must be exhausted, it is because Mandell was guilty of negligence which proximately caused injury to Rosemary. However, from the facts of the accident as pleaded, there is a readily imaginable set of facts—Mandell's absence of negligence proximately causing injury—which would make Mandell's policy inapplicable.

13 Neb. App. at 71, 688 N.W.2d at 640-41. Thus, the Court of Appeals rejected the argument that the fact of settlement constituted an admission of liability requiring the Pogges to exhaust the liability limits of Mandell's policy. Moreover, the Court of Appeals held that at least one set of facts could exist by which Mandell would not be legally liable to the Pogges, which if proved would mean that the Pogges would not need to exhaust the liability limits of Mandell's insurance policy in order to receive coverage under their own underinsured motorist insurance.

Despite the fact that in *Pogge I*, the Court of Appeals rejected the argument that the fact of settlement for less than Mandell's policy limits alone precluded the Pogges from recovery under their underinsured motorist insurance, the district court, upon remand and on cross-motions for summary judgment, nevertheless determined that "settling with Mandell's insurer for less than the policy's limit precludes [the Pogges] from recovering underinsured motorist benefits under their policy." Based upon this reasoning, the district court sustained American Family's motion for summary judgment and dismissed the Pogges' declaratory judgment action.

[4] Implicit in the district court's decision is a determination that the fact of settlement established Mandell's liability. This conclusion is an error of law. Under Nebraska law, evidence of settlement is not admissible to prove liability for the settled claim. See, Neb. Rev. Stat. § 27-408 (Reissue 1995); *Baker v. Blue Ridge Ins. Co.*, 215 Neb. 111, 337 N.W.2d 411 (1983) (stating that evidence of settlement is inadmissible). See, also, *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987) (stating that district court's inference of admission of liability from correspondence discussing settlement was improper); *Myers v. McMaken*, 133 Neb. 524, 528, 276 N.W. 167, 169 (1937) (stating that settlements are favored in law, "[i]t is common knowledge that a person disclaiming all liability may endeavor to buy his peace by ridding himself of the annoyance of litigation," and consequently, expressed interest in settlement does not constitute admission of liability). The mere fact that Mandell's insurer settled with the Pogges should not have been considered by the district court as conclusive of Mandell's negligence, and we conclude that the district court erred as a matter of

law in stating that because the Pogges had settled with Mandell for less than the limits of Mandell's insurance policy, the Pogges were precluded from receiving benefits under the provisions of their underinsured motorist insurance.

No Evidence Regarding Mandell's Negligence. Mandell's Insurance Is Not Available.

[5,6] The instant case was before the district court on cross-motions for summary judgment. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *NEBCO, Inc. v. Adams*, 270 Neb. 484, 704 N.W.2d 777 (2005). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* The record on appeal shows that the Pogges demonstrated, without contradiction, their entitlement to judgment.

The Pogges moved for summary judgment on the issue of coverage under their insurance policy, an issue for which they had the burden of proof. See *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003). In order to establish their coverage, the Pogges introduced various items of evidence, including Mandell's deposition testimony, to show that Mandell was not legally liable to the Pogges and that therefore, Mandell's liability policy was not available to the Pogges and the Pogges did not need to exhaust Mandell's insurance policy in order to receive coverage under their underinsured motorist insurance. In this regard, we note that taking Mandell's deposition as a whole, he testified he was not driving negligently at the time of the accident and was therefore not responsible for Rosemary's injuries.

We have reviewed the record in this case, and we determine the Pogges produced enough evidence to establish a prima facie case that, if left uncontroverted at trial, would entitle them to judgment as a matter of law. That showing shifted the burden to American Family to produce evidence of a material factual issue. Even considering the affidavit of the American Family representative, and taking all inferences in favor of American

Family, American Family did not produce evidence to contradict the Pogges' evidence regarding Mandell's lack of negligence. Therefore, American Family failed to meet its burden of producing evidence, and there is no material fact in dispute regarding Mandell's lack of negligence and no evidence which would preclude the Pogges' demand for coverage. See *NEBCO, Inc. v. Adams, supra*. In view of the foregoing, we conclude the district court erred in granting summary judgment in favor of American Family, in denying the Pogges' motion for summary judgment, and in failing to grant summary judgment in favor of the Pogges.

Accordingly, we reverse the district court's order granting summary judgment in favor of American Family and denying the Pogges' summary judgment motion and we remand the cause for further proceedings on the issue of damages. Upon remand, the district court is directed to determine on the existing record what damages, if any, the Pogges sustained as a result of the accident that exceed the sum of their settlements with Sisson and Mandell, and as a result, what insurance proceeds, if any, they are entitled to receive under their underinsured motorist insurance with American Family.

Attorney Fees Are to Be Considered by the District Court on Remand.

In the instant appeal, the Pogges claim they were improperly denied attorney fees by the district court. Attorney fees are available to an insured under § 44-359 "upon . . . judgment against" an insurance company "in addition to the amount of his or her recovery." See *Kirwan v. Chicago Title Ins. Co.*, 261 Neb. 609, 624 N.W.2d 644 (2001). Although in our analysis earlier in this opinion, we direct summary judgment in favor of the Pogges, because the Pogges have not yet obtained an amount of "recovery," if any, we cannot say that the district court's denial of their motion for attorney fees was in error. However, because we remand the cause for further proceedings in connection with the issue of damages, we further direct the district court to consider the Pogges' motion under § 44-359 upon remand and, in the event the Pogges obtain a recovery, to grant attorney fees as may be established by the record.

CONCLUSION

We conclude the district court erred as a matter of law in concluding that the Pogges' settlement with Mandell constituted an admission of liability by Mandell and that because the Pogges settled for less than Mandell's policy limits, the Pogges failed to exhaust Mandell's policy and were precluded from receiving benefits under their underinsured motorist insurance coverage with American Family. We further determine that the Pogges established their entitlement to coverage under their underinsured motorist coverage with American Family. Accordingly, the district court erred in granting the summary judgment motion of American Family and in denying the summary judgment motion of the Pogges. We reverse the orders and direct that judgment be entered in favor of the Pogges. We further direct the district court upon remand to determine the Pogges' damages on the existing record. Finally, we direct the district court to consider the Pogges' motion for attorney fees at the trial level under § 44-359. We reverse the district court's orders and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

ALISON J. ROZSNYAI, APPELLEE, V.
VINCENT VICTOR SVACEK, APPELLANT.

723 N.W.2d 329

Filed November 9, 2006. No. S-05-876.

1. **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: 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.
3. **Divorce: Child Custody: Child Support: Jurisdiction.** Full and complete general jurisdiction over the entire marital relationship and all related matters is vested in the county or district court in which a petition for dissolution of marriage is properly filed.
4. **Divorce: Domicile: Intent: Jurisdiction.** Pursuant to Neb. Rev. Stat. § 42-349 (Reissue 2004), in order to maintain an action for divorce in Nebraska, one of the

parties must have had actual residence in this state with a bona fide intention of making this state his or her permanent home for at least 1 year prior to the filing of the complaint.

5. ____: ____: ____: ____. One who proves that he or she has met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 2004) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Vacated and dismissed.

Elizabeth Stuht Borchers, P.C., Ari D. Riekes, and Leilani Harbeck, Senior Certified Law Student, of Marks, Clare & Richards, for appellant.

Michael B. Lustgarten, of Lustgarten & Roberts, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Alison J. Rozsnyai filed a petition for dissolution of marriage in the district court for Douglas County in June 2004. Vincent Victor Svacek, Rozsnyai's husband, challenged the court's personal jurisdiction over him and the court's subject matter jurisdiction over the divorce proceeding.

The district court found that it had both personal jurisdiction over Svacek and subject matter jurisdiction over the divorce proceedings. Following a bench trial in which Svacek's attorney appeared to contest the court's personal and subject matter jurisdiction, the district court entered a decree dissolving the parties' marriage, dividing the parties' marital assets, and awarding attorney fees to Rozsnyai.

BACKGROUND

Rozsnyai and Svacek are both Canadian citizens. They were married in February 1997, in Las Vegas, Nevada, and, following their marriage, resided together in British Columbia, Canada, until their separation in May 1997.

On June 2, 1997, Svacek initiated divorce proceedings in the Supreme Court of British Columbia. Rozsnyai filed an answer and cross-petition with that court on July 18, 1997. Rozsnyai testified that the last activity in the Canadian proceeding took place in December 1998. She also testified, however, that the Canadian dissolution action is still pending.

In 2001, Rozsnyai moved to Nebraska and has since resided in this state on a visitor's visa. The Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (2000 & Supp. IV 2004), defines several classes of nonimmigrant aliens, including visitors, who are described as "an alien . . . having a residence in a foreign country which he has no intention of abandoning" and who is coming to the United States for business or pleasure. 8 U.S.C. § 1101(a)(15)(B). On June 8, 2004, Rozsnyai filed a petition for dissolution of marriage in the district court. In the first paragraph of her unverified petition, Rozsnyai claims that she "has resided in the State of Nebraska for more than one year with the bona fide intention of making this State her permanent home." Following a motion by Rozsnyai, the district court issued an order allowing the appointment of a private process server and permitting service of the summons and petition on Svacek in British Columbia. Service was perfected on June 24.

On June 30, 2004, the district court received a letter from Richard C. Gibbs, Svacek's legal counsel in British Columbia, on behalf of Svacek. In his letter, Gibbs objected to the court's jurisdiction over the matter because of the pending action in Canada. Gibbs' letter was struck from the record, however, because Gibbs is not authorized to practice law in Nebraska. Thereafter, the court received a letter from Svacek wherein Svacek took issue with the allegations contained in Rozsnyai's complaint and objected to the court's jurisdiction over the matter.

After retaining local counsel, Svacek filed a motion to dismiss for lack of personal jurisdiction and because an action based on the same issues and relief is pending in a court of another jurisdiction. Svacek's motion was denied, and the matter came on for trial on June 2, 2005. At trial, Svacek's attorney renewed his objections to personal and subject matter jurisdiction. The objections were overruled, and on June 27, the court entered a decree dissolving the parties' marriage, dividing the marital assets and

debts, and awarding Rozsnyai $1,000 in attorney fees. Svacek appeals the district court's decree.

ASSIGNMENTS OF ERROR

Svacek assigns as error, restated and reordered, the district court's determination that it had subject matter jurisdiction over the proceeding and personal jurisdiction over him.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's. *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

ANALYSIS

Subject Matter Jurisdiction

Svacek claims that the district court did not have subject matter jurisdiction over the present divorce proceeding.

[2] 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. *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

[3,4] Pursuant to Neb. Rev. Stat. § 42-351 (Reissue 2004), full and complete general jurisdiction over the entire marital relationship and all related matters is vested in the county or district court in which a petition for dissolution of marriage is properly filed. See *State ex rel. Storz v. Storz*, 235 Neb. 368, 455 N.W.2d 182 (1990). Neb. Rev. Stat. § 42-349 (Reissue 2004) provides that in order to maintain an action for divorce in Nebraska, one of the parties must have had "actual residence in this state with a bona fide intention of making this state his or her permanent home for at least one year prior to the filing of the complaint."

[5] The record in the instant case is insufficient to establish Rozsnyai's intent to make this state her permanent home, thus, the district court did not have jurisdiction over this matter. At trial, Rozsnyai testified that she had lived in Nebraska 3½ years

at the time of trial. Generally, one who proves that he or she has met the durational residency requirement for jurisdiction in divorce proceedings set out in § 42-349 shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide. *Rector v. Rector*, 224 Neb. 800, 401 N.W.2d 167 (1987). We conclude, however, that where both parties are foreign citizens and the only party to have resided in Nebraska has done so by reason of a visitor's visa, the inference is negated and specific proof of intention is required. See *Jones v. Union P. R. Co.*, 141 Neb. 112, 2 N.W.2d 624 (1942) (stating that where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with facts, plaintiff does not sustain his position by reliance alone on inference which would entitle him to recover).

A nonimmigrant alien authorized to reside in this country on a visitor's visa does so on a temporary basis and on the condition that he or she is not abandoning his or her foreign residence. 8 U.S.C. § 1101(a)(15)(B); 8 C.F.R. § 214.2(b) (2006). The residency restrictions placed on a nonimmigrant alien residing on a visitor's visa negates the inference that a nonimmigrant alien intends to reside in Nebraska on a permanent basis merely because he or she has resided in this state for more than 1 year. Thus, in the instant case, the inference created by Rozsnyai's testimony that she has lived in Nebraska since 2001 was negated by the fact that she has done so on a visitor's visa.

Because an inference did not arise that Rozsnyai has resided in Nebraska with the intention to make it her permanent home, it was necessary for Rozsnyai to put forth evidence establishing that intent. However, the only evidence presented at trial was Rozsnyai's testimony regarding the length of time she had resided in Nebraska at the time of trial.

Because the record does not establish Rozsnyai's intention to reside in this state permanently, we conclude the district court did not have jurisdiction over this matter.

We note that Svacek argues on appeal that subject matter jurisdiction is lacking because Rozsnyai is present in the United States based on a visitor's visa and, therefore, does not have the requisite intent to remain in this country permanently. Because

we conclude there is insufficient evidence to establish Rozsnyai's intent, we need not determine whether or not she could legally form the intention to reside here permanently in light of her immigration status. We point out, however, that it appears there may be instances where a nonimmigrant alien is able to establish an intention to reside in a state permanently when the alien has offered proof of that intent apart from his or her presence in that state. See, e.g., *Alves v. Alves*, 262 A.2d 111 (D.C. App. 1970) (holding husband established domicile for purposes of obtaining divorce in that jurisdiction, despite immigration status); *Weber v. Weber*, 929 So. 2d 1165 (Fla. App. 2006) (holding nonimmigration status does not bar individual's right to establish residency for purposes of obtaining dissolution of marriage in that state and citing *Perez v. Perez*, 164 So. 2d 561 (Fla. App. 1964), for proposition that alien's nonpermanent immigration status is factor in determining issue of domiciliary intent); *Bustamante v. Bustamante*, 645 P.2d 40 (Utah 1982) (noting nonimmigrating aliens may form requisite intent to establish permanent residence for purpose of divorce). However, such evidence is not present in this case.

Because the evidence is insufficient to establish Rozsnyai's intention to reside in Nebraska permanently, we vacate the decree of dissolution entered by the district court and dismiss this action.

Personal Jurisdiction

[6] Having determined that the district court did not have subject matter jurisdiction over this proceeding, we need not address Svacek's argument that the district court erred in determining that it has personal jurisdiction over him. See *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

CONCLUSION

For the reasons discussed above, we conclude that the district court did not have subject matter jurisdiction over this proceeding and, accordingly, vacate the decree of dissolution and dismiss this action.

Vacated and dismissed.

Heavican, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JAMES D. MARRS, APPELLANT.

723 N.W.2d 499

Filed November 9, 2006. No. S-06-067.

1. **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.
2. **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.
3. **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.
4. **Constitutional Law: Appeal and Error.** Generally, a constitutional question not properly raised in the trial court will not be considered on appeal.
5. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
6. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
7. **Board of Pardons: Sentences.** The Nebraska Board of Pardons has the unfettered discretion to grant or deny a commutation of a lawfully imposed sentence for any reason or for no reason at all.
8. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

John H. Sohl, of Edstrom, Bromm, Lindahl, Sohl & Freeman-Caddy, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

STEPHAN, J.

Following his guilty plea to an amended charge of second degree murder, the district court for Saunders County sentenced James D. Marrs to "a term of imprisonment of not less than the

rest of his life nor more than the rest of his life." Marrs appeals the sentence. We affirm.

BACKGROUND

On May 5, 2004, Marrs was charged with first degree murder in the June 30, 2003, death of Sharron Erickson of Colon, Nebraska. After counsel was appointed to represent him, Marrs entered a plea of guilty to an amended charge of second degree murder. At Marrs' sentencing hearing, the prosecutor read into the record a letter from the sister of the victim which stated in part that Marrs was a " 'terrorist' " to Erickson and " 'to the people of Colon who lived in fear knowing a murderer was out there.' "

In summarizing the facts of the case, the prosecutor informed the court that an autopsy had determined that the victim died from "manual strangulation" and that in addition, she suffered "multiple cuts and bruises as a result of blunt trauma to her head, nose, face, and legs." The prosecutor noted that the victim had "multiple defensive wounds on the left-side of her body because of the desperate acts she did in trying to fight back." The prosecutor described the following sequence of events:

> While [Erickson] was sleeping, the defendant climbed a six-foot fence and broke into a screen door that was pried open with a chisel, kicked up the wooden storm door setting off an alarm, and cutting her phone line.
>
> At some point [Erickson] awoke, and apparently grabbed an unloaded Beretta that she kept in her house. When a struggle ensued, the defendant followed her into her garage, continued to beat her and strangle her with [his] hands. At some point he got tired and couldn't finish the job and had to stand on her throat to finally kill her.

After both sides had presented their arguments and immediately prior to imposing sentence, the district judge stated in part:

> You have deprived the community of a valuable citizen and have taken a loved one away from her family.
>
> [Nothing] I can say today or do today or that you could say or do . . . would change the fact that your actions terrorized your community. You placed its residents under fear and suspicion.

The judge's comments before pronouncing sentence also included the following:

> The facts concerning the offense at issue show that it was premeditated and violent. You admitted that you were using substances on the night of the offense.
>
> You went to the residence of the victim and you cut the phone lines. You broke into the residence with a chisel. At the residence you hit the victim who was unable to phone for help. The struggle continued in the victim's garage where you manually strangled the victim to death, an act which required tremendous and violent force.

The court then sentenced Marrs to a "term of imprisonment of not less than the rest of your life, nor more than the rest of your life." He filed this timely appeal.

ASSIGNMENTS OF ERROR

Marrs assigns, restated, renumbered, and consolidated, that the district court erred in (1) fixing an identical minimum and maximum term of imprisonment, (2) usurping the constitutional power of the Board of Parole and imposing an unconstitutional sentence, and (3) imposing an excessive sentence based on personal bias.

STANDARD OF REVIEW

[1] 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. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

[2] 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. *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005).

[3] 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. Iromuanya, ante* p. 178, 719 N.W.2d 263 (2006); *State v. Keen, ante* p. 123, 718 N.W.2d 494 (2006).

ANALYSIS

Murder in the second degree is a Class IB felony for which the maximum sentence is life imprisonment and the minimum

sentence is 20 years' imprisonment. Neb. Rev. Stat. §§ 28-105(1) (Cum. Supp. 2004) and 28-304(2) (Reissue 1995). Marrs argues that his sentence was unlawful because the minimum and maximum terms were the same: life imprisonment. He argues that the sentence was not a permissible indeterminate sentence and that it usurped the constitutional power of the Board of Parole. Alternatively, Marrs argues that the sentence was excessive.

Indeterminate Sentence

Marrs' first argument is premised upon Neb. Rev. Stat. § 29-2204 (Cum. Supp. 2004), which provides in pertinent part that

> in imposing an indeterminate sentence upon an offender the court shall:
>
> . . . .
>
> (ii) Beginning July 1, 1998:
>
> (A) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum. If the criminal offense is a Class IV felony, the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term and the maximum limit shall not be greater than the maximum provided by law; or
>
> (B) Impose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law.

Marrs contends that this statute does not permit an indeterminate sentence fixing both the minimum term and the maximum term at life imprisonment for second degree murder. He argues that the sentence imposed upon him should thus be construed as setting only a valid maximum term of life imprisonment and that the minimum term of 20 years' imprisonment should be imposed by operation of law. See, *State v. Gass*, 269 Neb. 834, 697

N.W.2d 245 (2005); *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000).

Under prior versions of § 29-2204, an indeterminate sentence could not be imposed for second degree murder offenses committed prior to September 9, 1993. See *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994), and *State v. Martin*, 246 Neb. 896, 524 N.W.2d 58 (1994) (both overruled on other grounds by *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998)). Beginning with amendments to § 29-2204 enacted in 1993, such sentences are now permitted. *Id.* However, the imposition of an indeterminate sentence, even where the maximum term is life imprisonment, requires that the minimum term be affirmatively stated. *State v. Gass, supra*; *State v. Schnabel, supra*. In *Schnabel*, we noted that while the current version of § 29-2204 "does not require that a minimum term be different from a maximum term, it does require that a minimum term be affirmatively stated if it is to be imposed, and if a minimum term is not set forth, an indeterminate sentence will be imposed by operation of law." 260 Neb. at 623, 618 N.W.2d at 703.

Marrs notes, correctly, that because *Schnabel* did not present the issue of whether the law required the minimum term of an indeterminate sentence for a Class IB felony to be lower than the maximum term, our statement that it did not was dicta. Relying primarily on authority from other jurisdictions, Marrs argues that there must be a difference between the maximum and minimum terms of an indeterminate sentence. See, *People v. Buxton*, 28 Ill. App. 3d 429, 436, 328 N.E.2d 703, 708 (1975), quoting *People v. Jacque*, 131 Ill. App. 2d 365, 266 N.E.2d 514 (1970) (" '[a] true indeterminate sentence is one with a sufficient difference between the minimum and maximum limit which will allow the prisoner an opportunity for parole' "); *State v. Moore*, 21 N.J. Super. 419, 91 A.2d 342 (1952) (reasoning terms "minimum and maximum" have separate and distinctly opposing meaning).

The Nebraska Court of Appeals has reached conflicting conclusions on this issue. In *State v. Wilson*, 4 Neb. App. 489, 501, 546 N.W.2d 323, 332 (1996), a majority of the panel relied on authority from other jurisdictions in concluding that in an indeterminate sentence, "there must be a difference between the periods, and a sentence fixing identical minimum and maximum

terms of imprisonment is not an indeterminate sentence." Because of uncertainty in the actual sentence imposed based on comments made by the sentencing judge, the cause was remanded for resentencing. The third member of the panel dissented, finding "nothing in the indeterminate sentencing statute which requires a differential between the minimum and maximum" term of the sentence. *Id.* at 503, 546 N.W.2d at 333 (Sievers, C.J., concurring in part, and in part dissenting). In *State v. DuBray*, 5 Neb. App. 496, 500, 560 N.W.2d 189, 192 (1997), a different panel which included the dissenting judge in *Wilson* affirmed a sentence of not less nor more than 4 years' imprisonment on a conviction for assault, concluding: "There is nothing in the current statutes requiring the minimum and maximum limits of a sentence to be different or that a separate minimum sentence must be imposed."

We addressed an indeterminate sentencing issue in *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). There, the defendant received a sentence of not less nor more than 5 years' imprisonment on a Class IV felony, for which the maximum term of imprisonment was 5 years. See § 28-105(1). We characterized the sentence as "an indeterminate term of imprisonment . . . in which the minimum term of imprisonment was 5 years and the maximum term of imprisonment was 5 years," and we noted that the sentence was "valid at the time it was imposed." *State v. Urbano*, 256 Neb. at 215, 589 N.W.2d at 158. However, during the pendency of the appeal, the sentencing statutes were amended to limit the minimum term of an indeterminate sentence imposed for a Class IV felony to one-third of the maximum term. We held that the defendant was entitled to the benefit of the amendment and therefore modified the sentence to a term of imprisonment of 20 months to 5 years.

In this case, we conclude that the district court pronounced an indeterminate sentence in which the minimum and maximum terms were the same. Unlike the circumstance in *Urbano*, we find no statutory requirement that the affirmatively stated minimum term for a Class IB felony sentence be less than the maximum term. Although § 29-2204(1)(a)(ii) permits a sentencing judge imposing a maximum term of life imprisonment for a Class IB felony to impose a minimum term of years not less than the statutory mandatory minimum, it does not require the judge to do so.

Accordingly, we reject Marrs' argument that his sentence was impermissible under the applicable sentencing statutes.

Constitutional Claim

[4-6] Marrs' argument that his sentence unconstitutionally usurped the authority of the Board of Parole was not presented to the district court. Generally, a constitutional question not properly raised in the trial court will not be considered on appeal. *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005). In this case, however, Marrs could not assert his constitutional argument until the sentence was pronounced. A sentence validly imposed takes effect from the time it is pronounced. *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000); *State v. Carlson*, 227 Neb. 503, 418 N.W.2d 561 (1988). When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *State v. Schnabel, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), *cert. denied* 526 U.S. 1162, 119 S. Ct. 2056, 144 L. Ed. 2d 222. This principle applies here because the sentence imposed by the district court was authorized by statute. Accordingly, Marrs did not have an opportunity to assert his constitutional argument in the district court, and we therefore consider it on appeal.

[7] Neb. Rev. Stat. § 83-1,110(1) (Cum. Supp. 2004) provides that "[e]very committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence . . . ." Marrs argues that by setting the minimum term of his sentence as life imprisonment instead of a term of years, the district court usurped the constitutional authority of the Board of Parole. That authority is derived from article IV, § 13, of the Nebraska Constitution, which provides:

> The Legislature shall provide by law for the establishment of a Board of Parole and the qualifications of its members. Said board, or a majority thereof, shall have power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment. The Governor, Attorney

> General and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment. The Board of Parole may advise the Governor, Attorney General and Secretary of State on the merits of any application for remission, respite, reprieve, pardon or commutation but such advice shall not be binding on them. The Governor shall have power to suspend the execution of the sentence imposed for treason until the case can be reported to the Legislature at its next session, when the Legislature shall either grant a pardon, or commute the sentence or direct the execution, or grant a further reprieve.

The powers and duties of the Board of Parole are set forth in Neb. Rev. Stat. § 83-192 (Reissue 1999), which provides for review of the record of committed offenders under various circumstances. Section 83-192(1)(f)(v) provides in part:

> If a committed offender is serving a minimum life sentence, his or her record shall be reviewed during the first year of incarceration and every ten years thereafter until such time as the sentence is commuted. If such sentence is commuted, the committed offender's record shall be reviewed annually when he or she is within five years of his or her earliest parole eligibility date.

The Nebraska Board of Pardons has the unfettered discretion to grant or deny a commutation of a lawfully imposed sentence for any reason or for no reason at all. *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992).

The minimum life sentence imposed upon Marrs does not itself restrict or usurp any power of the Board of Parole as defined in the constitution or parole eligibility statutes. Marrs' constitutional argument is without merit.

Excessive Sentence Claim

Marrs argues that his sentence was excessive "because the length of the sentence was affected by the judge's personal bias towards the crime committed." Brief for appellant at 34. He contends that the remarks of the district judge at the time of sentencing, as set forth above, are indicative of personal bias. Marrs

relies on *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998), and *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004), in support of his argument. In *Pattno*, the sentencing judge read a passage from the Bible which disparaged homosexuality when sentencing the defendant for the sexual assault of a child. We concluded that the judge's reliance on his personal religious beliefs injected an impermissible consideration into the sentencing process that could convince a reasonable person that the court was biased or prejudiced. Similarly, in *Bruna*, the sentencing judge injected his personal religious views when sentencing the defendant in a sexual abuse case, and the Court of Appeals concluded this was impermissible based upon the reasoning of *Pattno*.

[8] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006). After Marrs declined the opportunity to make a statement in his own behalf, the sentencing judge commented on each of these factors in explaining the basis for the sentence she was about to pronounce. Her characterization of the nature of the offense as "premeditated and violent" is fully supported by the information included in the presentence investigation report, as is the comment that Marrs' actions "terrorized" the community of Colon. We find nothing in the record upon which a reasonable person could conclude that the sentence was based upon personal bias or prejudice on the part of the district judge. We conclude that the judge did not abuse her discretion in sentencing Marrs.

CONCLUSION

For the reasons discussed above, we conclude that Marrs' assignments of error are without merit and affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. EDWARD ROBINSON, JR., APPELLANT.

724 N.W.2d 35

Filed December 1, 2006. No. S-05-107.

1. **Juries: Discrimination: Appeal and Error.** A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility.
2. ____: ____: ____. A trial court's determination that there was no purposeful discrimination in a party's use of his or her peremptory challenges and a trial court's determination of the adequacy of a party's neutral explanation of its peremptory challenges are factual determinations that will not be reversed on appeal unless clearly erroneous.
3. **Equal Protection: Jurors: Discrimination.** The Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race.
4. **Juries: Discrimination: Prosecuting Attorneys: Proof.** The evaluation of whether a party has used peremptory challenges in a racially discriminatory manner is a three-step process. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination.
5. **Juries: Discrimination: Proof.** A defendant satisfies the requirements of the first step in the evaluation of whether a party has used peremptory challenges in a racially discriminatory manner by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.
6. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Although the prosecutor must present a comprehensible reason, the second step in the evaluation of whether a party has used peremptory challenges in a racially discriminatory manner does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices.
7. ____: ____: ____: ____. The final step in the evaluation of whether a party has used peremptory challenges in a racially discriminatory manner involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
8. ____: ____: ____: ____. If a prosecutor's proffered reason for striking an African-American panelist applies just as well to an otherwise-similar non-African-American who is permitted to serve, that is evidence tending to prove purposeful discrimination.
9. **Trial: Jurors.** The same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges a lawyer has, and a strict comparison analysis may not properly take into account the variety of factors and considerations that may be part of a lawyer's decision to select certain jurors while challenging others that may appear to be similar.

10. ____: ____. The demeanor of a potential juror can be a legitimate, race-neutral reason for a peremptory challenge.
11. **Trial: Jurors: Discrimination: Proof.** The fact that the observations of a challenging party are unconfirmed may affect the trial court's determination of the persuasiveness of an explanation, but confirmation is not necessary for a party's observation of a potential juror's demeanor to form the basis of a race-neutral explanation for a peremptory challenge.
12. ____: ____: ____: ____. Although trial courts should be particularly sensitive when facial expressions or body language alone is advanced as the reason for striking a minority juror, either reason provides a sufficient basis to support the exercise of a peremptory challenge.
13. **Equal Protection: Juries: Discrimination.** While a pattern of strikes is not required to show an Equal Protection Clause violation, as the use of even a single peremptory challenge on racial grounds is a violation of equal protection, the lack of a pattern may be considered when evaluating the credibility of a race-neutral explanation for a challenge.
14. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
15. **Rules of Evidence: Hearsay.** The admission of hearsay is controlled by the Nebraska Evidence Rules.
16. **Rules of Evidence: Hearsay: Proof.** The party seeking to admit a business record under the business records exception to the hearsay rule bears the burden of establishing foundation under a three-part test. First, the proponent must establish that the activity recorded is of a type that regularly occurs in the course of the business' day-to-day activities. Second, the proponent must establish that the record was made as part of a regular business practice at or near the time of the event recorded. Third, the proponent must authenticate the record by a custodian or other qualified witness.
17. **Trial: Evidence: Proof.** A computer printout is admissible as a business record if the offeror establishes a sufficient foundation in the record for its introduction.
18. **Rules of Evidence: Hearsay.** When computer-stored records satisfy the business records exception to the hearsay rule, preparing printouts for evidentiary purposes does not deprive the printouts of their character as business records.
19. ____: ____. The reason for excluding business records from the hearsay rule is their circumstantial guarantees of trustworthiness.
20. **Evidence: Records.** It is the circumstances under which the records are recorded, kept, maintained, and used that give the reliability essential to the law's conclusion that without any independent recollections by those who made the succession of entries they are reliable, precisely because the business relies on them for important business judgments.
21. **Trial: Evidence: Appeal and Error.** On appeal, a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court.
22. **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.
23. **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.

24. **Trial: Expert Witnesses.** Under the recent *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), 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.
25. ____: ____. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), does not create a special analysis for answering questions about the admissibility of all expert testimony. Not every attack on expert testimony amounts to a *Daubert* claim.
26. ____: ____. If a witness is not offering opinion testimony, that witness' testimony is not subject to inquiry pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
27. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
28. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403.
29. **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.
30. ____: ____: ____: ____. 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.
31. **Witnesses: Juries: Appeal and Error.** The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.
32. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition.
33. **Homicide: Intent.** A person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice.

34. **Intent: Words and Phrases.** Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.
35. **Homicide: Intent: Words and Phrases.** The term "premeditated" means to have formed a design to commit an act before it is done.
36. ____: ____: ____. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
37. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.
38. ____: ____: ____. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
39. **Homicide: Intent: Juries.** A question of premeditation is for the jury to decide.
40. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
41. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
42. **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 improper remarks no later than at the conclusion of the argument.
43. ____: ____. Any objection to a prosecutor's arguments made after the jury has been instructed and has retired is untimely and will not be reviewed on appeal.
44. **Appeal and Error.** Absent plain error, an issue not raised to the trial court will not be considered by the Nebraska Supreme Court on appeal.
45. **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.
46. **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.
47. **Trial: Attorneys at Law: Evidence.** It is improper for counsel to comment during closing argument on matters unsupported by the evidence.
48. **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.
49. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

50. **Jury Instructions: Lesser-Included Offenses.** Step instructions which require consideration of the most serious crime charged before consideration of lesser-included offenses are not erroneous.
51. **Trial: Prosecuting Attorneys: Juries.** The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct.
52. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
53. **Sentences: Prior Convictions: Habitual Criminals: Waiver: Proof.** In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.
54. **Prior Convictions: Records: Proof.** The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.
55. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right.
56. **Trial: Jurors.** Both when determining whether a venireperson should be removed for cause and when determining whether a juror should be retained after the commencement of trial, the retention or rejection of a juror is a matter of discretion for the trial court.
57. **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.
58. **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal.
59. **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.
60. **Criminal Law: Jury Misconduct: Proof.** In a criminal case, jury misconduct must be demonstrated by clear and convincing evidence.
61. ____: ____: ____. Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Susan M. Bazis, of Bazis Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

GERRARD, J.

I. NATURE OF CASE

The defendant, Edward Robinson, Jr., was charged with first degree murder and use of a deadly weapon to commit a felony in connection with the killing of the victim, Herbert Fant. The State contended, at trial, that the victim had been in an argument with the defendant's wife and that as a result, the defendant was angry with the victim. This, according to the State, culminated in a fight in the parking lot of a Popeyes restaurant in Omaha that ended with the fatal shooting of the victim. At trial, the defendant, relying primarily on inconsistencies among the statements and testimony of the State's witnesses, argued that there was a reasonable doubt as to whether the defendant had been the victim's killer. The defendant was convicted of both charges and appeals from his convictions and sentences.

II. BACKGROUND

1. FACTS

Parisee Fant (Parisee), the victim's wife, testified that at the time of the killing, she and her husband had been having difficulties in their marriage. The two were avoiding each other by trying not to be home at the same time. Parisee testified that on February 24, 2003, Parisee and the victim were planning for him to move out of the residence. Parisee spoke to her cousin, Tiffany Newte, about the problems in her marriage. Newte was married to the defendant. Parisee testified that she and Newte were close and spoke often about "[p]roblems, kids, everything," including Parisee's relationship with the victim.

When Parisee spoke to Newte on February 24, 2003, Newte was angry at the victim because of Newte's belief that the victim had been unfaithful to Parisee. Parisee was also angry, and

she spoke to the victim several times that day about the matter. Later that evening, sometime after 8:30, the victim came home and argued with Parisee, and the encounter turned physical. The victim was angry. A friend of the victim, whom Parisee did not know, came into the home and led the victim out. The two men left in the victim's vehicle, which Parisee identified as an orange "Chevy Malibu" with tinted windows that the victim had owned for about 3 or 4 weeks.

Before proceeding further, we note, for the sake of clarity, that witness identification of the makes and models of different vehicles was a significant issue in this case. For instance, although Parisee identified the victim's vehicle as a Malibu, it is identified inconsistently throughout the trial, by different witnesses, as a Chevrolet Malibu, Caprice, or Impala. More important, a white sport utility vehicle that was seen by witnesses leaving the scene of the killing was identified by several of those witnesses as a Cadillac Escalade, and at trial, an essential part of the State's theory of the case was that those witnesses had actually seen a white GMC Yukon Denali owned by the defendant's wife.

About 30 to 45 minutes after the victim and his friend left Parisee, Newte called Parisee, angry and "screaming" such that she was hard to understand. Parisee called the victim and spoke to him about Newte's call. At 11:05 p.m., Parisee received a call from Michael Whitlock, a friend of the victim. As a result of that call, Parisee went to a local hospital, where she was informed that the victim had been shot and killed.

Tasha Brye testified that beginning in November 2002, she had been in an intimate relationship with the victim. Brye spoke to the victim on her cellular telephone sometime between 10 a.m. and noon on February 24, 2003, and then spoke to him again at about 2 p.m. After Brye arrived home from work, she called the victim at around 5 p.m. Brye lived in a home near 30th Street and Ames Avenue, "[w]ithin a couple of blocks of the Popeyes" where the victim was killed. Brye went to a friend's house to play cards, and then received a telephone call from her mother informing Brye that Brye's home burglar alarm was sounding. Brye called the victim and asked him to meet her at her house, then she drove home, arriving at about 6:15 p.m.

The victim met Brye at her home, she talked with him, and then they both left about 10 minutes after arriving.

The victim called Brye several more times that evening. Eventually, as a result of one of the telephone calls, Brye went to check on her home, and the victim arrived while she was there, at about 9:20 or 9:30 p.m. Brye described the victim as "furious." A few minutes later, the victim received a telephone call. The victim became more upset, and left. Brye called the victim again after he left, and they spoke briefly. Brye did not see the victim again before his death.

Daylan Dortch (Daylan) was a friend of the victim. In the afternoon of February 24, 2003, Daylan was at a house at 24th Street and Templeton Drive with his brother James Dortch (James), Whitlock, Andrew Cobb, another individual, and the victim. The house at 24th Street and Templeton Drive was a "hang-out spot" where Daylan and his friends played video games. Daylan testified that the victim seemed "frustrated." Daylan, Whitlock, Cobb, and the victim remained at the house smoking marijuana for a couple of hours, then "just went riding." Eventually, they returned to the house. The victim was using a cellular telephone, talking to someone Daylan believed to be the victim's girl friend. Daylan and the victim left again. Daylan testified that "[the victim] was kind of frustrated. He was like he needed somebody to ride with. I just rode with him." They took the victim's car, described by Daylan as an "orange Chevy Caprice," with four doors, and dark, tinted windows.

Daylan testified that they went to the house where the victim lived with Parisee, and Daylan waited outside in the car for about 20 minutes. When Daylan went up to the house to see what was happening, he found that the victim and Parisee were fighting. Daylan attempted to calm the victim, then left with him. Daylan testified that they took the "Interstate" to Florence Boulevard. The victim was "[r]eal frustrated then" and "real mad." The men arrived at a house on Florence Boulevard. Although Daylan was not able to be more specific about the location, other evidence established that Newte lived on Florence Boulevard, about a 7- to 10-minute drive northeast from the victim's residence.

Daylan said that after they arrived, the victim got out of the car, knocked on the door of the house, then knocked on the

window. A female came to the window, and she and the victim began shouting at one another. The men left and returned to the house at 24th Street and Templeton Drive. The victim, Daylan, Whitlock, Cobb, James, and Damion Jackson were there at that time. The victim continued to use his telephone, and the others tried to calm him down. The victim said he did not want to stay, and although the others attempted to persuade him to stay, he left, accompanied by Jackson.

Later that evening, James received a telephone call from Shaquata Mayfield, who told James that the victim had been shot. James, Daylan, Cobb, and Whitlock got in a car and went directly to the scene of the killing. The police arrived and took all the men into custody for questioning.

Whitlock, a close friend of the victim, also testified regarding the events of February 24, 2003. Whitlock testified that on that afternoon, he, Daylan, and Jackson had been "[j]ust riding" with the victim in the victim's car. Whitlock identified the victim's vehicle as a burnt orange 1995 "Chevy Impala SS," with very dark, tinted windows. They returned to the house on 24th Street, and the victim and Daylan left again, then returned. Whitlock agreed that the victim seemed "pretty upset," both before the victim and Daylan left the house and after they returned.

Whitlock testified that after the victim and Daylan left, Whitlock received a call on his cellular telephone from the defendant. Whitlock testified that although he had known the defendant for some time, it was unusual for Whitlock to speak to the defendant. According to Whitlock, the defendant asked Whitlock for the location of the victim:

> He just said — he asked where [the victim] was at and I was like, I don't know. He was like, Well, [the victim] came by my girl['s] house trippin' and callin' her all out of her name and disrespecting her, and I'm looking for him. I was like, Well, I can't give you the number, but I'll call you back.

The defendant hung up, and Whitlock called the victim. Ten or fifteen minutes later, the defendant called again. Whitlock said that "when he called, I said, Hello. He was like, Man, [the victim's] wrong for coming by my house disrespecting my girl like that. You don't go by nobody['s] house and disrespecting. And then he was like, I don't want to have to pop him." Whitlock

testified that later, the defendant called again. "He said, Are you with [the victim]? And I said, What? And he said, Is you with your boy? Is you in that Impala? And then I said, No." Whitlock testified that 4 or 5 minutes later, James got the call that the victim had been shot. The men got into James' car and went to the scene. Whitlock called Parisee at that point.

Cellular telephone records entered into evidence generally supported the testimony given by the State's witnesses at trial, both with respect to when and to whom calls were made, and the general location of the victim's telephone and the defendant's telephone when the calls to and from them were connected. The technical details of the telephone records and cellular site location data will be discussed below, but the most pertinent telephone records are summarized as follows:

A call was made from Newte's telephone to the defendant's telephone at 7:51 p.m. on February 24, 2003, connecting to the defendant's telephone through a cellular telephone tower at 46th and Farnam Streets. At 10:01 p.m., two more short calls were made from Newte's telephone to the defendant's telephone, connecting to the defendant's telephone from the northeast sector of a tower at 16th and Farnam Streets, serving the area of 11th and Nicholas Streets, where the defendant's business was located. At 10:09 p.m., the defendant's telephone received another call from Newte's telephone, connected through a sector aimed southeast from a cellular site located at 3600 North 24th Street, west of the defendant's business, but still east of the location of the killing.

At 10:15 p.m. on February 24, 2003, a call was made from the defendant's telephone to Whitlock's telephone, connecting to the defendant's telephone through the southeast sector of a tower at 30th and Fort Streets, extremely close to—and aimed at—the location of the killing. At 10:16 p.m., a call was placed from Whitlock's telephone to the victim's telephone, connecting to the victim's telephone through the southwest sector of the tower at 3600 North 24th Street, close to Brye's residence. At 10:17 p.m., a call was placed from the victim's telephone to the defendant's telephone.

The 10:17 p.m. call on February 24, 2003, from the victim's telephone to the defendant's telephone connected to the victim's telephone through the tower near Brye's residence, but another

call was placed from the victim's telephone to the defendant's telephone at 10:22 p.m., connecting to the victim's telephone through the tower at 30th and Fort Streets near the Popeyes restaurant where the crime would be committed. Both calls connected to the defendant's telephone through the 30th and Fort Streets tower. In other words, by 10:22 p.m., the last time the victim's telephone called the defendant's, both telephones were using the same tower.

Two more calls were received on Whitlock's telephone from the defendant's number at 10:30 and 10:36 p.m. on February 24, 2003, again connecting to the defendant's telephone through the 30th and Fort Streets tower. At 10:52 p.m., an outgoing call was placed from Whitlock's telephone to Parisee and the victim's home.

Mayfield was working at Popeyes at the time of the shooting. Mayfield testified that the front counter of Popeyes had closed at 8 p.m. but that the drive-through remained open until 10 p.m. Mayfield was working until closing that day, along with her manager and a cook. As 10 p.m. approached, there were no customers at the drive-through and Mayfield was cleaning the restaurant in preparation for closing.

As Mayfield was sweeping, an orange car pulled into the parking lot. Mayfield recognized the car, having seen Whitlock riding in it. At trial, Mayfield identified several individuals whom she knew to regularly ride in that car: Whitlock, Daylan, James, Jackson, and a man Mayfield knew only as "Herb," later identified as the victim. The car backed into a parking space.

Mayfield went into the bathroom to change clothes. When she came out, she saw the victim and two other men in the parking lot. She testified that two of the men were moving their hands and appeared to be talking: the victim and another, shorter man. Mayfield described the shorter man as wearing "a black hoodie or some kind of black jacket and some dark jeans." The victim was wearing just a T-shirt and was much taller than the person with whom he was talking. Mayfield testified that the third man was taller, "about as tall as [the victim]," and was wearing a black coat. Other evidence at trial established that the defendant had been shorter and smaller than the victim. Mayfield saw the third man trying to separate the victim and the shorter man.

Mayfield also saw that a dark blue or black van had appeared in the parking lot, along with a white sport utility vehicle. She saw two people in the white vehicle, which she described as having four doors. She also saw a dark green car, which pulled in behind the white vehicle but then backed out and left. Mayfield said that she was "walking back and forth towards the window [and] trying to tell the white truck the drive-thru was closed, but I guess they weren't trying to order no chicken so they sat there."

Mayfield testified that while she was at the window, Joe Lockett called Mayfield on her cellular telephone. Mayfield's telephone records confirmed that at 10:40 p.m. on February 24, 2003, Mayfield received a call from a telephone number used by Lockett. Mayfield testified that she and Lockett spoke about the green car that had backed out of the parking lot, although the precise content of this conversation is not reflected in the record. Then, Mayfield testified that while she was standing at the window,

> [t]he white car — I seen — well, somebody hopped out and ran out, but I never seen 'em come to the front. And when I went back to the window, the shorter man had the gun in his hand and him and [the victim] was standing face-to-face to each other and he just shot.

After seeing the victim get shot, Mayfield ran to the office in the back of the restaurant and called James, because she knew him to be a friend of the victim, and she told James that the victim had been shot. Mayfield's manager called the 911 emergency dispatch service.

Lockett called Mayfield again after the shooting. Mayfield testified that Lockett asked her if she was okay, then said, "If the police ask, tell them it was Fast Eddie." "Fast Eddie" was the defendant's nickname. Mayfield replied that she would not tell the police that "Fast Eddie" was the killer, because she did not recognize the killer and did not know "Fast Eddie." When James arrived, seconds after Mayfield had called him, Mayfield came out of the office and met James, Cobb, Whitlock, and Daylan. The police arrived later and prevented everyone from leaving, so Mayfield called Lockett, because she saw him outside talking to Jackson. Mayfield's cellular telephone records verify two calls between her telephone and Lockett's telephone.

Lockett testified that he had not known the victim personally, but had seen him around, with Jackson, Whitlock, and Daylan. In February 2003, Lockett had been dating Ramona Clark and was living in a house on North 28th Avenue, a short distance from the scene of the crime. Lockett was living with his mother at the time, and Lockett's brother lived a few doors to the south. Danny Robinson, Sr. (Robinson), the defendant's brother, also lived on 28th Avenue, down the street from Lockett's mother. Lockett used to speak to Robinson when he came down the street to Lockett's brother's house. Lockett testified that he had seen Robinson driving an older-model "black Chevy van." Lockett said that on occasion, the defendant visited Robinson's home. Lockett testified that he also knew the defendant, from seeing him on the streets and from a visit to the defendant's business.

Lockett testified that on February 24, 2003, he had dropped Clark and her sister off at work near 90th and Maple Streets, and picked them up after their shift ended at about 10 p.m. Lockett and Clark dropped Clark's sister off at a house on 26th Avenue, south of Fort Street, and drove toward 30th Street and Ames Avenue. Lockett testified that Clark wanted something to eat, so they headed north on 30th Street to see if Popeyes was open. Lockett testified that as they approached the restaurant, they saw the victim's car, which he identified as an "orange Caprice," and Mayfield's car. Lockett knew Mayfield because he had dated a friend of hers, and he knew that Mayfield's car was there because she worked at Popeyes.

Lockett said that as they got closer, he noticed people arguing, and that Robinson's "black Chevy van" was there. Lockett also saw a white truck that Lockett identified as "a Cadillac Escalade, an Escalade truck," a big sport utility vehicle, although Lockett said he was not really able to determine what type of model it was. Lockett testified that he saw five people in the parking lot, specifically identifying the victim, the defendant, and Robinson, as well as a person identified by Lockett only as "Shamika," whom Lockett knew. The victim and the defendant were facing one another, and Robinson was off to the side. Lockett drove to 29th and Fort Streets, turned around, and drove back past the restaurant.

Lockett testified that he saw the victim standing in the parking lot without a coat on and that the victim and the defendant were "pointing at each other." The defendant was standing close to the victim and had his finger in the victim's face. Lockett passed by and turned around again, "seeing what was going on." Lockett called Mayfield, and they had a short conversation.

Lockett entered the parking lot of a drive-in restaurant across 30th Street from Popeyes, to watch what happened. Lockett said that the victim and the defendant began "tussling, tussling and finger pointing" and "that's when the gun came out. Then that's when [the defendant] shot [the victim]." Lockett testified that he saw the defendant take a gun from Robinson and shoot the victim once and that when the victim tried to get back into his car, the defendant shot the victim again. Lockett said he heard "like four or five" gunshots at that time. Lockett testified that the victim made it back to his car, while the defendant was moving toward the victim, "still shooting, shooting the gun." The victim opened his car door and grabbed a cellular telephone, which Lockett could see because "the blue lights on the phone had came on the phone."

Lockett said that the defendant and Robinson got in the black van and left the scene. The van went over the curb and headed east on Fort Street, while the white sport utility vehicle went around to 30th Street, then went east on Fort Street in front of the van. Lockett did not see where the vehicles went after that.

Lockett called Mayfield and had two short conversations with her after the shooting. Lockett and Clark left the drive-in parking lot and went north on 30th Street to Fort Street, and they proceeded east on Fort Street to LaTonya Bell's house at 25th and Fort Street. Lockett identified Bell as his aunt, although Bell later identified herself as Lockett's first cousin. They stayed for a few minutes, then left and went back up to 30th and Fort Streets. Lockett testified that they saw the white sport utility vehicle that had been at the crime scene parked at the corner of 27th and Ellison Avenue, with the police behind it. They returned to the crime scene, parking east of the location and walking to the parking lot, where they saw Jackson, Whitlock, James, and Daylan. Lockett did not speak to police at the scene.

Clark testified in substantial agreement with Lockett's trial testimony. However, Clark testified that she and her sister left work between 10:15 and 10:30 p.m., rather than right at 10 p.m., as Lockett had testified. Clark testified that when the shooting took place, she was looking for her cellular telephone because it was ringing and that by the time she looked up, the shooting was over. Clark did not recognize the killer at the scene of the crime and was unable to identify the defendant at trial as having been the killer.

Ollie Blake, a jitney driver for North Side Delivery, had been working in the area of 30th and Fort Streets on February 24, 2003. Blake was traveling northbound on 30th Street and stopped at a red light at Fort Street. Blake saw "a couple of guys fighting in the Popeyes parking lot." Specifically, he saw four men in the parking lot and two of the four were fighting. Blake also recalled seeing two vehicles in the parking lot: an "orange Chevy Caprice" and a "white Cadillac Escalade with a dented fender." The men were fighting next to the driver's side of the orange car.

According to Blake, one of the men fighting was wearing a white T-shirt and was larger than the other men. Blake described the other men as wearing brown "nanny goat fur coat[s]," that Blake said had fur on the outside and a fur-lined hood "like an Eskimo coat." Blake saw the man in the T-shirt knock down the man in the coat that he was fighting. Blake could not see the other man's face, but could tell from his hands that he was black. The man fighting in the coat was knocked down "about two or three times," then one of the other men handed him a gun. Blake testified that the man wearing the T-shirt was "shot about four times in the chest up close" by the shorter man whom he had been fighting.

Blake made a right turn at the red light and called 911. As Blake was driving eastbound on Fort Street, he saw someone run down 29th Street on foot, followed by the white sport utility vehicle. Blake was still on the telephone with the police when he picked up his customer and drove back to 28th Avenue and Fort Street and saw the white sport utility vehicle turn off of 28th Avenue and proceed eastbound on Fort Street.

Leslie Daughtry, a manager of the drive-in restaurant across the street from Popeyes, testified as a defense witness. Daughtry

testified that she was working until closing time on the night of the killing; closing time that night was 11 p.m. Daughtry said that as she and her coworker, Daniel Payton, were leaving, she heard gunshots. She got in the vehicle being used to give them a ride home and said that she had heard shots. The driver went directly on to 30th Street and took Daughtry home. She did not see any other vehicles in the drive-in parking lot and did not see anything in the Popeyes parking lot other than the victim's feet hanging out of his car.

Payton testified that after he heard the gunshots, he looked toward Popeyes and "saw a[n] individual running east on Fort Street there and then I saw a white Suburban . . . on Fort Street going east." Payton did not observe any other vehicles in the drive-in parking lot either. On cross-examination, Daughtry admitted that she would have been leaving sometime between 11:15 and 11:30 p.m. Payton testified that although he was "not pretty sure," he recalled leaving between 11:30 and 11:50 p.m., but "[i]t could have been [earlier], because it was during winter and we're slow at that time."

Rosemary Burdess, an officer with the Omaha Police Department, was on duty at the time of the shooting. She and her partner were notified of a shooting at the Popeyes restaurant at 29th and Fort Streets. The officers were advised by dispatch that the suspect was a black male wearing a black hooded sweatshirt who left the scene on foot, eastbound, possibly toward a white Cadillac Escalade.

Burdess testified that they arrived at the scene within 2 minutes of the call and did not see the suspect or the vehicle. They saw three men standing next to the victim's vehicle, identified as an orange Chevrolet Impala. The orange car was facing east, backed into the parking lot. The officers saw the victim on the driver's side of the vehicle, leaning toward the passenger's side. Burdess checked on the victim and found that he was still alive, "breathing kind of heavily, making a gurgling sound." Medics arrived 2 to 3 minutes later and placed the victim in an ambulance. The victim evidently died after he was taken from the scene.

Matt Chandler, an Omaha police officer, was also on duty on the night of February 24, 2003. He was at 30th Street and Laurel Avenue, a little over six blocks northwest of Popeyes, when he

also received the radio call reporting the shooting. Information about a suspect was provided, indicating that a white Cadillac Escalade was eastbound on Fort Street, a black- or dark-colored minivan was involved, and one suspect was a black male wearing a dark hooded sweatshirt. Chandler drove south on 30th Street and east on Ellison Avenue "in order to kind of parallel the suspects' escape route."

Chandler drove about three blocks and discovered a white GMC Yukon Denali parked on Ellison Avenue at 27th Street, on the south side of the street, facing eastbound. The vehicle was approximately six blocks away from 30th and Fort Streets, although Chandler testified that in that area, because of the size of the blocks, the distance was "more actually like four blocks away." The Yukon Denali was registered to Newte. Chandler got out of his car and approached the Yukon Denali, which he found to be unoccupied. Chandler removed his gloves, felt the tailpipe of the Yukon Denali, and found it to be almost too hot to hold, indicating to Chandler that it had been recently driven. There was no apparent damage to the front of the vehicle.

Michael Kershisnik, a security guard, testified as a defense witness. On the night of the killing, Kershisnik was working at a steakhouse located at 30th and Fort Streets just north of Popeyes. Kershisnik was in his vehicle near the back door to the kitchen when he heard gunshots. Kershisnik got out of his vehicle and headed toward the steakhouse parking lot's Fort Street exit gate. Kershisnik made it about halfway across the parking lot, from where he saw one individual on foot, wearing a dark, heavy coat, and two vehicles leave the Popeyes parking lot. Kershisnik identified the two vehicles as a "large white SUV and a dark colored mini-van." After police arrived, they transported Kershisnik to the area of 27th and Ellison Avenue to look at the GMC Yukon Denali that had been found there. However, Kershisnik said that the Yukon Denali was not the same vehicle that he had seen leaving the Popeyes parking lot, because the vehicle he had seen leaving the parking lot was cleaner than the vehicle at 27th and Ellison Avenue.

An Omaha police officer and a crime laboratory technician processed the victim's vehicle, an "orange Chevy Impala," at the Omaha police tow lot the next day. A cellular telephone was

found on the floor of the victim's car. The cellular telephone was owned by the victim's mother, but the billing address was the victim's. This was the telephone that the victim was eventually found to have used to make the telephone calls described above.

Michael Kozelichki, an Omaha Police Department detective, was responsible for the investigation of the pearl-colored 2000 GMC Yukon Denali that had been towed from 27th and Ellison Avenue. The vehicle was searched at the Omaha police impound lot on February 25, 2003. Kozelichki determined that Newte, the defendant's wife, was the registered owner of the vehicle. Kozelichki also testified that Robinson, the defendant's brother, lived on North 28th Avenue, between Ellison Avenue and Fort Street, near where the vehicle had been found.

An autopsy was performed on the victim by a specialist in medical pathology. The pathologist found multiple gunshot wounds to the victim's body, and four bullets were retrieved from the body. Based on the autopsy, the pathologist opined that the cause of death was the multiple gunshot wounds.

A senior technician in the Omaha Police Department crime laboratory microscopically examined six spent .32-caliber shell casings recovered from the Popeyes parking lot after the killing. The technician also examined one of the bullets taken from the victim's body at the autopsy. The technician did not testify at trial, but the parties stipulated that had he been called to testify, he would have opined that the six spent shell casings were all fired from the same weapon. He would also have opined that the bullet retrieved from the victim was consistent with bullets of .32 caliber and with the .32-caliber casings found in the Popeyes parking lot.

Karl Koch, an Omaha police officer, was also on duty on the evening of February 24, 2003. After about 20 or 30 minutes of controlling traffic at the crime scene, Koch was instructed to proceed to a business on North 11th Street. Koch did so and, accompanied by other officers, made contact with an individual in an automobile body shop at that location. The individual identified himself as the defendant, and he was handcuffed and searched. The defendant was calm and did not ask why he was being handcuffed. The defendant was wearing light gray sweatpants and a light gray sweatshirt. Inside the building, the officers discovered

the defendant's nephew, Damar Haywood, who acted like he had been sleeping on the sofa. Koch transported the defendant to a police station interview room.

More factual details will be set forth in our analysis below to the extent they are necessary to our discussion of the defendant's specific assignments of error.

2. Procedural History

On October 16, 2003, the defendant was charged by information with one count of first degree murder and one count of use of a deadly weapon to commit a felony. An amended information, filed July 9, 2004, also charged the defendant with being a habitual criminal. The defendant filed a notice of alibi defense, asserting he was not at the scene of the crime, but at his place of business, at the time of the killing.

After a jury trial, the defendant was found guilty of first degree murder and use of a deadly weapon to commit a felony. Thereafter, the defendant filed a timely motion for new trial, which was denied.

A hearing was had on whether the defendant was a habitual criminal, at which hearing the State adduced evidence that the defendant had previously been convicted, pursuant to guilty pleas, of a state burglary charge and a federal charge of conspiracy to distribute a controlled substance. The defendant objected to the evidence relating to the federal conviction, arguing that the evidence did not show that the defendant had counsel at the time he entered his plea. The court overruled the objection and found that the defendant was a habitual criminal.

The court sentenced the defendant to life in prison on the conviction of first degree murder and, as a habitual criminal, to 10 years' imprisonment on the conviction of the use of a deadly weapon to commit a felony, sentences to be served consecutively.

III. ASSIGNMENTS OF ERROR

The defendant assigns, consolidated and restated, that the trial court erred in

(1) not finding that the State exercised a peremptory challenge to remove a juror for no reason other than race, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986);

(2) overruling the defendant's objection to the admission into evidence of cellular telephone records, because (a) the records did not fall within the business records exception to the hearsay rule and (b) location data contained in the records required a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001);

(3) overruling the defendant's objection to the admission into evidence of a coat found in the possession of the defendant's nephew;

(4) failing to grant the defendant's motions based upon the insufficiency of the evidence (a) to establish the defendant's guilt beyond a reasonable doubt and (b) specifically to prove that the crime was committed with deliberate and premeditated malice;

(5) not finding that the State committed misconduct during opening and closing statements in its arguments with respect to (a) location data contained in cellular telephone records, (b) a telephone call to the defendant's telephone from an employee of his business, (c) the customization of the defendant's vehicle, (d) an eyewitness misidentification of the model of the victim's vehicle, and (e) the jury instruction on lesser-included offenses of first degree murder;

(6) accepting evidence relating to the defendant's federal conviction for conspiracy to distribute a controlled substance and finding the defendant to be a habitual criminal, because the evidence did not show that the defendant was counseled when he entered his plea of guilty to the federal charge; and

(7) delaying the removal of (a) a juror who had contact with the victim's widow and (b) a juror who was sleeping during the trial.

The defendant also assigns, separately, that the court erred in overruling his motion for new trial. However, the reasons that the defendant argues that his motion should have been granted are addressed in the defendant's other, more specific assignments of error. We need not consider the defendant's motion for new trial separately, as the issues raised by that motion are subsumed in the defendant's other assignments of error.

IV. ANALYSIS

1. *Batson* Challenge

(a) Background

There were four African-Americans remaining in the venire after it had been passed for cause, and the State exercised peremptory challenges on two of the four, leaving two African-Americans on the jury. Jurors Nos. 181 and 278 were the two African-Americans removed from the jury by the State. The record does not precisely reflect the total number of peremptory challenges used by the State, but does show that juror No. 278 was the subject of the State's 12th peremptory challenge. Juror No. 278 was a schoolbus driver for the Omaha Public Schools who lived at 36th Street and Laurel Avenue, near the scene of the killing, but who said he did not know about anything that happened in the case. The defendant conceded, and the court agreed, that the State had valid nondiscriminatory reasons for striking juror No. 181. However, the defendant objected to the striking of juror No. 278, based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

The State argued that the defendant had not made a prima facie case for a *Batson* objection, because other African-Americans in the venire had not been stricken by the State. However, the State also explained that juror No. 278 had been stricken because he lived in the area and was a schoolbus driver in the area where the defendant's children went to school. The State also said that juror No. 278's demeanor seemed negative toward the prosecution. Specifically, the State said that juror No. 278 had been crossing his arms and scowling at the State. The court indicated that it had not witnessed that demeanor, but it was "something in good faith you say you observed."

The court overruled the defendant's objection. The court explained that

> first of all . . . it's incumbent upon the courts to find that there was a discriminatory intent on the part of the prosecutor and that the findings or the findings of fact or the facts or the reasons for eliminating the juror were racially motivated or, in turn, if they were racially neutral, then you have to find some type of overriding discriminatory plan on the part of the prosecution.

> In this case I can find no overt discriminatory plan on the part of the prosecution. Two of the possible four African-American citizens have been kept on the jury, as it stands right now. There have been racially neutral statements made by the prosecution, one of location of the residence of the juror in question; secondly, the juror's position as a school bus driver within OPS and also the body language which has been stated by the prosecutor. Each one of those would be — could be viewed to be racially neutral. I cannot find that the — that there's enough evidence to show that there is a plan for racial discrimination of elimination of that prospective juror.
>
> Therefore, the Batson challenge . . . is denied.

(b) Standard of Review

[1,2] A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility. *State v. Lowe*, 267 Neb. 782, 677 N.W.2d 178 (2004). A trial court's determination that there was no purposeful discrimination in a party's use of his or her peremptory challenges and a trial court's determination of the adequacy of a party's neutral explanation of its peremptory challenges are factual determinations that will not be reversed on appeal unless clearly erroneous. See *id*.

(c) Analysis

[3] In *Batson, supra*, the U.S. Supreme Court held that the Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race. See, also, *Lowe, supra*. The defendant argues that the State exercised a peremptory challenge to remove juror No. 278 solely on account of his race.

[4-7] The evaluation of whether a party has used peremptory challenges in a racially discriminatory manner is a three-step process. See, *Rice v. Collins*, 546 U.S. 333, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006); *Lowe, supra*. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor has exercised peremptory challenges on

the basis of race. See *id*. A defendant satisfies the requirements of this step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. *Johnson v. California*, 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). Second, if the requisite showing has been made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. See, *Rice, supra*; *Lowe, supra*. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. *Rice, supra*. Third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination. See, *Rice, supra*; *Lowe, supra*. The final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. *Rice, supra*.

In this case, while there was some question whether the defendant had made a prima facie case at the first step in the analysis, the State was asked to tender a race-neutral explanation for the strike, and the trial court evaluated the persuasiveness of that explanation in determining, pursuant to the third step, that the defendant failed to carry his burden of proving a racial motivation for the strike. Thus, whether or not the defendant made a prima facie showing is moot, and we consider whether the trial court's final determination was clearly erroneous. See, *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003).

[8,9] The defendant argues, first, that another juror who lived in the area, who was not African-American, was not stricken by the State. If a prosecutor's proffered reason for striking an African-American panelist applies just as well to an otherwise-similar non-African-American who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered in the third step of the *Batson* analysis. *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). However, the same factors used in evaluating a juror may be

given different weight depending on the number of peremptory challenges a lawyer has, and a strict comparison analysis may not properly take into account the variety of factors and considerations that may be part of a lawyer's decision to select certain jurors while challenging others that may appear to be similar. See *People v. Johnson*, 47 Cal. 3d 1194, 767 P.2d 1047, 255 Cal. Rptr. 569 (1989).

We first note that the prosecutor in this case did not rely solely on juror No. 278's residence in the area. Moreover, the record indicates that the non-African-American potential juror upon whom the defendant's argument is based, juror No. 301, lived in the area of 42d Street and Vernon Avenue, which juror No. 301 indicated in voir dire was "fairly close" to the scene of the crime at 30th and Fort Streets. The record from jury selection does not indicate the relative proximity of the crime scene to either 42d Street and Vernon Avenue or 36th Street and Laurel Avenue, other than the obvious inference that 30th Street is about half as far from 36th Street as it is from 42d Street. On this record, remembering that the burden of proving intentional discrimination is always on the defendant, we cannot conclude juror No. 301 was "otherwise similar" to juror No. 278 aside from race, such that the trial court's conclusions were clearly erroneous.

The defendant also argues, with respect to the State's observation that juror No. 278 had his arms crossed and was scowling at the prosecutors, that "[n]either the court nor [the defendant's] counsel ever saw [juror No. 278] do either of these things." Brief for appellant at 29. In other words, the defendant argues that the record is not sufficient to support this race-neutral reason articulated by the State for the strike.

[10] The defendant does not take issue with the general proposition that the demeanor of a potential juror can be a legitimate, race-neutral reason for a peremptory challenge. See, *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). See, also, *U.S. v. Marrowbone*, 211 F.3d 452 (8th Cir. 2000); *Yarborough v. State*, 947 S.W.2d 892 (Tex. Crim. App. 1997); *State v. Higginbotham*, 917 P.2d 545 (Utah 1996); *People v. Munson*, 171 Ill. 2d 158, 662 N.E.2d 1265, 215 Ill. Dec. 125 (1996). Cf.,

Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (prosecutor's proffered explanation for peremptory challenge, that juror had long, unkempt hair, moustache, and beard, was race-neutral and satisfied prosecution's burden of articulating nondiscriminatory reason for strike); *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988) (explaining, as possible basis for peremptory challenge, value of observing prospective jurors' demeanor during voir dire). As we explained in *Bronson*, 242 Neb. at 945, 496 N.W.2d at 893:

> [W]e are cognizant of the importance of achieving a venire made up of jurors who, at least during voir dire, (1) respond to the attorneys, (2) do not give off the impression through body language, eye contact or otherwise that he or she has already made up his or her mind, and (3) exhibit a receptiveness to follow the administrative instructions, as well as courtroom testimony in order to make a fair and impartial decision in the matter at hand.

[11] Instead of challenging this principle, the defendant seems to suggest that such observations of demeanor are insufficient to support a strike unless corroborated for the record by opposing counsel or the court. However, the fact that the observations of a challenging party are unconfirmed may affect the trial court's determination of the persuasiveness of an explanation, but confirmation is not necessary for a party's observation of a potential juror's demeanor to form the basis of a race-neutral explanation for a peremptory challenge. See, *Yarborough, supra*; *Higginbotham, supra*; *Munson, supra*. But see *Dorsey v. State*, 868 So. 2d 1192 (Fla. 2003). This is in part because a record of the demeanor of a potential juror would be extraordinarily difficult to make. Behavior noticed by one party, and related in good faith, may simply not have been seen by the opposing party or the court. Bringing the matter up in court could prejudice the other potential jurors, and the complained-of conduct might not even be present by the time it is called to the court's attention. A person's demeanor is also subjective and subject to more than one interpretation. Therefore, even if the court's observation and interpretation differs from that of the challenging party, it would not necessarily be dispositive. See *Munson, supra*. In short, "[t]he impracticality of requiring a trial judge to take note for the

record of each prospective juror's demeanor with respect to his or her ongoing contacts with the prosecutor during voir dire is self-evident." *People v. Reynoso*, 31 Cal. 4th 903, 929, 74 P.3d 852, 869, 3 Cal. Rptr. 3d 769, 790 (2003).

[12] Instead, while confirmation that the trial court observed the same demeanor as did the challenger would lend credence to any purported race-neutral explanation, it is sufficient that the court must closely examine such explanation in light of its observation and other relevant factors. *Munson, supra.* "Although trial courts should be particularly sensitive when facial expressions or body language alone is advanced as the reason for striking a minority juror, these reasons provide a sufficient basis to support the exercise of a peremptory challenge." *State v. Higginbotham*, 917 P.2d 545, 548 (Utah 1996). Although a party could attempt to use subjective evaluations of potential jurors to disguise violations of the Equal Protection Clause, this does not mean that such evaluations must always be disregarded. "Trial judges are not without ability to detect pretexts." *Yarborough v. State*, 947 S.W.2d 892, 896 (Tex. Crim. App. 1997).

[13] Here, although the State's observations were not corroborated, the prosecutor's stated reason for the strike specifically described the body language and nonverbal actions that led the prosecutor to believe that juror No. 278 was hostile toward the State. The trial court also relied on the fact that two African-Americans were seated on the jury, although the State had sufficient peremptory challenges to have stricken them as well. While a pattern of strikes is not required to show an Equal Protection Clause violation, as the use of even a single peremptory challenge on racial grounds is a violation of equal protection, the lack of a pattern may be considered when evaluating the credibility of a race-neutral explanation for a challenge. See, *State v. Lowe*, 267 Neb. 782, 677 N.W.2d 178 (2004); *State v. Thompson*, 231 Neb. 771, 438 N.W.2d 131 (1989); *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987).

In short, where there is nothing in the record to affirmatively contradict the State's race-neutral justification for exercising a peremptory challenge on juror No. 278, we cannot say that the trial court's conclusion that the defendant did not prove purposeful discrimination is clearly erroneous.

2. Cellular Telephone Records

(a) Background

Prior to trial, the defendant made a motion in limine with respect to the defendant's cellular telephone records, complaining that the State had gathered data regarding the locations of the towers through which the defendant had placed telephone calls. The defendant argued that the location data were not scientifically reliable. The court replied that such data "could be, theoretically, subject to a Daubert type of hearing. I mean, I don't know." The defendant contended that it could not be said "a hundred percent that that's where [the defendant] was at that location because they can bounce towers." The defendant argued, in sum, that the evidence

> should not be submitted because we may have to have what I would say is a Daubert type hearing, or if they can present evidence prior to it coming in where if the Court's going to deem it a business record exception, I guess we can deal with that. I think that's going to be their position to get it in. However, I think it still has to be reliable to come in, even for a business records exception. In regard — in particular to the tower, I don't know that it does.

The State responded by contending that the evidence would not be used to show that "this person is standing here," but for location purposes in terms of the tower. The State argued that the evidence would show when the defendant's cellular telephone was used to make a call and what tower was utilized for that call and that each tower generally had a range of approximately a half-mile or 1-mile area. The relevance of the data would be based on "the use of that phone, where defendant is specifically identified using that phone and the tower that was used." The defendant contended that the location data were unreliable because the evidence would be that "it's probable that that's the tower he used but it's possible that he was somewhere else and hit that tower instead."

In overruling the motion in limine, the court stated that "[m]aybe you have to have a Daubert hearing on it, I don't know." But the court concluded that if the business records exception to the hearsay rule was met with respect to data indicating the

use of a particular tower, then the State could adduce that evidence without a *Daubert* hearing. The court indicated that left "plenty of room" for the defendant to eliminate the inference that the defendant was at a precise location. The court overruled the motion in limine, pending the State's presentation at trial of proper and sufficient foundation for the evidence.

(i) Alltel Communications Records

At trial, Susie Mason, a records custodian for Alltel Communications (Alltel), described the recordkeeping process for wireless telephones. Mason explained that when a customer first subscribes to a wireless service, personal information is obtained from the customer. That information is retained permanently. Once service is established, a telephone number is assigned to that particular account and housed in a centralized billing system. For billing purposes, data are retained for each account regarding calls that are received and placed.

Mason testified that Alltel often received requests for such data pursuant to subpoenas, court orders, or search warrants. Mason's primary duty was handling those requests. To do so, she typically queried either by name or telephone number to retrieve the name of the account holder, telephone number, billing address, and sometimes a contact telephone number. That information was printed out.

Mason also described the process by which cellular telephone calls are made. Mason explained that a cellular telephone maintains regular contact with cellular towers. The telephone is identified by a serial number to the cellular site. When a call is placed from a telephone,

> [o]nce you place the call, it verifies who you are, go[es] ahead and place[s] the call for you. That call is automatically registered. It lets us know what time you placed the call, what location you were in when you placed the call.
>
> As you're traveling around town, it also keeps a record of the various cell sites as you're driving or wherever you are. And the call, it lets us know when you end the call, from start to finish.

Once a call is placed or received, those data are kept in the "switch," the central computer system.

Exhibits 86 and 87 at trial were records for particular Alltel telephone numbers. The telephone number referenced in exhibit 86 belonged to Michael Morris, but Whitlock identified exhibit 86 as being the record for the cellular telephone that he used, explaining that Morris was his father. Exhibit 87 contained subscriber information for a telephone owned by Sarah Ricker, but Ricker testified that she had given the telephone to her daughter's father, Lockett, and the billing address for the telephone was Lockett's brother's house.

Mason testified that the records were made or transmitted by a system with knowledge of the information and were made at or near the time the events appearing in them took place, that it was the regular practice of Alltel to make such a record, that the activity was continuous and for business purposes, and that the records were kept in the regular course of conducted business activity. The defendant objected on the bases of foundation and hearsay, but the objection was overruled and the exhibits were admitted.

(ii) Cox Communications Records

Christopher Paterson was responsible for the care of records at Cox Communications (Cox) and was responsible for subpoena fulfillment. Paterson testified that for a subscriber to obtain telephone service from Cox, the company would enter the subscriber's name and address into the billing system. A credit check would be performed, and then a technician would go out and install telephone service. The subscriber's information would be permanently stored in the Cox billing system.

Paterson testified that the creation of subscriber information was performed by customer service representatives at the time it was received from the subscriber, was a part of the regular course of Cox's business, and was done continuously by Cox. Cox also kept records of every telephone call, incoming or outgoing, placed by every telephone number. The record was made by the computer system at the time of the telephone call and included the date, time, and length of the call.

When Paterson received a request for subscriber information for a particular number, he would look in the billing system and input the telephone number, and the system would return information on anyone who had ever had that telephone number.

Exhibits 88 through 91 were printouts of such data, returned in response to requests for information from the State. Exhibits 88 and 89 were records of incoming and outgoing telephone calls for Newte's home telephone number on February 24 and 25, 2003. Exhibits 90 and 91 were records for Parisee and the victim's home telephone number for February 24 to 28. The defendant's hearsay and foundation objections were overruled, and the exhibits were received.

(iii) Cricket Communications Records

Michael Filip was a "switch tech" for Cricket Communications (Cricket), working on the central computer system that interacted with the cellular sites. Filip testified that Cricket keeps records for all active or inactive customers, collecting personal information input into its system by customer representatives, including a customer's name, address, and billing address. The identification code for the telephone and the corresponding telephone number are assigned to that customer. Filip testified that the information was input as it was received from the customer, for identification and billing purposes, in the regular course of business for Cricket.

Filip explained that to connect a call, each time a customer turns on a cellular telephone, the telephone searches for the closest tower that can provide service for that telephone, then it registers with the switch system to establish that the customer is valid and that the telephone is in usable condition. When the customer attempts to make a call, data are kept regarding the call. Filip testified that those records were also made contemporaneously with the events recorded, for business purposes, in the regular course of the business activities of Cricket.

Filip identified exhibits 106 through 113 as Cricket telephone records. In particular, exhibit 108 contained call records for Mayfield's cellular telephone, exhibit 112 contained call records for the telephone that had been found in the victim's vehicle, and exhibit 113 contained call records for a cellular telephone purchased in the names of the defendant and his business. Each call entry in exhibits 112 and 113 showed the billed telephone number, the dialed telephone number, a date and time stamp for the call, the length of the call, and the cellular tower and sector face information (i.e., location data) for the call. The defendant

objected to the exhibits on the basis of hearsay and foundation, and he specifically argued that data contained in exhibits 112 and 113 should be subject to a *Daubert* hearing. The objections were overruled, and the exhibits were received.

Douglas Broer was a field engineer for Cricket, responsible for maintaining and optimizing the network of cellular sites throughout the city. As part of his duties, Broer would drive the entire city, collecting data regarding the network's coverage. Broer explained that in Omaha, Cricket has approximately 60 cellular sites, spread throughout the city based on capacity and coverage needs, all linked back to a central switch. Each cellular site includes three sectors, or directions in which signals flow, generally aimed at 120-degree angles from one another. For instance, a particular cellular tower might have three sectors, one directed north, one directed southeast, and the other directed southwest.

Each sector puts out a constantly generated pilot signal. When a call is generated, the cellular telephone finds the strongest pilot signal and sets up the call on the corresponding sector. The sector serving the geographic area where the telephone is located is most likely the one that will be utilized to set up the call. After the call is established, the telephone can utilize several towers at the same time, but during the call setup phase, it uses only the sector with the strongest signal. Once a traffic channel has been established, the signals go from the cellular site to the switch and are then routed back out either to another telephone, if the call is to another Cricket customer, or to another telephone company's switch, if the call is to a customer of another service provider.

Cricket keeps records of the sector and tower utilized to set up each call. From those, Broer testified that the physical location of the sectors and towers could be determined from the call record database.

Broer admitted on cross-examination that if there was a problem with a particular cellular site, it was possible for a call to be placed through another site farther away. Broer also admitted that since the pilot signal is a radio signal, it was a possibility that a "stray signal" could bounce off a building or something in the atmosphere and end up someplace else, although the signal is generally in the intended location.

(b) Standard of Review

[14,15] 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. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). The admission of hearsay is controlled by the Nebraska Evidence Rules. *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995).

(c) Analysis

(i) Business Records Exception

The defendant first argues that the trial court erred in concluding that the cellular telephone records entered into evidence met the foundational requirements of the business records exception to the rule against hearsay. Pursuant to Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Cum. Supp. 2004), the following is not excluded by the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events, or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness.

[16] The party seeking to admit a business record under this exception to the hearsay rule bears the burden of establishing foundation under a three-part test. First, the proponent must establish that the activity recorded is of a type that regularly occurs in the course of the business' day-to-day activities. Second, the proponent must establish that the record was made as part of a regular business practice at or near the time of the event recorded. Third, the proponent must authenticate the record by a custodian or other qualified witness. See, *Misle v. Misle*, 247 Neb. 592, 529

N.W.2d 54 (1995); *State v. Wright*, 231 Neb. 410, 436 N.W.2d 205 (1989).

The defendant claims that contrary to the foundational testimony presented, the telephone records were not actually made in the course of regularly conducted activity, because the documents entered into evidence were not of a type normally sent to customers, but were generated in response to requests from law enforcement. However, the defendant misapprehends the nature of the records at issue. The business records for which foundation was laid were made at the time of the calls they reflect and stored in the regular course of business by the computers of the communications companies of the respective customers. The fact that hard copies of the relevant records were prepared for trial does not change their character.

We considered and rejected an argument effectively identical to the defendant's in what is considered a seminal case on the admissibility of computer records, *Transport Indemnity Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965). In that case, decided under the subsequently abrogated Uniform Business Records as Evidence Act, Neb. Rev. Stat. §§ 25-12,108 to 25-12,111 (Reissue 1964) (repealed, 1975 Neb. Laws, L.B. 279, § 75), computer-generated records were used to establish the amount due in an action for insurance premiums. Information on insurance premiums paid was entered into the insurance company's computer, and the computer applied those premiums to the result of calculations performed to determine the amount due, based on what products the consumer had purchased. The data were stored on magnetic tape.

At trial, however, the plaintiff proffered a computer printout showing the premiums the plaintiff alleged were due. The defendant objected on the basis that the printout was prepared for use during litigation and trial, and when that objection was overruled, he raised the issue on appeal. We rejected that argument, concluding that it "exalt[ed] the form over the substance" because, although "[t]he retrieval from the taped record . . . was made for the purposes of the trial . . . the taped record and the information and calculations thereon were made in the usual course of business and for the purpose of the business alone." *Seib*, 178 Neb. at

260, 132 N.W.2d at 875. See, also, *State v. Watson*, 192 Neb. 44, 218 N.W.2d 904 (1974).

Although the Uniform Business Records as Evidence Act has been supplanted by the Nebraska Evidence Rules, rule 803(5) has the same basic foundational requirements for the admission of business records. See *Omaha World-Herald Co. v. Nielsen*, 220 Neb. 294, 369 N.W.2d 631 (1985). See, also, *Richards v. Arthaloney*, 216 Neb. 11, 342 N.W.2d 642 (1983). The reasoning we expressed in *Seib* remains persuasive, and decisions applying Fed. R. Evid. 803(6), upon which Nebraska's rule 803(5) is based, are in substantial accord with that reasoning.

[17] Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule. *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005). Under Fed. R. Evid. 803(6), a computer printout is admissible as a business record if the offeror establishes a sufficient foundation in the record for its introduction. *U.S. v. Salgado*, 250 F.3d 438 (6th Cir. 2001). See, e.g., *U.S. v. Moore*, 923 F.2d 910 (1st Cir. 1991); *U.S. v. Hernandez*, 913 F.2d 1506 (10th Cir. 1990); *U.S. v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990); *United States v. Miller*, 771 F.2d 1219 (9th Cir. 1985); *United States v. Sanders*, 749 F.2d 195 (5th Cir. 1984). In particular, it has been repeatedly held that telephone calling records such as the exhibits offered in this case, upon foundation comparable to that laid in the instant case, are admissible as business records. See, e.g., *Salgado, supra*; *U.S. v. Chatman*, 994 F.2d 1510 (10th Cir. 1993); *Briscoe, supra*; *Miller, supra*.

[18] Most pertinently, under federal rule 803(6), courts have uniformly rejected arguments such as the defendant's and have held that when computer-stored records satisfy the business records exception to the hearsay rule, preparing printouts for evidentiary purposes does not deprive the printouts of their character as business records. See, e.g., *U.S. v. Fujii*, 301 F.3d 535 (7th Cir. 2002); *Hernandez, supra*; *Briscoe, supra*; *Sanders, supra*. We agree and reaffirm our decision in *Transport Indemnity Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965), permitting the

admission into evidence of computer-generated records such as those admitted into evidence in this case.

The defendant also argues that "[t]here was no sufficient testimony as to the accuracy and/or trustworthiness of the records." Brief for appellant at 33. We assume, although the defendant's argument is somewhat unclear, that the defendant is referring to the language in rule 803(5) providing that business records are admissible "unless the source of information or method or circumstances of preparation indicate lack of trustworthiness." However, the defendant misunderstands the foundational requirements of the business records exception.

[19,20] The reason for excluding business records from the hearsay rule is their circumstantial guarantees of trustworthiness. *United States v. Pfeiffer*, 539 F.2d 668 (8th Cir. 1976). The business records exception " 'contemplates that certain events are regularly recorded as "routine reflections of the day to day operations of a business" so that "the character of the records and their earmarks of reliability" import trustworthiness. Thus, the recordation becomes a reliable recitation of the fact.' " *Higgins v. Loup River Public Power Dist.*, 159 Neb. 549, 557-58, 68 N.W.2d 170, 176 (1955) (discussing Uniform Business Records as Evidence Act). See, *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943); *U.S. v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990). Cf. *State v. Spaulding*, 211 Neb. 575, 319 N.W.2d 449 (1982) (discussing trustworthiness of business records under Confrontation Clause). It is the circumstances under which the records are recorded, kept, maintained, and used that give the reliability essential to the law's conclusion that without any independent recollections by those who made the succession of entries they are reliable, precisely because the business relies on them for important business judgments. *United States v. Blake*, 488 F.2d 101 (5th Cir. 1973).

In other words, the defendant is incorrect in suggesting that there was no testimony as to the trustworthiness of the records, because "the ordinary business circumstances described suggest trustworthiness . . . at least where absolutely nothing in the record in any way implies the lack thereof." (Citation omitted.) *U.S. v. Moore*, 923 F.2d 910, 915 (1st Cir. 1991). See *Chalupa v. Hartford Fire Ins. Co.*, 217 Neb. 662, 665, 350 N.W.2d 541,

544 (1984) (testimony of business circumstances is sufficient foundation under rule 803(5), unless " 'the source of information or method or circumstances of preparation indicate lack of trustworthiness' "). The defendant had the opportunity to cross-examine each of the communications company witnesses regarding the process by which the records were created and maintained, yet there is nothing in the record to suggest that the exhibits presented in this case were not trustworthy, as such records are presumed to be when sufficient foundation for the business records exception is laid.

[21,22] The defendant also appears to argue that even if the business records exception was satisfied, the exhibits should have been excluded as irrelevant and unduly prejudicial, because cellular site location data was used, according to the defendant, to place him at the scene of the crime. However, exhibits 112 and 113, which were the only records to contain such location data, were objected to by the defendant only on the bases of foundation, hearsay, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). On appeal, a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). To the extent that the defendant's claims with respect to cellular site location data are not subsumed in his *Daubert* argument, we decline to consider them, in the absence of an objection at trial.

For the foregoing reasons, we reject the defendant's argument that the trial court erred in finding that the cellular telephone records offered by the State fell within the business records exception to the hearsay rule.

(ii) Daubert *Requirements for Cellular Location Data*

[23,24] The defendant argues that the cellular location data, contained in exhibits 112 and 113 and explained by Filip and Broer, should not have been admitted without a *Daubert* inquiry. 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. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006). 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, supra*. See *Mason, supra*. 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. *Mason, supra*.

[25] The principles articulated in *Daubert* and adopted by this court in *Schafersman* were based on Fed. R. Evid. 702, which was, at the time of *Daubert*, effectively identical to Nebraska's rule 702. Both rules provide that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." But *Daubert* does not create a special analysis for answering questions about the admissibility of all expert testimony. *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005). Not every attack on expert testimony amounts to a *Daubert* claim. *City of Lincoln, supra*. Here, the defendant's purported *Daubert* claim is suspect because the defendant's *Daubert* objection was made, not to expert opinion testimony, but to business records evidencing historical facts. Moreover, even if the objection is extended to the testimony based upon those records, the testimony given was not expert opinion testimony.

[26] If a witness is not offering opinion testimony, that witness' testimony is not subject to inquiry pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). See, *Questar Pipeline Co. v. Grynberg*, 201 F.3d 1277 (10th Cir. 2000); *Binakonsky v. Ford Motor Co.*, 133 F.3d 281 (4th Cir. 1998); *Gilbert v. Monaco*

Coach Corp., 352 F. Supp. 2d 1336 (N.D. Ga. 2004). Cf. *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996) (permitting "expert witness" to testify to personal knowledge). *Daubert* is inapplicable under such circumstances because it pertains to the validity of the reasoning or methodology underlying an expert's opinion. See, *Binakonsky, supra*; *Gilbert, supra*. As the *Gilbert* court explained:

> In the paradigm *Daubert* situation, a party seeks to use an expert witness to opine regarding causation in a matter where a lay finder of fact would be unable to discern the cause of a particular event, absent some guidance by someone with more knowledge or experience than the layperson. In such cases, the expert is allowed to offer an opinion because the Court determines that the finder of fact would be otherwise unable to reach a conclusion merely through an assessment of the credibility of witnesses or through the operation of the finder's own inductive abilities. The operative task for the typical expert witness, then, is the presentation of an opinion, along with an explanation of the methodology that led to the formation of the particular opinion.

352 F. Supp. 2d at 1340. Obviously, while that is a common example, not all expert opinions relate to causation. But regardless of the issue to which an expert opinion might be relevant, the fact remains that if no expert opinion is tendered, there is no basis for a *Daubert* inquiry.

With that understood, it is evident that *Daubert* is not pertinent to exhibits 112 and 113. Those records contained nothing even resembling "expert opinion testimony," since they did not refer to an expert, an opinion, or any testimony. They were, as previously detailed, computer-generated business records containing data of telephone calls made to and from the defendant's and the victim's cellular telephones. Any challenge to the reliability of those records, or the trustworthiness of the data they contained, would properly have been framed under rule 803(5), not rule 702 and *Daubert*. As explained above, however, the defendant failed to effectively make such a challenge.

Even if the defendant's objections and argument are construed to address Broer's testimony relating to exhibits 112 and

113, *Daubert* remains inapplicable. Since Broer's testimony was based on his personal experience with the data and locations at issue, there is, initially, some question as to whether Broer testified as an expert under rule 702, as opposed to offering testimony based on personal knowledge pursuant to Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 1995). See *Gordon v. State*, 863 So. 2d 1215 (Fla. 2003) (testimony of telephone company employee and police detective, regarding cellular telephone records and location of cellular sites, was not expert testimony, but based on personal knowledge).

But even if Broer's testimony was based on "scientific, technical, or other specialized knowledge," there is little doubt that it assisted the trier of fact to understand the evidence and that Broer would have been qualified as an expert. See rule 702. Regardless, Broer's testimony was limited to explaining the data contained in exhibits 112 and 113, and he did not offer any opinions based on that data. Compare *Pullin v. State*, 272 Ga. 747, 534 S.E.2d 69 (2000) (inquiry into scientific theory required where expert opined, based on cellular telephone location data, that particular telephone calls could not have been made from location asserted by defendant). Since Broer offered no expert opinion, his testimony presented no basis for an inquiry into his reasoning or methodology pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). To the extent that the defendant wanted to raise more general questions about the reliability of the records and the cellular location data, Broer was available for cross-examination on those issues.

The trial court did not err in refusing to hold a *Daubert* hearing with respect to exhibits 112 and 113, and we have already rejected the defendant's argument under the business records exception. Therefore, the defendant's second assignment of error is without merit.

3. Defendant's Nephew's Coat

(a) Background

At the scene of the defendant's arrest, Larry Cahill, of the Omaha police homicide unit, obtained a fur-lined leather coat from Damar Haywood, the defendant's nephew, who was the

person arrested and detained along with the defendant. At trial, outside the presence of the jury, the State indicated its intent to offer the coat into evidence. The defendant objected that the coat was not relevant, because Haywood had not been charged in the crime and there had been no suggestion that the defendant wore the coat or that it even fit him. The State argued that because of the testimony that the perpetrators wore dark, fur-lined hooded coats, it was relevant that such a coat was found in the possession of the person accompanying the defendant when he was arrested, within 2 hours after the killing. The court reserved ruling until the coat was offered at trial.

At trial, Cahill testified that he had been assigned to interview Haywood following the arrest. Cahill said that the first thing he noticed on Haywood was that he was wearing a coat similar to that described by witnesses at the scene. The defendant's relevance objection to that testimony was overruled. Cahill said he seized the coat from Haywood. Cahill identified the coat at trial, and it was admitted into evidence over the defendant's relevance objection.

(b) Standard of Review

[27] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Iromuanya, ante* p. 178, 719 N.W.2d 263 (2006).

(c) Analysis

The defendant argues that the coat found with the defendant's nephew was not relevant or, alternatively, that if relevant, the probative value of the coat was outweighed by undue prejudice to the defendant. The defendant claims that the coat was irrelevant and unduly prejudicial because there was no evidence that the defendant "ever wore or could fit into that coat." Brief for appellant at 35.

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. Rule 401. The coat at issue was relevant because witnesses to the killing, which occurred approximately 2 hours before the defendant's arrest, described similar garments being worn by the killer and his companions. Because similar garments were described at the scene of the crime, finding the coat in the proximity of the defendant a short while later made it more probable that the defendant or his companion was one of the men seen wearing such a garment at the scene of the crime.

The fact that no testimony directly established that the coat belonged to the defendant does not diminish its relevance. Had the coat been found in the closet at the defendant's business, instead of with his nephew, the evidence connecting the coat to the defendant would be no more direct. The jury was entitled to infer, from the proximity of the garment to the defendant, that it was possible for the defendant to have worn the coat at the scene of the killing. The jury was equally entitled to infer that even if the coat actually belonged to the defendant's nephew, the reason the killer's companions at the scene of the crime were dressed similarly to the defendant's companion when he was arrested was that the killer and the defendant were one and the same person. Either way, the fact that the coat was at the defendant's business made the defendant's presence at the crime scene more probable than it would have been without the evidence. The trial court did not abuse its discretion by concluding that the evidence was relevant.

[28] For similar reasons, we conclude that the trial court did not abuse its discretion in overruling the defendant's objection pursuant to rule 403. We note that there is no rule 403 objection in the record. But even if we apply rule 403, the defendant's argument is without merit. As pertinent, rule 403 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 . . . ." The fact that evidence is prejudicial is not enough to require exclusion under rule 403, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403.

State v. Miner, 265 Neb. 778, 659 N.W.2d 331 (2003). Here, while the admission of the coat into evidence may have been prejudicial to the defendant, it was not unfairly so, because it did not suggest a decision on an improper basis.

The trial court did not abuse its discretion by admitting the coat into evidence, so we reject the defendant's third assignment of error.

4. Sufficiency of Evidence

At trial, the defendant, relying primarily on inconsistencies among the statements and testimony of the State's witnesses, argued that there was a reasonable doubt as to whether the defendant had been the victim's killer. Those inconsistencies, and other facts relating to the credibility of the State's witnesses, are summarized below.

(a) Background

When Daylan was interviewed by police after the shooting, he did not tell them about going with the victim to a house on Florence Boulevard, because he "didn't think it was nothing." Only when he was interviewed for the third time, on July 22, 2003, did he mention that he had gone with the victim to the defendant's residence. Daylan had previously been convicted of giving false information on more than one occasion.

When interviewed by police on the night of the killing, Mayfield said that she had not seen the shooting. Instead, Mayfield told police that the white sport utility vehicle pulled up at the ordering station and that when the occupants were informed that the restaurant was closed, the vehicle continued around the building and Mayfield did not see it again. When contacted again on February 25 and 27, 2003, Mayfield again denied witnessing the shooting. But after viewing a videotape from Popeyes, Mayfield told police that she had actually seen the shooting. Mayfield admitted to lying to police, stating that she was "fibbing then" because she "didn't even want to be involved." Mayfield did not mention anything to police about the telephone call from Lockett identifying "Fast Eddie" as the killer until the February 27 interview, and even then did not identify Lockett as the caller. Only on July 22, when specifically

confronted on that issue by police, did Mayfield admit that Lockett had told her that "Fast Eddie" committed the crime.

Whitlock admitted that he had two previous convictions for giving false information. Whitlock did not remember whether or not he had, when interviewed at the crime scene, mentioned the defendant's telephone calls to him. However, he admitted that he "probably didn't mention it." Kozelichki testified that Whitlock had not informed police of the telephone calls. Whitlock first told police about the telephone calls in an interview conducted on March 30, 2003. At that time, Whitlock only told police about two telephone calls and said to police that he did not think he could testify about the matter. But after that interview, Whitlock was indicted in federal court for conspiracy to distribute crack cocaine. At the time of trial, Whitlock was in federal custody stemming from his 2004 conviction on that charge. Whitlock admitted that although he did not have a "deal or any specific agreement with any agency," he hoped that his willingness to testify in this proceeding might benefit him. When asked if he hoped "the fact that you have testified would be relayed to the U.S. Attorney in order to attempt to get a downward departure," Whitlock replied, "I wouldn't mind, but I doubt it."

Lockett admitted that he had three convictions for providing false information to the police and two other felony convictions in the 10 years prior to trial. At the time he testified, Lockett was serving his sentence on his second felony conviction on a federal charge. Lockett did not have an agreement with the State regarding his testimony or any guarantee that he would receive a reduced sentence if he testified. Lockett admitted that "[a]t first," he had hoped that he might get some kind of reduction if the U.S. Attorney filed a motion for a downward departure, but realized that even if the U.S. Attorney filed such a motion, a federal judge would determine if a reduction would be granted. Lockett also admitted that he had provided information to the police regarding the alleged murder of Lockett's brother by Danny Ray Robinson, another nephew of the defendant. See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

Lockett did not, immediately after the killing, tell police about the events to which he testified at trial. Lockett claimed that he did not contact police because he was on federal pretrial release

at the time and was not supposed to have contacts with law enforcement. Lockett admitted that he was located by law enforcement and interviewed on February 26, 2003, at which time he admitted driving past Popeyes and seeing the victim "in a beef," but did not report seeing anything else. Lockett admitted that he came forward after he was contacted in July by his lawyer, who told Lockett and Clark that police wanted to talk to Lockett about a homicide involving the victim and the defendant. Only then did Lockett tell his lawyer that he had seen the defendant shoot the victim. At trial, Lockett was cross-examined with respect to factual inconsistencies between his trial testimony and the telephone call he made to his lawyer, which was recorded and transcribed because Lockett was in federal custody.

After the conversation between Lockett and his lawyer, police came to interview Lockett on July 31, 2003. Lockett was, at that point, awaiting sentencing on his federal conviction. Lockett made a statement to police and was cross-examined extensively about inconsistencies between his July 31 statement to police and his trial testimony. For instance, Lockett told police that he observed events from the driveway of a house near the drive-in, not from the parking lot of the drive-in itself. In his statement, Lockett indicated that Robinson left the scene of the crime in the black van, not the white sport utility vehicle. Lockett was also cross-examined with respect to various inconsistencies in his descriptions of the clothing that the victim, the killer, and the killer's companions were wearing.

Defense counsel took Lockett's deposition on June 29, 2004. The deposition was the first time that Lockett stated that he observed the killing from the drive-in parking lot. Lockett was again cross-examined with respect to inconsistencies in his accounts of what the participants in the killing were wearing.

Lockett denied speaking with Clark about the details of the events of February 24, 2003, between the time of his interview with police and the taking of his deposition. However, telephone calls between Lockett and Clark, recorded because Lockett was in federal prison, indicated that the two had discussed the events of February 24.

Clark did not speak with police about the killing until July 26, 2003. When she spoke to Lockett's lawyer, and to police on

July 26, she said that she was on the corner of 30th and Fort Streets when she saw the shooting take place. Clark admitted that she is nearsighted and was not wearing her glasses on February 24. Clark was also cross-examined with respect to other inconsistencies between her statement to police and her trial testimony. Most pertinently, it was not until she was taken back to the scene by police, on August 1—after a visit with Lockett—that she told the police that she and Lockett had witnessed events from the drive-in parking lot. Clark also admitted that prior to her testimony, the county attorney had canceled some warrants for Clark and had permitted Clark and her child to meet with Lockett, who is the child's father.

(b) Standard of Review

[29,30] 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. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006). 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. *Id.*

(c) Analysis

The defendant argues, first, that the evidence is insufficient to sustain a conviction on any charge. The defendant contends that the State's witnesses, particularly Lockett, are not credible. Since Lockett was the only witness to identify the defendant as the killer, the defendant contends no credible witness can place him at the scene of the crime.

[31,32] But all of the arguments that the defendant makes on appeal against Lockett's credibility are the product of extensive cross-examination at trial, and the defendant's closing argument attacked Lockett's credibility in the same way. The credibility and weight of witness testimony are for the jury to determine, and

witness credibility is not to be reassessed on appellate review. See *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). The defendant may disagree with the jury's evaluation of the credibility of the State's witnesses, but this court will not revisit the jury's conclusions.

[33] The defendant also argues that even if there is enough evidence to support a conclusion that the defendant was the killer, the evidence does not substantiate a conviction for first degree murder. The elements of first degree murder are listed in Neb. Rev. Stat. § 28-303 (Cum. Supp. 2004), which states that a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice. The defendant argues the evidence does not support a finding that the killing was done with deliberate and premeditated malice.

[34-39] Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002). The term "premeditated" means to have formed a design to commit an act before it is done. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *Harms, supra*. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. *Harms, supra*. A question of premeditation is for the jury to decide. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995).

Given the foregoing propositions, it is apparent that the evidence, viewed in the light most favorable to the State, is sufficient to support the jury's finding that the defendant killed the victim with deliberate and premeditated malice. To begin with, Whitlock testified that in a telephone call prior to the killing, the defendant said that he did not want to have to "pop" the victim. This statement could easily be interpreted as a reference to killing the victim and, while not conclusive, supports an inference that the defendant was contemplating the possibility of killing the victim well before their actual confrontation. Whitlock's testimony also indicates that the defendant was angry with the victim and had been searching for the victim, suggesting both a motive and a deliberate intent to confront the victim and perhaps to kill him. While the witnesses generally testified that one of the killer's companions handed him the gun used in the shooting, the jury could reasonably infer that the killer was not surprised to be provided with a weapon, either because the killing was planned or because the killer asked for the gun. Lockett testified that the defendant shot the victim and continued to fire, even when the victim had retreated to his car, which also supports a finding of deliberate and premeditated malice.

In short, when the record is viewed in the light most favorable to the State, there is sufficient evidence to support the conclusions that the defendant killed the victim and that he committed the killing with deliberate and premeditated malice. The defendant's challenge to the sufficiency of the evidence is without merit.

5. Misconduct in Opening and Closing Argument

(a) Standard of Review

[40,41] Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999).

(b) Analysis

The defendant takes issue with several aspects of the State's opening and closing arguments, particularly the closing argument. The defendant claims that the State misused cellular site

location data because "[t]he State repeatedly in their [sic] closing argument said the phone records are unimpeachable third party independent evidence and they are telling you people's exact location and time." Brief for appellant at 47. The defendant claims the State committed misconduct in referring to a telephone call received on the defendant's telephone from an employee of the defendant's business, because the State implied that the employee was at the defendant's business at the time he made the call but did not prove that fact. The defendant also claims that the State misstated the record in impeaching Blake's testimony that the killer drove a Cadillac Escalade by noting that Blake misidentified the victim's Chevrolet Impala as a Chevrolet Caprice. But the defendant did not object to any of these arguments.

[42-46] In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to improper remarks no later than at the conclusion of the argument. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). Any objection to a prosecutor's arguments made after the jury has been instructed and has retired is untimely and will not be reviewed on appeal. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). Absent plain error, an issue not raised to the trial court will not be considered by the Nebraska Supreme Court on appeal. *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005). Furthermore, 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. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). 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. *Id*. We have carefully reviewed the record and find no plain error.

[47,48] The defendant also takes issue with the State's discussion of whether the defendant's GMC Yukon Denali was customized. The State implied that the Yukon Denali was misidentified by eyewitnesses because it had features not present

on an ordinary Yukon Denali, but there was no evidence to that effect. The defendant objected to the argument concerning the customizing of the defendant's vehicle, but when those objections were sustained, the defendant did not make a motion for a mistrial. It is a well-established legal principle that it is improper for counsel to comment during closing argument on matters unsupported by the evidence. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). But, as previously noted, it is equally well established that 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. *Robinson, supra*. No such motion was made here. In any event, before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006). While the State went beyond the facts in evidence when its argument implied that the defendant's GMC Yukon Denali had different features from the stock features of such a vehicle, we cannot conclude that a miscarriage of justice occurred as a result of the State's objectionable references to the customization of the defendant's vehicle.

The defendant also contends that the State's argument misstated the law with respect to the jury instructions on lesser-included offenses. The State noted that although a step instruction had been given, instructing the jury on lesser-included offenses of first degree murder, the State's position was that the defendant was guilty of first degree murder. As we understand the defendant's claim, he is characterizing the State's argument as implying that the lesser-included offense instructions were merely technicalities, not supported by the evidence. But again, the defendant did not object to the State's argument.

[49,50] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Step instructions which require

consideration of the most serious crime charged before consideration of lesser-included offenses are not erroneous. *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[51] We have reviewed the State's closing statement, and we disagree with the defendant's contention that the State misstated the law. The State's argument, in fact, correctly explained the operation of the step instruction. The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). The State did not act improperly, or mislead the jury, by stating that although the jury had been instructed on lesser-included offenses, the State's consistent position was that the defendant committed first degree murder. In the absence of an objection or motion for mistrial, we find no plain error in this argument.

For the foregoing reasons, we reject the defendant's claim of prosecutorial misconduct.

6. Finding of Habitual Criminal

(a) Background

Exhibits 137 through 139 evidenced the defendant's conviction, pursuant to a plea agreement, of a federal charge of distribution of a controlled substance. Exhibit 137, a certified copy of the plea agreement, indicated the defendant's willingness to plead guilty to conspiring to distribute and to possess with intent to distribute cocaine, exposing him, among other punishments, to imprisonment of 10 years to life and a fine of not more than $4 million. Over several pages, the agreement explained the rights and obligations of the parties. The agreement was executed on June 28, 1993, by "[t]he United States of America, by and through the United States Attorney for the District of Nebraska, and the Defendant, by and through his attorney . . . ." The document was signed by the defendant, the defendant's attorney, and an assistant U.S. Attorney.

Exhibit 138 is a certified and file-stamped copy of the defendant's petition to enter a plea of guilty, filed in the U.S. District Court on June 28, 1993. In the petition, the defendant identified his counsel by name and indicated that he had had enough time to talk with counsel, had told counsel everything about his

case, and was satisfied with the job counsel had done for him. The defendant indicated that he understood the charges against him, expressly stated his understanding of several constitutional rights that he was waiving by pleading guilty, and indicated his understanding of several specific aspects of the sentencing process. The defendant indicated the voluntary nature of his plea. The defendant also indicated that his attorney had reviewed all of the questions in the petition and the defendant's answers to them. The petition was signed by the defendant in the presence of his attorney.

The petition is accompanied by a certificate of defense counsel, signed by the defendant's attorney in the presence of the defendant, in which the defendant's attorney indicated that he had read and fully explained to the defendant the allegations against him; that the plea of guilty offered by the defendant accorded with the attorney's understanding of the facts related to him, was consistent with the attorney's advice to the defendant, and was, in the attorney's opinion, voluntarily and understandingly made; and that the attorney had advised the defendant about the sentencing procedures and explained the potential consequences of the plea.

Exhibit 139 is a certified and file-stamped copy of the U.S. District Court's judgment and commitment order, entered February 8, 1994. The order stated that the defendant "appeared in person with counsel" and "has pleaded guilty to Count I of the Indictment." The defendant was adjudged guilty of conspiracy to distribute and to possess with intent to distribute cocaine, a controlled substance, and was sentenced to a term of 68 months' imprisonment, to be followed by a term of 5 years' supervised release.

(b) Standard of Review

[52] A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005), *cert. denied* 547 U.S. 1134, 126 S. Ct. 2028, 164 L. Ed. 2d 790 (2006).

(c) Analysis

[53-55] Neb. Rev. Stat. § 29-2221(1) (Reissue 1995) provides, in relevant part, that

> [w]hoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment in a Department of Correctional Services adult correctional facility for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings. See *Hall, supra*. The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities. *Id*. Specifically, in a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

The defendant argues that exhibits 137 through 140, evidencing the defendant's conviction, pursuant to a plea agreement, of a federal charge of distribution of a controlled substance, were objectionable because "none of the documents offered actually showed that the defendant appeared before a Judge with counsel and entered his plea." Brief for appellant at 48. The defendant compares this case to *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004), in which we found it insufficient that the record of a defendant's prior conviction showed that he had been represented

by counsel at sentencing, but did not show that he had been represented by counsel or waived counsel prior to sentencing. See, also, *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

The defendant's argument is without merit. Exhibit 137, the defendant's plea agreement, was signed by the defendant's attorney. In exhibit 138, the defendant's petition to enter a plea of guilty, both the defendant and his attorney indicated repeatedly that the defendant was counseled with respect to the plea. And prior to convicting and sentencing the defendant, the federal district court indicated in exhibit 139, its sentencing order, that the defendant appeared in person with counsel and pleaded guilty. These exhibits were admissible and clearly sufficient to support the trial court's finding that the defendant was a habitual criminal.

7. Removal of Jurors

(a) Standard of Review

[56] The retention or rejection of a juror is a matter of discretion for the trial court. *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002). This rule applies both to the issue of whether a venireperson should be removed for cause and to the situation involving the retention of a juror after the commencement of trial. *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998).

(b) Juror No. 3

(i) Background

During voir dire, juror No. 3 reported that she knew a "Parisee" who attended her church. Juror No. 3 reported that she did not know Parisee's last name or really know her. After lunch on the second day of trial, the defendant's counsel brought it to the attention of the court that when the jury was out on recess, "it appeared that maybe [juror No. 3] had some acknowledgement with Parisee Fant, who has previously testified." Juror No. 3 explained, "I just tried — I try not to look, keep straight ahead. I don't know if she spoke or not. I was trying not to look at her at all. And it's hard, it's hard every time I have to go out." Counsel for the defendant clarified, for the record, that juror No. 3 indicated that Parisee waved at juror No. 3 and that juror No. 3 waved back, but that "was the end of it." The defendant made no request that juror No. 3 be removed from the jury at that time.

Another short recess was taken that afternoon. After the recess, juror No. 3 complained to the court that she felt very uncomfortable because of the situation with Parisee and wanted to be removed from the jury. When asked if she had discussed the issue with any of the other jurors, juror No. 3 replied that she had mentioned that she might ask to be removed. When asked if she had discussed the reason for that request, juror No. 3 said that the jury already knew the reason, from the questioning that had occurred during voir dire. Juror No. 3 identified the fellow juror to whom she had spoken about possibly asking to be removed, although there were other jurors in the jury room at the time.

The court excused juror No. 3 from the jury, and she was replaced with an alternate. The court informed the jury that juror No. 3 had been excused and instructed the remaining jurors not to speculate or concern themselves with her absence. The defendant did not make any objection or motion based upon juror No. 3's removal.

(ii) Analysis

[57] The defendant assigns that the trial court "erred in not immediately removing . . . a juror who had contact with the victim's wife." However, the defendant's brief does not actually advance that argument. Instead, the defendant argues that the court erred in not asking the other jurors about any conversations they may have been a part of with juror No. 3. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006). Here, the defendant's assignment of error and the argument in his brief, while both dealing with juror No. 3, raise completely different legal issues.

[58,59] Furthermore, the defendant's brief asserts that after juror No. 3 indicated that she did not want to remain on the jury, "[t]he Defendant's counsel did ask that the Court inquire of the other jurors to see if anything [juror No. 3] said would affect their ability to continue; this was denied by the Court." Brief for appellant at 50. This assertion is unsupported by the record. Neither the section of the record specifically cited by the defendant for this assertion nor any other part of the voluminous record

before this court contains any such request by any party. It is incumbent upon an appellant to supply a record which supports his or her appeal. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). 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. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[60,61] The trial court did not remove juror No. 3 from the jury until she said that it would be difficult for her to continue, and the record does not suggest that any conversation that juror No. 3 may have had with other jurors about the matter would have been prejudicial to the defendant. In other words, the record does not suggest misconduct on the part of juror No. 3, much less prejudicial misconduct. In a criminal case, jury misconduct must be demonstrated by clear and convincing evidence. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *Id*. The trial court carefully exercised its discretion on this matter, and no abuse of that discretion, or plain error, is evidenced by the record.

(c) Juror No. 22

(i) Background

On the morning of Thursday, October 7, 2004, the third day of trial, the court and counsel addressed a situation involving juror No. 22, who appeared to have been sleeping during Tuesday's proceedings. The State suggested a general admonishment to the jury to be vigilant and attentive. The defendant asked that juror No. 22 be removed from the jury. The Court decided to perform a general admonishment, as suggested by the State, and "continue to attempt to monitor the situation."

After the midday recess on October 7, 2004, the court noted, outside the presence of the jury, that juror No. 22 had again been sleeping during Whitlock's testimony. The court also noted that "the juror seated next to him was making eye contact with me and motioning towards him while this was going on." The court, while acknowledging that removal of juror No. 22 would commit the

last alternate juror, determined that juror No. 22 would be removed from the jury. The defendant did not object to the removal or make a motion for mistrial as a result of either the removal of juror No. 22 or the failure to remove juror No. 22 earlier.

(ii) Analysis

The defendant's appellate argument is that the trial court erred in not removing juror No. 22 from the jury on the morning of October 7, 2004, instead of after lunch. The defendant argues that juror No. 22's conduct could have been a distraction to the other jurors.

However, as previously noted, where jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *Thomas, supra*. The record here does not suggest that the defendant was prejudiced. Nor did the defendant make a timely motion for mistrial based upon any perceived distraction. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Iromuanya, ante* p. 178, 719 N.W.2d 263 (2006).

The trial court in this case, faced with placing its final alternate juror on the panel in an early stage of a long and complicated proceeding, appropriately exercised its discretion in deciding whether and when to remove juror No. 22 from the jury. And, as previously discussed, the trial court did not err in the exercise of its discretion with respect to the removal of juror No. 3. Consequently, we find the defendant's final assignment of error to be without merit.

V. CONCLUSION

For each of the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DONELL KING, APPELLANT.

724 N.W.2d 80

Filed December 1, 2006. No. S-05-1212.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
3. **Sentences: Prior Convictions: Habitual Criminals: Waiver: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions. The State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.
4. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
5. **Names.** The rule of idem sonans is applicable to both civil and criminal proceedings.
6. ____. Under the doctrine of idem sonans, a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Sentences vacated, and cause remanded with directions.

James J. Regan for appellant.

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

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

STEPHAN, J.

On direct appeal, we affirmed Donell King's convictions for first degree sexual assault, kidnapping, and robbery. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005) (*King I*). However, we determined that the district court erred in sentencing King as a habitual criminal and therefore vacated the sentences and remanded the cause to the district court with directions to conduct

a new enhancement hearing and resentence. On remand, the district court conducted a new enhancement hearing, determined King to be a habitual criminal, and sentenced him to 10 to 25 years' imprisonment for first degree sexual assault, 10 to 25 years' imprisonment for kidnapping, and 10 to 25 years' imprisonment for robbery, the sentences running consecutively. King appeals these sentences.

I. BACKGROUND

The State seeks to subject King to enhanced penalties under the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1995) on the basis of two criminal convictions in the State of Illinois: a 1993 conviction for possession of a controlled substance and a 1994 conviction for robbery. Based upon *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), we determined in *King I* that the State had not met its burden of proving that King either was represented by counsel or had waived the right to counsel at the time of sentencing for his 1994 conviction. We held that this conviction was thus erroneously used for habitual criminal enhancement and did not reach issues raised by King with respect to the 1993 conviction.

At the enhancement hearing on remand following *King I*, the State reoffered all of the exhibits which had been offered at the first hearing. Some were received without objection. Over King's hearsay objection, the court received the transcribed testimony of a crime laboratory technician who testified at the first enhancement hearing on the subject of fingerprint comparisons. The district court sustained King's objections to portions of an exhibit consisting of records of the Illinois Department of Corrections on the ground that such records were not authenticated and constituted hearsay. The district court also sustained King's objection, on grounds of hearsay and lack of authentication, to an unsigned "Report of Proceedings" purportedly held on October 25, 2004, in the circuit court for Cook County, Illinois. The court also sustained King's foundation and hearsay objections and did not receive an affidavit executed by an Illinois prosecutor which was offered by the State.

The State offered two exhibits which had not been offered at the first enhancement hearing. These documents consisted of

transcribed proceedings held in the circuit court for Cook County in 1993 and 1994. Both were signed and certified by an official court reporter. King objected to both exhibits on the ground of insufficient authentication, but the district court overruled the objections and received both exhibits as "official records admissible under [Neb. Rev. Stat. §] 27-902, Subsection 4."

On the record made at the postremand enhancement hearing, the district court found that King was a habitual criminal as defined by § 29-2221 and imposed the same sentences as it had originally: 10 to 25 years' imprisonment for first degree sexual assault, 10 to 25 years' imprisonment for kidnapping, and 10 to 25 years' imprisonment for robbery, with the sentences running consecutively. King 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).

Before the State filed its appellate brief, it filed a "Suggestion of Remand" in which it acknowledged certain deficiencies in the record with respect to the 1994 conviction and suggested that this court vacate the sentences imposed by the district court and remand the cause with directions to conduct a new habitual criminal enhancement hearing and resentence following the hearing. Because the appeal presented other issues, we declined the State's suggestion and ordered the case fully briefed and argued.

II. ASSIGNMENTS OF ERROR

King assigns, restated, that the district court erred in (1) determining that he was a habitual criminal as defined by § 29-2221 and (2) determining that documents purporting to show a counseled prior conviction were properly authenticated under the Nebraska Evidence Rules.

III. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005); *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005). A trial court's determination of the admissibility of physical evidence will not

ordinarily be overturned except for an abuse of discretion. *State v. Hall, supra*; *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

IV. ANALYSIS

1. General Principles

Under the Nebraska habitual criminal statute, § 29-2221(1):

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this state or any other state . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal and shall be punished by imprisonment . . . for a mandatory minimum term of ten years . . . .

Furthermore, Neb. Rev. Stat. § 29-2222 (Reissue 1995) provides:

> At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

[3] In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). The State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings. *State v. Robinson, ante* p. 582, 724 N.W.2d 35 (2006); *State v. Hall, supra*; *King I, supra*.

2. Evidentiary Issues

(a) Prior Testimony of Crime Laboratory Technician

[4] At the second enhancement hearing, the State requested that the court take judicial notice of the testimony of a crime

laboratory technician who had testified at the first enhancement hearing in this case. King's attorney made a hearsay objection, arguing that the technician's unavailability for the second hearing had not been established. The court overruled the objection and received the transcribed testimony. King argues that the technician's prior testimony was inadmissible because unavailability was not established, but he does not specifically assign error with respect to this issue. An appellate court does not consider errors which are argued but not assigned. *State v. Hernandez*, 268 Neb. 934, 689 N.W.2d 579 (2004); *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

(b) Transcribed Illinois Proceedings

Exhibits 67 and 68, offered for the first time at the second enhancement hearing, are each captioned in the circuit court for Cook County. The documents in question are verbatim transcripts of portions of two separate criminal proceedings involving "Donnell King" conducted in 1993 and 1994. Each exhibit includes a certification page signed by an official court reporter of the circuit court for Cook County, criminal division. In exhibit 67, the court reporter stated that she "reported in shorthand the proceedings had on the hearing in the above-entitled cause" and that she thereafter "caused to be transcribed into typewriting the above Report of Proceedings, which I hereby certify is a true and correct transcript of the proceedings had before the . . . Judge of this court." In exhibit 68, the court reporter certified that she transcribed the document from notes taken by a certified shorthand reporter, producing "a true and correct transcript of said Report of Proceedings as appears from the notes had before the . . . Judge of said court, to the best of my ability." The documents are similar in nature to a bill of exceptions filed in this court.

Authentication and identification of documentary evidence is governed by Neb. Evid. R. 901 and 902, Neb. Rev. Stat. §§ 27-901 and 27-902 (Reissue 1995). Rule 901 provides, generally, that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). Rule 902 further provides that certain documents are self-authenticating; that is, no extrinsic evidence

of authenticity as a condition precedent to admissibility is required. These include:

> (1) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof . . . or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution;
>
> (2) A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in subdivision (1) of this section, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine;
>
> . . . .
>
> (4) A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with subdivision (1) [or (2)] or complying with any Act of Congress or the Legislature or rule adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters.

§ 27-902.

King argues that exhibits 67 and 68 are not self-authenticating documents under rule 902(1) or (2) because they bear no seal and that they do not meet the requirements of rule 902(4), as determined by the district court, because they are not "officially-filed" court documents. Brief for appellant at 13. The State contends that both documents were properly authenticated under the reasoning of *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985), *overruled on other grounds, State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000). In *Benzel*, we held that a transcription of proceedings bearing the certification of a court reporter in compliance with our rule pertaining to the preparation of bills of exceptions was self-authenticating pursuant to rule 902(4). See Neb. Ct. R. of Prac. 5 (rev. 2006).

Like Nebraska, Illinois grants its supreme court the authority to make rules of practice and procedure for all courts within the state. 735 Ill. Comp. Stat. Ann. 5/1-104 (1993). In Illinois, a report of proceedings "may include evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his decision, and any other proceedings that the party submitting it desires to have incorporated in the record on appeal." 1 Ill. Code R. 323(a) (LexisNexis Supp. 2006). The rule provides in part that "[c]ourt reporting personnel who transcribe a report of proceedings shall certify to its accuracy . . . ." *Id.* at 323(b). The rule further provides for the filing of the report of proceedings in the appellate court. *Id*. Rule 902 does not distinguish between in-state and out-of-state court records in its requirements, and we have applied it equally to in-state and out-of-state records of convictions. *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Benzel, supra.* Based on our reasoning in *Benzel*, we conclude that because exhibits 67 and 68 are documents authorized by law to be filed in court and their accuracy has been certified by court reporters in compliance with a rule of the Illinois Supreme Court which is harmonious with our corresponding rule, the documents are self-authenticating under rule 902(4). The district court did not err in receiving exhibits 67 and 68.

3. Evidence of Prior Convictions

(a) 1993 Conviction

The report of proceedings identified as exhibit 68 reflects that on July 20, 1993, King appeared in the circuit court for Cook County with counsel and entered a plea of guilty to the felony offense of possession of a controlled substance. At the same hearing, he received a sentence of 2 years in the custody of the Illinois Department of Corrections. The record also includes a statement of conviction and disposition certified by the clerk of the circuit court for Cook County and bearing the seal of that court, which reflects the conviction and sentence and issuance of a mittimus.

[5,6] The Illinois court records refer to "Donnell" King, whereas King's first name is spelled "Donell" in the records of this case. The rule of idem sonans is applicable to both civil

and criminal proceedings. *State v. Laymon*, 217 Neb. 464, 348 N.W.2d 902 (1984); *State v. Cardin*, 194 Neb. 231, 231 N.W.2d 328 (1975). Under the doctrine of idem sonans, a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance. *State v. Laymon, supra*; *State v. Journey*, 201 Neb. 607, 271 N.W.2d 320 (1978). In *Laymon*, the defendant argued that records of prior convictions could not be used for enhancement because they identified the defendant as "Tony I. Layman," not "Tony I. Laymon." 217 Neb. at 465, 348 N.W.2d at 902. We concluded that the surnames were "so similar in pronunciation and appearance and the variation is so slight that they must be regarded as idem sonans." *Id*. at 465, 348 N.W.2d at 903. We further noted that the defendant offered no evidence and made no claim that he was not the same person referred to in the prior conviction records, and concluded that the records were properly received for purposes of enhancement. Here, the names "Donell" and "Donnell" are similar in pronunciation and appearance, and King did not object to the 1993 records on the ground that they referred to a different person.

We conclude that the State proved by a preponderance of the evidence that in 1993, King was convicted of a crime for which he was sentenced and committed to prison for not less than 1 year and that he was represented by counsel at the time of the conviction and sentencing.

(b) 1994 Conviction

A properly authenticated record of the circuit court for Cook County establishes that in 1994, King was convicted by that court of robbery and was sentenced to imprisonment for 12 years. The record further reflects that a mittimus was issued on the day of sentencing. For the reasons discussed above, the record is sufficient to establish that the person identified in the Illinois records as "Donnell" King is the same person as the appellant. This evidence is sufficient to establish that in 1994, King was convicted of a crime for which he was sentenced and committed to prison for not less than 1 year.

The report of proceedings identified as exhibit 67 includes a verbatim transcript of King's sentencing hearing for the 1994 conviction reflecting that he was represented by an attorney at

that time. A similar document pertaining to King's earlier bench trial, which was received in evidence apparently without objection at the first enhancement hearing, was properly rejected when King objected to its reoffer at the second enhancement hearing because the certification was not signed by a court reporter as required by the Illinois Supreme Court rule 323(b). The evidence received by the court at the second hearing includes a "Notice of Investigation Order" dated October 25, 1994, the date of the conviction. The same attorney is shown on this form as the defense attorney. Exhibit 67 includes a verbatim transcript of the hearing on a motion for new trial which immediately preceded the sentencing hearing. The attorney represented King on both matters. In arguing for the motion for new trial, the attorney stated that he "took the trial" and described certain evidence adduced.

In assessing whether the State proved that King was represented by counsel at the time of his 1994 Illinois conviction, we consider only the evidence which was offered and received at the second enhancement hearing. Any statements in our opinion in *King I* based upon evidence received at the first hearing but not the second are inapposite, inasmuch as our disposition in *King I* required a "new enhancement hearing." It is clear from the record that the district court and the parties understood that evidence received in the first hearing must be reoffered and received in the second hearing in order to be considered. We note that during the pendency of this appeal, the State filed a "Suggestion of Remand" in which it conceded that exhibit 66, the unsigned report of proceedings which was not received at the second enhancement hearing, was "the only piece of evidence that establishes that King was represented by counsel at his 1994 trial and conviction." The State further admitted that the attorney's name on the notice of investigation order did not establish that King was represented by counsel during his 1994 trial and conviction, only that he had counsel "after conviction but before sentencing." We agree with the State's evaluation of this evidence. The attorney's ambiguous statement that he "took the trial" does not provide the requisite specificity necessary to meet the State's burden. On this record, therefore, the 1994 conviction cannot be considered for enhancement purposes under the habitual criminal statutes.

Because the State did not prove two prior convictions as to which King had or waived counsel at the time of conviction and sentencing, we vacate the enhanced sentences which he received under the habitual criminal statute and remand the cause for resentencing. In his brief, King requests that we remand "with directions to the District Court to sentence the Appellant without designation as a habitual criminal." Brief for appellant at 17. In its "Suggestion of Remand," the State suggests that we remand "with directions for [a] new habitual criminal hearing and for resentencing following the hearing." Neither side has briefed the issue of whether the State is entitled to another opportunity to prove that King is a habitual criminal subject to the enhanced sentencing provisions of § 29-2221. We conclude that this determination should be made in the first instance by the district court on remand, and we therefore express no opinion with respect to the issue.

V. CONCLUSION

For the reasons discussed, we vacate King's sentences and remand the cause for resentencing. Upon remand, the district court may conduct whatever additional evidentiary proceedings it deems appropriate and legally permissible, subject to appellate review.

SENTENCES VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.

JILL C. WATSON, NOW KNOWN AS JILL C. DAY, APPELLEE,
v. ROBERT W. WATSON, APPELLANT.

724 N.W.2d 24

Filed December 1, 2006. No. S-05-1423.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **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 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.

3. **Child Custody: Jurisdiction: Appeal and Error.** The question whether jurisdiction should be exercised under the Uniform Child Custody Jurisdiction and Enforcement Act is entrusted to the discretion of the trial court and is reviewed de novo on the record for abuse of discretion by the appellate court.
4. **Child Custody: Jurisdiction.** Jurisdiction over child custody proceedings is governed by the Uniform Child Custody Jurisdiction and Enforcement Act.
5. **Child Custody: Words and Phrases.** A child custody proceeding for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act is a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue.
6. **Child Custody: Jurisdiction: States.** Pursuant to Neb. Rev. Stat. § 43-1239(a)(1) (Reissue 2004), whether a court's exclusive and continuing jurisdiction has been lost is a determination to be made by a court of this state.
7. ____: ____: ____. A court with exclusive and continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act may decline to exercise its jurisdiction if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum.
8. **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.
9. **Words and Phrases.** As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion.
10. **Child Custody: Jurisdiction.** Before determining whether it is an inconvenient forum, the Uniform Child Custody Jurisdiction and Enforcement Act requires a court to allow the parties to submit information and to consider all relevant factors.
11. ____: ____. As a general rule, a decision to decline to exercise jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act for the reason of an inconvenient forum is entrusted to the discretion of the trial court.
12. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
13. **Child Custody: Jurisdiction: States: Appeal and Error.** After a court of this state has declined to exercise its jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, the objecting party is entitled to know that the trial court has engaged in a proper consideration of all relevant factors and to a record that allows for meaningful appellate review.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Reversed and remanded with directions.

Chris A. Johnson, of Conway, Pauley & Johnson, P.C., for appellant.

Robin L. Binning, of Binning & Plambeck, for appellee.

Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

WRIGHT, J.

NATURE OF CASE

This case involves interstate jurisdictional questions governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2004). In 2002, the district court for Sarpy County, Nebraska, dissolved the marriage of Jill C. Watson (now known as Jill C. Day) and Robert W. Watson and awarded custody of the parties' children to Jill, subject to Robert's visitation rights. With the court's permission, Jill later moved with the children to Maryland.

In the case at bar, Robert filed a motion for contempt in the district court, alleging that Jill had refused to allow the children to visit him. Jill then moved the court to release its jurisdiction over the matter and transfer the cause to Maryland. The court sustained Jill's motion and denied Robert's contempt motion. Robert appeals from the court's order. We reverse the judgment and remand the cause with directions.

SCOPE OF REVIEW

[1] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005).

[2] This court has not previously discussed the standard of review regarding jurisdictional issues under the UCCJEA. The Nebraska Legislature adopted the UCCJEA to repeal and replace the Nebraska Child Custody Jurisdiction Act (NCCJA), operative January 1, 2004. See, 2003 Neb. Laws, L.B. 148; *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006). In considering whether jurisdiction existed under the NCCJA, we stated 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 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. *White v. White, supra*.

[3] The question as to whether jurisdiction existing under the NCCJA should be exercised was entrusted to the discretion of the trial court and was reviewed de novo on the record for abuse of discretion. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal. See *White v. White, supra*. We determine that the same standards of review should govern questions concerning whether jurisdiction exists under the UCCJEA and whether that jurisdiction should be exercised. Therefore, the question whether jurisdiction should be exercised under the UCCJEA is entrusted to the discretion of the trial court and is reviewed de novo on the record for abuse of discretion by the appellate court.

FACTS

Robert and Jill were married in 1993. Three children were born of their marriage. The marriage was dissolved in June 2002 by decree of the district court for Sarpy County. Jill was awarded custody and control of the minor children, subject to reasonable visitation rights reserved in Robert.

On July 11, 2003, Jill filed an application to permanently remove the children from Nebraska to Maryland. The district court granted Jill's request. The Nebraska Court of Appeals affirmed the district court's order, but modified Robert's visitation schedule. See *Watson v. Watson*, No. A-03-1165, 2004 WL 1724902 (Neb. App. Aug. 3, 2004) (not designated for permanent publication). The children have resided in Maryland with Jill since October 18, 2003.

On October 22, 2004, Jill filed in the circuit court for Howard County, Maryland, a petition to register the dissolution decree and related judgments and to establish jurisdiction in that court. Robert filed no response, and the Maryland court granted Jill's petition.

On January 19, 2005, Jill filed in the Maryland court a petition to modify Robert's visitation schedule. Robert moved to dismiss, alleging that Nebraska had exclusive and continuing jurisdiction over the matter. The Maryland court denied Robert's motion. It concluded that because he had not objected to the registration of the dissolution decree and related judgments in Maryland, Robert had waived his right to challenge the authority of the court to enforce or modify such orders. Robert appealed

the Maryland court's order and requested review by an en banc panel. Robert's appeal is apparently pending in Maryland.

Robert filed a motion for contempt in the district court for Sarpy County on July 11, 2005, alleging that Jill had refused to allow the children to visit him. Jill subsequently filed a motion requesting that the district court relinquish jurisdiction of the pending matters and transfer jurisdiction to the State of Maryland. Jill informed the district court that she had registered the dissolution decree and related judgments in the Maryland court and that Robert had not objected to such registration.

On October 21, 2005, the district court determined that all matters related to the dissolution decree should be transferred to Maryland because Jill had registered the decree in the Maryland court and Robert had not objected. The district court granted Jill's motion to transfer jurisdiction and denied Robert's motion for contempt. Robert timely appealed the district court's ruling, and this court moved the appeal to its docket on its own motion, pursuant to its 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

Robert claims, summarized and restated, that the district court erred (1) in not following the UCCJEA and (2) in denying his motion for contempt without hearing any evidence on the issue.

ANALYSIS

[4,5] Jurisdiction over child custody proceedings is governed by the UCCJEA. See Neb. Rev. Stat. § 42-351(1) (Reissue 2004). A child custody proceeding for purposes of the UCCJEA is a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. *Lamb v. Lamb*, 14 Neb. App. 337, 707 N.W.2d 423 (2005). See § 43-1227(4). The case at bar involves a child custody proceeding as defined in the UCCJEA.

The UCCJEA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1997 to replace the Uniform Child Custody Jurisdiction Act (UCCJA) (which was referred to in Nebraska as "the NCCJA"). The UCCJEA has been adopted in 42 states, including Nebraska and Maryland. See Unif. Child Custody Jurisdiction and Enforcement Act

(1997), Table of Jurisdictions Wherein Act Has Been Adopted, 9 U.L.A. 74 (Cum. Supp. 2006).

In promulgating the UCCJEA, the National Conference of Commissioners on Uniform State Laws sought to clarify a number of ambiguities that had caused the UCCJA to be interpreted differently and applied inconsistently from one jurisdiction to another. See Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. Rev. 301 (1999). For example, the UCCJEA clarifies the rules for original, modification, and enforcement jurisdiction. *Seamans v. Seamans*, 73 Ark. App. 27, 37 S.W.3d 693 (2001). The purposes of the UCCJEA are to avoid interstate jurisdictional competition and conflict in child custody matters, to promote cooperation between courts of other states so that a custody determination can be rendered in a state best suited to decide the case in the interest of the child, to discourage the use of the interstate system for continuing custody controversies, to deter child abductions, to avoid relitigation of custody issues, and to facilitate enforcement of custody orders. Unif. Child Custody Jurisdiction and Enforcement Act (1997), § 101, comment, 9 U.L.A. 657 (1999).

The UCCJEA requires courts, when applying and construing the act, to consider the need to promote uniformity of the law with respect to its subject matter among the states that enact it. See § 43-1265. The UCCJEA was intended to resolve jurisdictional conflicts that had arisen under the UCCJA due to unclear language and inconsistent application. See Stoner, *supra*. Conflicting interpretation of the UCCJA had resulted in a loss of uniformity among states. See Prefatory Note, Unif. Child Custody Jurisdiction and Enforcement Act (1997), 9 U.L.A. 649 (1999). See, also, *Vannatta v. Boulds*, 318 Mont. 472, 475, 81 P.3d 480, 482-83 (2003) (stating that one purpose of UCCJEA was to " 'eliminate inconsistent state court interpretations of jurisdictional issues' "). The goal of uniformity under the UCCJEA can be realized only if trial courts in each state make requisite considerations under the act and follow its procedures.

The district court for Sarpy County had exclusive and continuing jurisdiction under the UCCJEA of the custody and visitation

issues involved in this case because the court had made the initial child custody determination. See § 43-1239. Accord *Shanoski v. Miller*, 780 A.2d 275 (Me. 2001). Jurisdiction remained in the district court either until jurisdiction was lost under § 43-1239(a) or until the court declined to exercise its jurisdiction under § 43-1244 for the reason of an inconvenient forum. Below, we address whether either of those scenarios occurred.

Exclusive and Continuing Jurisdiction

Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005). The first issue presented is whether the district court's exclusive and continuing jurisdiction of this matter was lost under § 43-1239(a).

Section 43-1239(a) provides the rules for continuing jurisdiction, an issue which was not specifically addressed in the UCCJA. See Unif. Child Custody Jurisdiction and Enforcement Act (1997), § 202, comment, 9 U.L.A. 674 (1999). Section 43-1239(a) provides:

> Except as otherwise provided in section 43-1241 [providing temporary emergency jurisdiction in cases of abandonment or abuse], a court of this state which has made a child custody determination consistent with section 43-1238 or 43-1240 has exclusive, continuing jurisdiction over the determination until:
>
> (1) a court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
>
> (2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

The district court maintained exclusive jurisdiction under § 43-1239. This jurisdiction would continue unless the district court determined that neither the children, nor the children and

one parent, nor the children and a person acting as a parent had a significant connection with this state and that substantial evidence was no longer available in this state concerning the children's care, protection, training, and personal relationships. The California Court of Appeal has observed the following concerning the California statute that is substantially equivalent to § 43-1239:

> Professor Robert G. Spector, the reporter for the committee which drafted the new uniform act, explained the intended application of [this section of the UCCJEA]: "So long as one parent, or person acting as a parent, remains in the state that made the original custody determination, only that state can determine *when the relationship between the child and the left-behind parent has deteriorated sufficiently so that jurisdiction is lost.*" (Spector, *Uniform Child-Custody Jurisdiction and Enforcement Act (with Prefatory Note and Comments)* (1998) 32 Family L.Q. 301, 340, fn. 81, italics added.) . . . If the remaining parent continues to assert and exercise his visitation rights, then the parent-child relationship has not deteriorated sufficiently to terminate jurisdiction.

Grahm v. Superior Court, 132 Cal. App. 4th 1193, 1198-99, 34 Cal. Rptr. 3d 270, 274 (2005).

Both parties have conceded that the district court had exclusive and continuing jurisdiction under § 43-1239. Despite the parties' belief that the district court did not lose its jurisdiction under § 43-1239, the court explained its decision to relinquish jurisdiction in the following manner:

> In granting [Jill's] Petition to Register the Decree [in Maryland], the Maryland Court specifically determined that [Jill] and the children reside in that state and it is the more appropriate and convenient forum for determining child custody issues, as outlined in § 43-1239[(a)](2). As such, this Court can and should relinquish its continuing and exclusive jurisdiction under [§ 43-1239(a)(1)] as requested by [Jill] in her Motion to Release Case and Transfer Jurisdiction. This will accomplish the moving of all matters with respect to these children and their best interests to the State in which they and one parent reside.

The district court's reading and application of § 43-1239 were in error. The district court found that the Maryland court had determined that Jill and the children resided in Maryland and that Maryland was the more appropriate and convenient forum. Although the district court cited § 43-1239(a)(2), neither the convenience nor the appropriateness of the forum is a factor to be considered under that statute. Exclusive and continuing jurisdiction could be lost only if the children, Jill, and Robert no longer resided in the state. See § 43-1239(a)(2). The district court erred in making such a determination because Robert continued to reside in Nebraska.

[6] The district court also erred in relying on the Maryland court's determination that it was the more appropriate and convenient forum. Pursuant to § 43-1239(a)(1), whether a court's exclusive and continuing jurisdiction has been lost is a determination to be made by a court of this state. Moreover, such determination must be based upon a Nebraska court's finding that "neither the child, nor the child and one parent . . . have a significant connection with this state *and* that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships." (Emphasis supplied.) See § 43-1239(a)(1).

The National Conference of Commissioners on Uniform State Laws explained jurisdiction pursuant to this section of the UCCJEA in the following manner:

> In other words, even if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction, so long as the general requisites of the "substantial connection" jurisdiction provisions of [§ 43-1239(a)(1)] are met. If the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

Unif. Child Custody Jurisdiction and Enforcement Act (1997), § 202, comment, 9 U.L.A. 674 (1999).

The district court made no determination whether the children and one parent maintained a "significant connection" to this state or whether "substantial evidence" was available in this

state. See § 43-1239(a)(1). Therefore, we conclude that the district court's exclusive and continuing jurisdiction was not lost under § 43-1239.

Relinquishing Jurisdiction Under UCCJEA for Reason of Inconvenient Forum

Although the district court did not lose its exclusive and continuing jurisdiction under § 43-1239, the court had discretionary authority under the UCCJEA to decline to exercise its jurisdiction. We now address whether the district court properly exercised its discretion to relinquish exclusive and continuing jurisdiction.

[7] A court with exclusive and continuing jurisdiction under the UCCJEA may decline to exercise its jurisdiction if it determines that it is "an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." See § 43-1244(a). Although the district court concluded that the Maryland court was the "more appropriate and convenient forum," the district court failed to consider the relevant factors for relinquishing jurisdiction under § 43-1244.

Under the UCCJEA, a court may decline to exercise its jurisdiction only after the court considers certain factors. Section 43-1244 sets forth the proper procedure for relinquishing jurisdiction on the basis that the court is an inconvenient forum. The statute mandates:

> *Before determining whether it is an inconvenient forum*, a court of this state *shall consider* whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court *shall allow the parties to submit information* and *shall consider all relevant factors, including*:
>
> (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) the length of time the child has resided outside this state;
>
> (3) the distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (4) the relative financial circumstances of the parties;
>
> (5) any agreement of the parties as to which state should assume jurisdiction;

(6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) the familiarity of the court of each state with the facts and issues in the pending litigation.

(Emphasis supplied.) § 43-1244(b).

[8-10] 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. *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006). As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). Before determining whether it is an inconvenient forum, the UCCJEA requires a court to "allow the parties to submit information" and to consider "all relevant factors." See § 43-1244(b). In the instant case, no evidentiary hearing was conducted and the district court made no analysis under § 43-1244(b) before it relinquished exclusive and continuing jurisdiction to the Maryland court.

In concluding that Maryland was a more appropriate forum, the district court relied upon the fact that Jill had registered the dissolution decree and related judgments in Maryland and that Robert had not objected. The district court also relied on the Maryland court's alleged determination that it was a more appropriate and convenient forum. While recognizing that the factors in § 43-1244(b) are not exhaustive, we note that the considerations made by the district court did not include the conditions expressed in § 43-1244(b).

The record before us contains copies of the orders issued by the Maryland court; however, the record does not indicate that the Maryland court "specifically determined that . . . it [was] the more appropriate and convenient forum for determining child custody issues." Our de novo review reveals that Jill registered the dissolution decree and related judgments in the Maryland court, without objection by Robert. Later, Jill filed a petition in

the Maryland court to modify the visitation schedule. Robert filed a motion to dismiss, alleging that Nebraska had exclusive and continuing jurisdiction. In denying Robert's motion, the Maryland court reasoned that Robert had waived his right to contest the authority of that court to enforce or modify the dissolution decree because he had not contested its registration. Thus, the record indicates that the Maryland court based its exercise of jurisdiction not on the fact that Maryland was a more convenient and appropriate forum, but on the fact that Robert did not object to the registration of the dissolution decree and related judgments in Maryland.

Whether the Maryland court erred in denying Robert's motion to dismiss and in exercising jurisdiction to modify the visitation schedule is not an issue before us and is apparently on appeal in Maryland. We refer to the Maryland court's decision because that is the basis upon which the district court relinquished its jurisdiction. Consideration of another state's exercise of jurisdiction is not a factor set forth in § 43-1244(b), and in this case, it was not a "relevant" factor under that section.

The State of Maryland has also adopted the UCCJEA. See Md. Code Ann., Family Law §§ 9.5-101 to 9.5-318 (LexisNexis 2006). Jill registered the dissolution decree and related judgments in the Maryland court, and Robert did not object to such enrollment. See, generally, Md. Code Ann., Family Law § 9.5-305 (setting forth procedure for registering child custody determination issued by court of another state). Accord § 43-1252. The uncontested registration of a Nebraska child custody determination in Maryland authorizes the Maryland court to *enforce* the Nebraska order. See Md. Code Ann., Family Law § 9.5-306. Accord § 43-1253(b) ("[a] court of this state shall recognize and enforce, but may not modify, except in accordance with sections 43-1238 to 43-1247, a registered child custody determination of a court of another state"). Whether Jill's registration of the dissolution decree and related judgments conferred on the Maryland court authority to *modify* those orders is apparently pending on appeal in Maryland.

Since Robert continued to reside in Nebraska, the Maryland court could obtain jurisdiction to modify Nebraska's child custody determination only if a Nebraska court first determined

either that it had lost its exclusive and continuing jurisdiction under § 43-1239 or that a Maryland court was a more convenient forum under § 43-1244. See Md. Code Ann., Family Law § 9.5-203. Accord § 43-1240. See, also, *Vannatta v. Boulds*, 318 Mont. 472, 81 P.3d 480 (2003) (holding that Montana court lacked jurisdiction to modify child custody determination of another state because other state had not determined that it no longer had exclusive, continuing jurisdiction or that Montana would be more convenient forum). The Maryland court's exercise of jurisdiction in the modification proceeding was not a factor to be considered by the district court under § 43-1244.

[11] As a general rule, a decision to decline to exercise jurisdiction under the UCCJEA for the reason of an inconvenient forum is entrusted to the discretion of the trial court. See *Shanoski v. Miller*, 780 A.2d 275 (Me. 2001). Cf. *In re Interest of Floyd B.*, 254 Neb. 443, 577 N.W.2d 535 (1998) (stating that whether jurisdiction existing under NCCJA should be exercised was entrusted to discretion of trial court and reviewed de novo on record). Although the district court had discretionary authority under § 43-1244 to find that it was an inconvenient forum and thus to decline to exercise its jurisdiction, the court failed to correctly apply the provisions of § 43-1244(b) in making its determination.

[12] In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005). Section 43-1244(b) instructs trial courts to "allow the parties to submit information" and to "consider all relevant factors, including [certain specified considerations]." Prior to making a determination that another state is a more convenient forum, courts must consider relevant factors under § 43-1244(b). Because an evidentiary hearing was not held, this court is unable to review whether the district court declined to exercise its jurisdiction for appropriate reasons. The record does not contain any evidence or analysis by the district court as required under § 43-1244.

In *Shanoski v. Miller, supra*, the Supreme Judicial Court of Maine considered whether the trial court had abused its discretion in declining to exercise jurisdiction under Maine's UCCJEA

for the reason of an inconvenient forum. In declining to exercise jurisdiction, the trial court stated that it had considered the inconvenient forum factors of the UCCJEA, but the court's ruling did not reflect a factor-by-factor analysis. On appeal, the Supreme Judicial Court of Maine analyzed each of the statutory factors and concluded that the trial court had not abused its discretion in declining to exercise jurisdiction.

Although the trial court in *Shanoski v. Miller, supra*, did not make findings for each factor of the inconvenient forum statute, the appellate court stated that the trial court's "thoughtful discussion" contained several findings regarding convenience, three of which findings related to the specified statutory factors. *Id*. at 280. An evidentiary hearing was not held on the mother's motion to decline jurisdiction because the parties agreed to let the trial court consider the motion by affidavit and exhibits. The appellate court stated that the statute did not expressly require trial courts to specifically enumerate their findings for each factor, but the court did require findings "sufficient to inform the parties of the court's reasoning and sufficient for effective appellate review." *Id*.

[13] Section 43-1244 prescribes the method by which a trial court may relinquish its jurisdiction on the basis of an inconvenient forum. In the case at bar, no evidentiary hearing was afforded the parties at which they could "submit information" for the district court to consider. See § 43-1244(b). There is no record that the court considered the factors required by § 43-1244. After a court of this state has declined to exercise its jurisdiction under the UCCJEA, the objecting party is entitled to know that the trial court has engaged in a proper consideration of "all relevant factors" and to a record that allows for meaningful appellate review. See § 43-1244(b). For the reasons set forth above, we conclude that the district court erred by failing to comply with the provisions of the UCCJEA.

Motion for Contempt

At a proceeding on August 5, 2005, the district court scheduled a hearing on Jill's motion to relinquish and transfer jurisdiction. The district court said it would wait to set a hearing on Robert's contempt motion until the jurisdictional issue was resolved.

Arguments were heard regarding Jill's motion on September 16. Following that hearing, the district court sustained Jill's motion, and the court denied Robert's motion for contempt. The record does not reflect that a hearing was ever held on Robert's motion before it was denied.

Robert argues that the district court erred in "dismissing" his motion for contempt without hearing any evidence on the issue. See brief for appellant at 15. The record shows that the court did not dismiss Robert's motion, but denied it. We interpret Robert's argument to mean that the district court erred because it issued a ruling on his contempt motion even though the court relinquished jurisdiction over the matter and even though a hearing was not held on that issue.

Robert contends the denial of his motion was error because the district court should have stayed the proceedings in Nebraska. We agree. The UCCJEA provides that

> [i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

§ 43-1244(c). The district court erred in denying Robert's motion for contempt.

CONCLUSION

The judgment of the district court is reversed, and the cause is remanded to that court with directions to hold an evidentiary hearing at which it will determine whether to decline to exercise jurisdiction in this matter pursuant to the UCCJEA. We further instruct the district court that if it declines to exercise jurisdiction, it should stay the motion for contempt in accordance with § 43-1244(c).

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLANT, V. CYNTHIA J. CANIGLIA, APPELLEE.

724 N.W.2d 316

Filed December 8, 2006. No. S-05-069.

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. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Probation and Parole: Appeal and Error.** A sentence imposed in a revocation of probation proceeding is considered a sentence under Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2004) and is subject to an appeal by the prosecutor challenging its leniency.

Petition for further review from the Nebraska Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge. Judgment of Court of Appeals vacated, and cause remanded with directions.

L. Kenneth Polikov, Sarpy County Attorney, and Tricia A. Freeman for appellant.

Thomas P. Strigenz, Sarpy County Public Defender, and Patrick J. Boylan for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

After Cynthia J. Caniglia, appellee, admitted that she had violated the terms of her probation, the district court for Sarpy County entered an order on January 7, 2005, providing that "the probation be terminated as unsuccessful." The State filed an appeal, relying on Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2004) as the basis for jurisdiction. Section 29-2320 allows the State to appeal in a criminal case when it believes that a sentence is excessively lenient. The Nebraska Court of Appeals concluded that it had jurisdiction pursuant to § 29-2320, found that the district court had imposed an excessively lenient sentence, and vacated the sentence and remanded the cause with instructions

for a different judge to impose a greater sentence. *State v. Caniglia*, 14 Neb. App. 714, 714 N.W.2d 462 (2006). Caniglia petitioned for further review challenging the jurisdiction of the Court of Appeals. We granted the petition for further review. Because we conclude that the Court of Appeals did not have jurisdiction, we vacate the judgment of the Court of Appeals and enter orders accordingly.

STATEMENT OF FACTS

The Court of Appeals described the facts of this case as follows:

> Caniglia was convicted in the Sarpy County District Court of driving under the influence of alcohol (DUI), fourth offense, a Class IV felony punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. Caniglia was driving on a suspended driver's license at the time of her January 29, 2003, offense. We note that Caniglia was also convicted of fourth-offense DUI in the Douglas County District Court and sentenced by that court on July 30, 2003, to 60 months' intensive supervision probation (ISP). The charges in that case stemmed from Caniglia's DUI arrest in Douglas County 8 days prior to her DUI arrest in the present Sarpy County case.
>
> On August 1, 2003, the Sarpy County District Court sentenced Caniglia to 18 months' probation. In sentencing Caniglia, the court stated: "While you were at [a treatment center] last January you went on a binge and committed offenses in two counties of driving while intoxicated. You were arrested, you then went back to [the treatment center] and appear to be doing okay there. I have read a copy of the sentence by [the Douglas County District Court] which gives you probation under intensive supervision. I'm going to place you on probation also, not under intensive supervision, to run concurrently with your current probation so there won't be duplication. I have not ordered certain of the costs for running the probation since it would be a duplication. When you complete your time at [the treatment center], you're going to need to get a job. The Court notes you had a job for about 20 years that you kept. You're going

to have to get one when you get out. You got a lot of fines and costs to pay both here and in Douglas County. There's other terms. I'm requiring that you attend two Mothers Against Drunk Driving Panels and several other conditions that are not in your supervised probation. I have a copy of the probation order in this case for you, but also a copy of what I was going to do before I had heard that you were sentenced by [the Douglas County District Court] which included some time in jail but I won't impose that. I have a copy for you and counsel." No appeal was taken from Caniglia's conviction and sentence in Sarpy County.

The record shows that on November 19, 2004, the Douglas County District Court entered an order terminating Caniglia from probation in the Douglas County case upon finding that Caniglia had not satisfactorily completed one of the conditions of her ISP, namely that she refrain from the use or possession of alcohol. Also on November 19, the court entered an order sentencing Caniglia to 15 days' jail time, with credit for 18 days served, and revoking Caniglia's driver's license for a period of 15 years.

On December 3, 2004, the State filed a motion to revoke probation in the Sarpy County case, alleging that Caniglia had violated one of the conditions of her probation, namely that she refrain from the use of alcoholic beverages. A hearing on the motion was held on December 27, at which hearing Caniglia admitted the allegations of the motion. The district court found a sufficient factual basis to support Caniglia's admission, and it continued the hearing to January 7, 2005. We note that during the December 27, 2004, hearing, the parties discussed with the court the disposition of Caniglia's probation violation in the Douglas County case.

At the January 7, 2005, hearing, the Sarpy County District Court terminated Caniglia's probation as unsuccessful, without specifically ruling on the motion to revoke probation. The parties and the court again discussed the disposition of the Douglas County case, including the fact that Caniglia's driver's license had been revoked for 15 years. The court engaged Caniglia in the following dialog:

> "THE COURT: You were on probation up in Omaha first, then I put you on probation. Then you violated that probation and then you were — How much time did you spend in jail on that? [Caniglia]: 18 days in Omaha. THE COURT: And you've been in jail here since you were picked up on the — [Caniglia]: The 16th. THE COURT: Okay. I'm terminating your probation as unsuccessful. You'll be processed out today and you need to stick with your program. If you drive, it's a felony, you'll go to jail for a long time."

State v. Caniglia, 14 Neb. App. 714, 715-17, 714 N.W.2d 462, 464-65 (2006).

Following the above-quoted dialog, the Sarpy County District Court entered a written order dated January 7, 2005, in which it stated its finding that "it would be in the best interests of justice that the probation be terminated as unsuccessful." On January 13, the State filed a notice of appeal stating its intent to appeal the January 7 order of the Sarpy County District Court terminating Caniglia's probation as an order imposing an excessively lenient sentence. The State purported to appeal under § 29-2320.

In its published opinion, the Court of Appeals determined that the State could appeal the district court's January 7, 2005, order terminating Caniglia's probation under § 29-2320. The Court of Appeals concluded:

> Although the district court did not technically impose a sentence on January 7, 2005, the court's termination of Caniglia's sentence of probation . . . is the practical equivalent of revoking probation and imposing a new sentence of no imprisonment or fine under the original charge. . . . In other words, the new sentence is zero incarceration, no fine, and no license revocation.

State v. Caniglia, 14 Neb. App. at 718, 714 N.W.2d at 466.

After concluding that the January 7, 2005, order was a sentencing order over which it had jurisdiction, the Court of Appeals evaluated the sentence it had determined was imposed and found such sentence to be excessively lenient. The Court of Appeals vacated the sentence and remanded the cause to the district court with instructions that a different district court judge impose a greater sentence.

Caniglia filed a petition for further review. We granted Caniglia's petition for further review.

ASSIGNMENT OF ERROR

Caniglia asserts on further review that the Court of Appeals erred in concluding that it had jurisdiction over this appeal filed by the State under § 29-2320.

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. *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

ANALYSIS

Caniglia claims that no sentence was imposed by the district court for Sarpy County on January 7, 2005, and that, therefore, there was no sentencing order which the State could challenge as excessively lenient under § 29-2320. Caniglia asserts on further review that because there was no sentence, the Court of Appeals erred when it concluded that it had jurisdiction and considered the State's appeal. We agree with Caniglia.

[2] It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Vela, ante* p. 287, 721 N.W.2d 631 (2006). In the instant case, the State claims that appellate jurisdiction is premised on § 29-2320. Section 29-2320 provides as follows:

> Whenever a defendant is found guilty of a felony following a trial or the entry of a plea of guilty or tendering a plea of nolo contendere, the prosecuting attorney charged with the prosecution of such defendant may appeal the sentence imposed if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient.

[3] We give the phrase "may appeal the sentence imposed" in § 29-2320 its plain meaning and therefore require that a sentence be imposed in order for the prosecuting attorney to appeal under § 29-2320. The requirement that a sentence be imposed extends to the probation violation context. In this regard, we

note that we have treated sentencing orders made in revocation of probation proceedings as sentences from which an appeal may be taken by a criminal defendant, e.g., *State v. Finnegan*, 232 Neb. 75, 439 N.W.2d 496 (1989), and given the statutory authority of § 29-2320 permitting the State to appeal, it logically follows that a sentence imposed in the context of a probation violation proceeding is a sentence from which the prosecuting attorney may appeal under § 29-2320. Accordingly, we conclude that a sentence imposed in a revocation of probation proceeding will be considered a sentence under § 29-2320 and is subject to an appeal by the prosecutor challenging its leniency.

In the instant case, a probation violation proceeding was conducted in the district court for Sarpy County. The initial issue before the district court was whether Caniglia violated a condition of her probation. She admitted as much, and the district court found a violation. Having found a violation, the district court proceeded under Neb. Rev. Stat. § 29-2268 (Reissue 1995), which provides as follows:

> (1) If the court finds that the probationer did violate a condition of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted.
>
> (2) If the court finds that the probationer did violate a condition of his probation, but is of the opinion that revocation of probation is not appropriate, the court may order that:
>
> (a) The probationer receive a reprimand and a warning;
>
> (b) Probation supervision and reporting be intensified;
>
> (c) The probationer be required to conform to one or more additional conditions of probation which may be imposed in accordance with the provisions of sections 29-2246 to 29-2268; and
>
> (d) The probationer's term of probation be extended, subject to the provisions of section 29-2263.

Given the violation, under § 29-2268, the district court was authorized to revoke probation and impose a sentence, to reprimand and warn the probationer, to intensify supervision, to

impose additional terms of probation, or to extend the term of probation. The district court did none of the above. Instead, the district court ordered the probation "terminated as unsuccessful." This was neither an authorized order nor a sentence.

We have observed that a violation of probation is not itself a crime, but that § 29-2268(1) merely provides a mechanism whereby the previous probation is revoked and the court may impose a new sentence. *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994). Alternatively, the court can find a violation and not revoke probation and instead order the probationer to comply with one of the orders indicated in § 29-2268(2). The district court in this case found a violation of probation but failed to follow the statutory mechanism found in § 29-2268 for imposing a consequence for the violation.

The Court of Appeals was confronted with the district court's failure to follow § 29-2268 and correctly noted that "the district court did not technically impose a sentence on January 7, 2005." *State v. Caniglia*, 14 Neb. App. 714, 718, 714 N.W.2d 462, 466 (2006). Although the district court failed to impose a sentence, the Court of Appeals supplied the sentence it believed comported with the district court's having found the probation to have been terminated as unsuccessful. We have stated that "[i]n imposing sentence, the court should state with care the precise terms of the sentence which is imposed." *State v. Bensing*, 249 Neb. 900, 903, 547 N.W.2d 464, 466 (1996). Imposition of a sentence in a revocation of probation context is deserving of the same clarity expected when the initial sentence is imposed. It was error for the Court of Appeals to supply a sentence where none had been imposed by the district court.

Because the Court of Appeals supplied a sentence, it then concluded that a sentence existed which the prosecuting attorney could challenge as excessively lenient under § 29-2320. Contrary to the conclusions reached by the Court of Appeals, no sentence had been imposed by the district court in the violation of probation proceeding and there was no sentence from which the prosecuting attorney could appeal under § 29-2320. In the absence of a sentence, appellate jurisdiction asserted by the prosecuting attorney could not be founded on § 29-2320 and the Court of Appeals lacked jurisdiction.

CONCLUSION

The district court found that Caniglia violated probation but failed to issue a proper order under § 29-2268. In particular, the district court did not impose a sentence. Because there was no sentence, the Court of Appeals lacked jurisdiction to hear the appeal brought by the prosecuting attorney claiming an excessively lenient sentence under § 29-2320. The Court of Appeals erred when it concluded that it had jurisdiction and thereafter considered the merits. Because the Court of Appeals lacked jurisdiction, we vacate the judgment of the Court of Appeals and remand the cause to the Court of Appeals with directions to vacate the order of the district court and remand the cause to the district court with directions to enter a proper order outlining the consequences resulting from the finding that Caniglia had violated probation.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

LARRY W. MYERS, FOR HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED, APPELLANT, V. NEBRASKA INVESTMENT COUNCIL, AN AGENCY OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

724 N.W.2d 776

Filed December 8, 2006. No. S-05-532.

1. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
2. ____: ____. When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
3. **Pleadings: Proof.** A court will not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief.
4. **Jurisdiction: Appeal and Error.** An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.
5. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
6. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.

7. **Standing: Jurisdiction.** Standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
8. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
9. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have a personal stake in the outcome of a controversy: a personal stake that would warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
10. **Actions: Taxation.** Taxpayer litigants have an equitable interest in public funds and can maintain an action to prevent their unauthorized appropriation.
11. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
12. **Constitutional Law: Statutes: Governmental Subdivisions.** A governmental entity may not accomplish indirectly what it is prohibited from doing directly, whether prohibited by constitutional or statutory provisions.
13. **Standing: Pleadings.** Standing is to be assessed under the facts existing when the complaint is filed.
14. **Declaratory Judgments: Standing: Moot Question.** Both standing and mootness are key functions in determining whether a justiciable controversy exists, or whether a litigant has a sufficient interest in a case to warrant declaratory relief.
15. **Declaratory Judgments: Proof.** To obtain declaratory relief, a plaintiff has the burden to prove the existence of a justiciable controversy and an interest in the subject matter of the action.
16. **Declaratory Judgments: Moot Question.** A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
17. **Declaratory Judgments.** A party cannot seek a declaratory judgment which is merely advisory.
18. **Damages: Moot Question.** A suit seeking damages for harm caused by past practices is not rendered moot by the cessation of the challenged conduct.
19. **Actions: Public Officers and Employees: Immunity.** When a party brings an action against an individual employee of a state agency, a court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity.
20. ____: ____: ____. Sovereign immunity bars suits which seek to compel state officials to take affirmative action.
21. ____: ____: ____. Sovereign immunity does not bar an action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent because a court regards a state officer's illegal or unauthorized acts as their own acts and not acts of the state.
22. **Actions: Public Officers and Employees: Equity.** A resident taxpayer of a municipal corporation has an equitable right to maintain an action against its officers who have squandered or dissipated its funds, or paid them out for an unlawful or unauthorized purpose, and to recover such funds where its proper law officer neglects and refuses to prosecute such action.

23. **Actions: Public Officers and Employees: Taxation: Equity.** Before a taxpayer can maintain an equitable action to recover money expended by the officers of a governmental entity, it must appear that the entity itself could have maintained such action in the first instance.
24. ____: ____: ____: ____. A taxpayer has no equitable right to recover funds from public officers merely because they violated a statute.
25. **Contracts: Governmental Subdivisions: Taxation: Statutes.** If a statute explicitly prohibits a governmental entity from entering into a contract and avoids the obligation made in violation of the statute, then the contract is void ab initio and funds paid out under the contract may be recovered in suit by the governmental entity or by a taxpayer suing on its behalf.
26. ____: ____: ____: ____. When a governmental entity is wholly without statutory authority to make a contract, the contract is void ab initio and a taxpayer may recover funds paid out under the public contract.
27. **Contracts: Governmental Subdivisions: Quantum Meruit.** A taxpayer can only recover on behalf of a governmental entity if the public contract is void ab initio such that the party providing services or materials could not recover the value of those services in a quantum meruit action.
28. ____: ____: ____. Where a contract has been entered into in good faith by a governmental entity, which contract was within the power of the governmental entity to make but was void for failure to comply with statutory requirements, an action in quantum meruit for the service performed or the material furnished may be maintained.
29. **Constitutional Law: Public Purpose.** The Nebraska Constitution does not prohibit the State from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose.
30. **Administrative Law: Governmental Subdivisions: Contracts.** Unless authorized by statute or charter, a governmental entity, in its public character as an agent of the state, cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers.
31. ____: ____: ____. When a governmental entity is responsible for providing a service and has the power or legislative authority to contract for those services, its determination to enter into a contract for those services is a legislative act.
32. **Courts: Contracts: Public Policy.** The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt.
33. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.
34. **Contracts.** The unconscionability of a contract provision presents a question of law.
35. **Words and Phrases.** The term "unconscionable" means manifestly unfair or inequitable.
36. **Contracts.** A contract is not substantively unconscionable unless the terms are grossly unfair under the circumstances that existed when the parties entered into the contract.
37. ____. In a commercial setting, substantive unconscionability alone is usually insufficient to void a contract or clause.
38. **Contracts: Courts.** A court must consider whether the contract formation was procedurally unconscionable.

39. **Contracts: Evidence.** An essential fact in determining unconscionability is the disparity in respective bargaining positions of parties to a contract.
40. ____: ____. Unconscionability presents a question of law. Usually, the issue should not be determined before the plaintiffs have an opportunity to present evidence of disparity in their bargaining positions and that the provisions unreasonably favored the defendant.
41. **Contracts: Standing: Taxation: Governmental Subdivisions.** A taxpayer's standing on claims of illegal expenditures extends to seeking recovery from private parties contracting with the governmental entities.
42. **Contracts: Derivative Actions: Governmental Subdivisions.** A taxpayer, in pursuing a derivative action on behalf of a governmental entity, has no greater rights against a party contracting with the governmental entity than the entity itself possesses.
43. **Securities Regulation: Brokers: Words and Phrases.** A broker operating a discretionary account, in which the broker determines which investments to make, is viewed as a fiduciary.
44. **Actions: Securities Regulation: Brokers.** To sustain an unsuitability claim, the investor must prove: (1) The broker recommended (or in the case of a discretionary account purchased) securities which are unsuitable in light of the investor's objectives, (2) the broker recommended or purchased the securities with an intent to defraud or with reckless disregard for the investor's interests, and (3) the broker exercised control over the investor's account.
45. **Brokers: Fraud.** A broker can rely on representations made by the investor in determining whether an investment is suitable to the investor's needs; investments consistent with an investor's objective do not constitute fraudulent conduct when the broker makes the investor aware of the risks.

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

H. Daniel Smith and David J. Koukol, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., and J. Patrick Green, of Creighton University School of Law, for appellant.

Jon Bruning, Attorney General, and Dale A. Comer, and Tim Engler and Christopher R. Heinrich, of Harding, Shultz & Downs, Special Assistant Attorneys General, for appellees Nebraska Investment Council et al.

Shawn Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and Earl H. Nemser and David S. Hoffner, of Dechert, L.L.P., for appellees WG Trading Company, L.P., and Westridge Capital Management, Inc.

CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ., and CARLSON and MOORE, Judges, and HANNON, Judge, Retired.

CONNOLLY, J.

Larry W. Myers appeals from a district court order dismissing a class action he filed on behalf of himself and other taxpayers to recover an alleged illegal expenditure of state funds. Myers sought an order declaring illegal, ultra vires, and void two contracts entered into between the Nebraska Investment Council (NIC) and private entities, WG Trading Company Limited Partnership (WG Trading) and Westridge Capital Management, Inc. (Westridge). Myers alleged that the State had lost $40 million or more in public retirement funds because the contracts were speculative and illegal and were statutorily and constitutionally prohibited investments. The investment of these funds was governed by the Nebraska State Funds Investment Act, Neb. Rev. Stat. §§ 72-1237 through 72-1260 (Reissue 1996 & Cum. Supp. 2000).

Myers asked for the following relief from Westridge and WG Trading: (1) a repayment to the State of all losses, (2) a disgorgement of all fees received or denied under the contracts, and (3) an equitable accounting of all transactions occurring under the contracts. From the NIC officials, Myers sought a money judgment for the funds transferred to Westridge and WG Trading and the amount necessary to reimburse the retirement funds for all losses suffered by the State because of the investment contracts.

I. MYERS' PLEADINGS AND BACKGROUND

We glean the following from Myers' operative complaint and attachments and evidence submitted at a hearing to determine whether the case was moot. On April 24, 2001, the NIC members voted to invest 10 percent of the domestic equity assets from the State's defined-benefit retirement plans in an "enhanced index strategy" managed by Westridge. According to the report prepared by the NIC's counsel, this amount represented about 5 percent of the State's approximate $4.5 billion in defined-benefit retirement funds.

In June 2001, the investment officer, Rex W. Holsapple, signed a contract on behalf of NIC with Westridge for investment management services. In the contract, Westridge offered services for an enhanced index strategy, as measured against the

total return of Standard & Poor's 500 total return index. The strategy consisted of (1) "a separately managed account that invests in securities, futures and options," for which account Westridge served as the investment manager, and (2) an investment in Westridge's affiliated partnership, WG Trading. WG Trading is a Delaware limited partnership that invests in an "index arbitrage strategy." The managing general partners of WG Trading are Paul R. Greenwood and Stephen Walsh.

In the Westridge contract, the NIC granted Westridge broad discretion to invest and reinvest the State's assets in the managed account, and the contract required 80 percent of the State's assets to be invested in WG Trading. Also in the contract, the NIC acknowledged that WG Trading could have conflicting loyalties between the NIC and Westridge and that its fee schedule created an incentive for Westridge "to make investments that are riskier or more speculative than would be the case in the absence thereof." The parties could terminate the Westridge contract upon 30 days' notice, but the NIC's withdrawal from the WG Trading contract was not governed by the Westridge contract.

On June 14, 2001, the NIC executed a subscription contract to purchase limited partnership interests in WG Trading for $200 million. See Black's Law Dictionary 1427 (6th ed. 1990) (defining subscription contract as "any contract by which one becomes bound to buy"). Around June 27, the NIC transferred $200 million to Westridge or WG Trading, with $160 million invested with WG Trading and $40 million invested with Westridge. The NIC later transferred an additional $35 million to Westridge and WG Trading.

The WG Trading partnership contract provided: "The purposes of the Partnership are (i) to buy, sell, sell short, lend, borrow, hold, trade, invest, deal in and otherwise exercise all rights, powers, privileges and other incidents of ownership in Securities, Options, commodities, futures and any and all other types of investments . . . ." The partnership contract authorized WG Trading to engage in any transaction necessary to accomplish this purpose, "including, without limitation, borrowing money, engaging in margin or short sale transactions, repurchase transactions and reverse repurchase transactions."

Paragraph 17.1 of the contract provided:

> The Limited Partners acknowledge that the Partnership has been organized to invest primarily in arbitrage and other hedged strategies but that this type of investing is speculative and may involve a high degree of risk, including both market and credit risks. . . . Moreover, the Limited Partners acknowledge that allocation of Net Profits to the General Partners may create an incentive for the Managing General Partners to make investments that are riskier or more speculative than would be the case in the absence thereof . . . .

After entering into this contract, Holsapple requested from the Nebraska Attorney General an opinion that the NIC had authority to enter into the WG Trading partnership contract. The Attorney General responded by letter that the NIC and Holsapple had exceeded their authority by entering into the limited partnership. He opined that the contract violated § 72-1247, which expressly prohibited "purchasing securities or investments on margin and the buying of call and put options." In addition, the Attorney General concluded that the investment violated the "prudent man standard" of § 72-1247, which required the funds to be managed "not for speculation but for investment." The Attorney General concluded that the State was not bound by the contract and that the NIC should take immediate steps to secure the retirement funds.

Holsapple later sought to address the Attorney General's concerns about the investments and submitted a report to the Attorney General. The Attorney General repeated, by letter, its earlier conclusions that the partnership contract violated § 72-1247. The Attorney General agreed, however, to allow the NIC to obtain an opinion from outside legal counsel.

The law firm retained by the NIC, Kutak Rock, issued a report to Holsapple in January 2002. The firm acknowledged that § 72-1247 prohibited the NIC from directly making the investments that the contract authorized WG Trading to make. It concluded, however, that this circumstance was similar to many investments that are made in entities "engaging in conduct in which the investor could not engage directly. For example, the [NIC] certainly could not operate a software company, but no one would question an investment by the [NIC] in Microsoft

[Corporation].” Based on this reasoning, Kutak Rock framed the issue as whether WG Trading was acting as an agent or alter ego for the NIC. The firm concluded that the NIC’s investment in WG Trading did not violate § 72-1247 because the NIC could not direct WG Trading to make investments, prohibited or otherwise.

Kutak Rock further concluded that the prudent investor standard of § 72-1247, prohibiting speculation, was ambiguous on its face. It asserted that any investment in equity securities was speculative and that options and futures could be methods to decrease overall risk, i.e., hedging. Citing commentary in the Restatement (Third) of Trusts, ch. 7, topic 5 (1992), the firm concluded that specific investments should not be judged in isolation but on the roles they play in overall portfolio strategies.

In January 2002, the Attorney General sent a letter to the chair of the Legislature’s executive board, explaining the investment contracts and disagreeing with Kutak Rock’s conclusions. The Attorney General acknowledged that the NIC was not required to transfer additional funds to WG Trading for margin calls because the investment was through a limited partnership, but he argued that the State’s assets could still be lost if the underlying securities decreased 50 percent in value.

Also, in January 2002, Holsapple’s tenure as the investment officer ended. In April, the Legislature repealed § 72-1247. In August, the NIC appointed Carol L. Kontor, who had been an NIC member, as the new investment officer.

1. Myers’ Complaint

In April 2003, Myers filed this class action against (1) the NIC, (2) the five NIC voting members, (3) Holsapple, (4) WG Trading, and (5) Jane Doe and John Doe, representing other unknown business entities that may have entered into partnership agreements or investment contracts with the State. In June, the NIC, Holsapple, the NIC members, and WG Trading moved to dismiss because the court lacked personal and subject matter jurisdiction and Myers’ pleading failed to state a cause of action.

In December 2003, Myers filed his operative complaint and included Westridge as a defendant. Myers alleged that he had made demand on the Attorney General to bring this action and

that the Attorney General had declined. In Myers' first four claims, he alleged the following: (1) The NIC officials breached their statutory duties; (2) the NIC officials breached their fiduciary duties to act in the best interests of the equitable beneficiaries of the retirement funds; (3) Westridge, WG Trading, Walsh, and Greenwood breached their fiduciary duty to the State to disclose that the investment contracts with the State were illegal and to refrain from investing the State's assets until they had obtained authorization from the Attorney General; and (4) the acts of the defendants constituted constructive fraud by injuring the public's interests.

In his fifth claim, Myers asked the court to declare the Westridge and WG Trading contracts void ab initio because they were "*ultra vires*, contrary to public policy, procured through constructive fraud and breach of fiduciary duties, contrary to statute, and prohibited by the Constitution of the State of Nebraska." He also requested the court to declare that §§ 72-1237 and 72-1239.01 were unconstitutional to the extent they purported to "exculpate, exonerate or immunize" NIC members from personal liability for breaches of their fiduciary or statutory duties.

In his sixth claim, Myers sought a rescission of the contracts for the same reasons stated in his fifth claim. In his seventh claim, Myers requested an accounting and order returning all state moneys with interest that had come into the possession of Westridge, WG Trading, Walsh, or Greenwood. In the eighth claim, Myers alleged that the WG Trading contract was ultra vires and void for the additional reason that it constituted the giving or loaning of the State's credit to WG Trading, in violation of Neb. Const. art. XIII, § 3 ("credit of the state shall never be given or loaned in aid of any individual, association, or corporation").

In his ninth claim, Myers requested the court to declare the contracts void as an impermissible delegation of the State's legislative and police powers, vested in the NIC, to private individuals and entities. In his 10th claim, he requested restitution and alleged that in addition to the original $200 million the NIC transferred to Westridge, the NIC also transferred $15 million, $1.75 million, and amounts not yet determined for capital calls

under the illegal contract with WG Trading. In his final claim, Myers alleged that if the court did not declare the contracts void, Westridge had breached the contract because Westridge knew or should have known that the NIC could not lawfully expend public funds on the WG Trading partnership.

Myers prayed for a judgment against the NIC members individually for the full amount necessary to reimburse the retirement funds, plus interest. He also requested an order requiring WG Trading to disgorge all fees and pay all funds lost plus interest from the illegal contracts. In addition to his declaratory judgment request in the fifth claim, Myers also requested that the court declare in the eighth and ninth claims that (1) the contracts were void ab initio and (2) §§ 72-1237 and 72-1239.01 were unconstitutional to the extent they protected the NIC officials from individual liability.

By February 9, 2004, all the defendants had moved to dismiss. On February 23, the NIC terminated the contracts with Westridge and WG Trading.

2. District Court's Order

In July 2004, the district court entered an order concluding that Myers had standing as a taxpayer on the first 10 claims. The court also found that Myers lacked standing to pursue his breach of contract claim against Westridge.

Regarding the claims against the NIC members and Holsapple, the court concluded that Myers was "seeking to compel an affirmative action by said defendants (that they pay money to the state)." Thus, the court concluded that sovereign immunity protected the NIC members and Holsapple from claims seeking monetary damages. The court further determined that Myers' operative complaint failed to state a cause of action against Westridge, WG Trading, Walsh, or Greenwood. The court held that these defendants were investors for the NIC and Holsapple, but "not advisors concerning the validity or appropriateness of any investment by the NIC and Holsapple of state funds into the Westridge Agreement and the WG Trading Agreement." The court concluded the defendants had no duty to independently verify Holsapple's representations that the NIC had authority to enter into the investment contracts. Thus, the court dismissed every claim except the claims that the contracts

were void ab initio and that the contracts and the two statutes were unconstitutional.

In August 2004, the NIC and Holsapple filed their answer. They alleged as affirmative defenses, among other things, that Myers lacked standing and that the causes of action were moot or barred by laches and sovereign immunity. On September 3, $246,251,319.75 was returned to the NIC. Several days later, the NIC members and Holsapple moved for partial summary judgment on the remaining declaratory judgment issues in the operative complaint. The court, however, never conducted a hearing on this motion.

In October 2004, the NIC and Holsapple filed a suggestion of mootness. At the hearing, the court questioned the need for voiding the contracts and whether a justiciable issue remained when the contracts no longer existed.

In March 2005, the court issued a written order in which it found that the NIC had invested a total of $235 million and that WG Trading had returned to the NIC $246,251,319.75, the total principal plus interest. We note, however, that according to Kontor's affidavit, the amount returned actually equaled "principal and income." Thus, the court determined that declaratory relief was moot. It further determined that the public interest exception did not apply because the Legislature had repealed § 72-1247.

This court granted Myers' petition to bypass the Nebraska Court of Appeals.

II. ASSIGNMENTS OF ERROR

Myers assigns that the district court erred in (1) granting the defendants' motions to dismiss, (2) sustaining the State's suggestion of mootness, (3) failing to declare the NIC contracts unlawful and void, (4) failing to declare the contracts unconscionable and void, (5) dismissing individual NIC members and Holsapple from the case, (6) dismissing Westridge and WG Trading, (7) holding that claims against Holsapple and the NIC members were barred by sovereign immunity, (8) holding that Myers did not have standing to pursue a breach of contract claim against Westridge, and (9) concluding that the case was moot after the contracts were canceled.

III. STANDARD OF REVIEW

[1-3] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006). When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff. *Id.* A court will not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief. *Id.*

[4] An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law. See *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

IV. ANALYSIS

1. Standing

[5] The State raises two initial jurisdictional issues. It contends that Myers lacks taxpayer standing and that Myers lost taxpayer standing even if he initially had standing. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005).

(a) Taxpayer Standing

[6] The State argues that Myers does not qualify for the taxpayer exception to traditional standing requirements. Standing is the legal or equitable right, title, or interest in the subject matter of the controversy, which entitles a party to invoke the jurisdiction of the court. *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

[7-9] Standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). As an aspect of jurisdiction and justiciability, standing requires that a litigant have a personal stake in

the outcome of a controversy: a personal stake that would warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Id.*

[10,11] Taxpayer litigants have an equitable interest in public funds and can maintain an action to prevent their unauthorized appropriation. See *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004). Usually, a person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public. *Id.* But a resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. *Id.* Here, Myers has alleged an illegal expenditure of public funds.

The State, however, contends that "there never existed an 'expenditure' of public funds" because "[a]n 'investment' is not an 'expenditure.' " Brief for appellee at 17. The State argues that an investor anticipates it may redeem its investment at any time as the parties agree, whereas an expenditure involves a permanent exchange of funds for goods or services. This argument misses the point. Both Westridge and WG Trading charged base management fees for their services, regardless of whether their investments were profitable. The fee schedule provided Westridge with a base fee of .0625 percent quarterly, in addition to its incentive fees. Under the WG Trading partnership contract, the managing partners were entitled to a .25-percent quarterly fee, in addition to their priority status for 20 percent of the partnership's net profits. The WG Trading contract also provided that the State give 6 months' notice to withdraw its capital contributions and terminate the contract. Thus, upon execution, the WG Trading contract required the State to make "permanent" expenditures for investment management services for two quarterly periods.

The State also argues the contracts did not violate § 72-1247. Attempting to create a legal figleaf, the State repeats the argument made by Kutak Rock in its report to Holsapple. That is, the contracts were permissible because, by analogy, the State could legally invest in Ford Motor Company, even though the company might use those funds to buy call and put options or

buy securities on margin, investment transactions prohibited by § 72-1247.

[12] The State confuses service contracts with security investments. The WG Trading contract specifically provides that buying options was one of the partnership's purposes. In addition, the contract authorized WG Trading to engage in margin or short sale transactions. A governmental entity may not accomplish indirectly what it is prohibited from doing directly, whether prohibited by constitutional or statutory provisions. See, e.g., *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

Because Myers alleged that § 72-1247 prohibited the investment officer from investing state assets in specified transactions, he alleged facts sufficient to survive a motion to dismiss. The district court did not err in concluding that Myers had standing as a taxpayer to bring an action to challenge the illegal expenditure of public funds.

(b) Continuing Standing

The State argues that even if Myers initially qualified for the taxpayer exception, he no longer has standing because the alleged illegal expenditure has been returned to the State. The State contends that WG Trading's return of the State's assets "also removes Myers' standing" because "standing must be maintained throughout the course of litigation for a court to maintain jurisdiction." Brief for appellee at 13-14.

[13] It is true that the "personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) (quoted in *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989)). Further, the U.S. Supreme Court has held that a plaintiff bears the burden of establishing standing and that a defendant may "point out a *pre-existing* standing defect late in the day." (Emphasis supplied.) *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.4, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Yet, in the same case, the Court stated that jurisdiction, including standing, "is to be assessed under the facts existing when the complaint is filed." *Id.* The timing requirement is important because the plaintiff's personal interest "is to be assessed under the rubric of standing at

the commencement of the case, and under the rubric of mootness thereafter." *Becker v. Federal Election Com'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000).

The State cites only one decision in which a court held that a plaintiff can lose its standing during a lawsuit. See *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477 (10th Cir. 1995). In a more recent case, however, the 10th Circuit held that "[s]tanding is determined as of the time the action is brought." *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). In a footnote, the court specifically addressed its earlier holding:

> In *Powder River Basin Res. Council v. Babbitt*, we stated that a plaintiff had "lost standing" in the middle of a lawsuit. . . . Although we used standing terminology, it seems that this was really a mootness question. Other courts have criticized *Powder River* for using standing terminology for what was really a mootness issue. See *Becker v. FEC*, 230 F.3d 381, 386 n. 3 (1st Cir.2000).

Nova Health Systems v. Gandy, 416 F.3d at 1155 n.5. We reject the State's argument that Myers lost standing.

2. Mootness

[14-16] Myers argues that because he is entitled to equitable remedies against the NIC officials, Westridge, and WG Trading, the district court erred in determining that the case was moot. Both standing and mootness are key functions in determining whether a justiciable controversy exists, or whether a litigant has a sufficient interest in a case to warrant declaratory relief. *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989). To obtain declaratory relief, a plaintiff has the burden to prove the existence of a justiciable controversy and an interest in the subject matter of the action. *Id.* And a declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action. *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

[17,18] Also, a party cannot seek a declaratory judgment which is merely advisory. *Id.* But a suit seeking damages for harm caused by past practices is not rendered moot by the cessation of the challenged conduct. *Id.*

Here, the parties have terminated the contracts, and the principal and income have been returned to the State. But Myers sought a money judgment against Holsapple and the NIC members that was greater than the moneys returned to the State. If Myers was entitled to recover the additional relief he requested, then the case is not moot. However, whether he is entitled to additional relief depends upon whether sovereign immunity bars his requested relief and whether he is barred as a taxpayer to recover on behalf of the State.

(a) Sovereign Immunity

The State contends that Myers' prayer for monetary damages would have required affirmative "acts" from the NIC defendants, which are barred by sovereign immunity. Thus, the State contends that the district court properly dismissed those claims. Myers, however, contends that sovereign immunity does not apply because his claim is not against the State but against public officials who abused their authority or committed ultra vires acts.

[19-21] When a party brings an action against an individual employee of a state agency, a court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity. *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002). Sovereign immunity bars suits which seek to compel state officials to take affirmative action. *Martin v. Nebraska Dept. of Corr. Servs.*, 267 Neb. 33, 671 N.W.2d 613 (2003). But sovereign immunity does not bar an action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent. *Martin v. Nebraska Dept. of Corr. Servs., supra*. The exception to sovereign immunity applies because a court regards a state officer's illegal or unauthorized acts as their own acts and not acts of the state. See *State ex rel. Steinke v. Lautenbaugh, supra*.

Construing Myers' allegations in the light most favorable to him, sovereign immunity does not bar his claims against the NIC officials. The question still remains, however, whether Myers has alleged facts that show that he has an equitable right to recover on behalf of the State.

(b) Taxpayer's Equitable Right to Recover Illegal Expenditures

Myers contends that the investment contracts were void when made because the WG Trading partnership contract violated the prohibition in § 72-1247 against buying options, buying on margin, and engaging in speculative investments. He argues that because the contracts were void, he has an equitable right to recover on the contracts.

[22,23] This court first discussed a taxpayer's equitable rights to recover from public officials almost 100 years ago in *Cathers v. Moores*, 78 Neb. 17, 113 N.W. 119 (1907). The *Cathers* court held that a resident taxpayer of a municipal corporation has an equitable right to "maintain an action against its officers who have squandered or dissipated its funds, or paid them out for an unlawful or unauthorized purpose, *to recover such funds* . . . where its proper law officer neglects and refuses to prosecute such an action." 78 Neb. at 18-19, 113 N.W. at 120. But the *Cathers* court also held that "before a taxpayer can maintain an equitable action to recover money expended by the officers of a [governmental entity], it must appear that the city itself could have maintained such action in the first instance." *Id.* at 23, 113 N.W. at 122.

In *Cathers*, the Legislature had passed an act creating a new charter for the city of Omaha, which mandated that specified employees would not receive compensation before the mayor and city council had fixed their compensation. The city failed to comply with this charter provision, and a taxpayer brought an action to force city officials to refund the payroll funds paid under void transactions. The taxpayer's right to recover on behalf of the city hinged on the distinction between a contract that is void ab initio and a contract that is unenforceable. See, Restatement (Second) of Contracts § 8 (1981); 1 Samuel Williston, A Treatise on the Law of Contracts § 1:21 at 51 (Richard A. Lord ed., 4th ed. 1990) ("there is a class of agreements which, though not enforceable by ordinary legal remedies, may nevertheless produce certain legal consequences for the parties to them"). In discussing this difference, the court in *Cathers* stated:

> "There is a clear distinction between contracts outside of the powers conferred upon municipal corporations and contracts within the general scope of the powers conferred, but which have been irregularly exercised. Contracts falling entirely outside of powers delegated to the corporation are absolutely null and void, and no right of action against the corporation can be founded upon them. The rule with reference to the liability of the corporation on contracts within the general scope of the powers granted, but which have been irregularly exercised, is well stated in 2 Dillon, Municipal Corporations (4th ed.), sec. 936, as follows: 'A municipal corporation, as against persons who have acted in good faith and parted with value for its benefit, cannot . . . set up mere irregularities in the exercise of the power conferred, as, for example, its failure to make publication in all of the required newspapers of a resolution involving the expenditure of moneys.' "
>
> The action of the [defendant officials] was not *ultra vires* in the proper sense of that term, and we are of [the] opinion that the city would be estopped to set up the irregularities complained of as a defense to an action brought against it by the employees to recover the value of their services.

Cathers v. Moores, 78 Neb. 17, 21-22, 113 N.W. 119, 121 (1907), quoting *Rogers v. City of Omaha*, 76 Neb. 187, 107 N.W. 214 (1906) (holding that city was liable in quantum meruit for value of contractor's street grading despite city's failure to comply with statute requiring it to obtain consent from landowners and make damage assessments before grading streets).

In *Cathers*, this court stated that the city unquestionably had the power to contract for the services at issue even if "it may be said that its authority was so irregularly exercised as to render the proceedings illegal." 78 Neb. at 21, 113 N.W. at 121. We further stated that the city had received the benefit of the employees' services and that the trial court had found that none of the defendant city officials had interests in the contracts. Thus, we held that a taxpayer could not recover from the city because the city would be estopped from relying upon the alleged statutory violation as a defense in an action to recover the value of the services rendered.

This court reached the same conclusion in *Scheschy v. Binkley*, 124 Neb. 87, 245 N.W. 267 (1932), a taxpayer action against a school district's treasurers and officers. The taxpayer alleged that the officers had violated a statute providing that " '[n]o school officer shall be a party to any school contract for building or furnishing supplies, except in his official capacity as a member of the board.' " *Id.* at 90, 245 N.W. at 268. The officers had paid school board members for services and materials for constructing temporary buildings before the brick schoolhouse was constructed. This court concluded that a taxpayer could not recover against the officers except for fraud or unreasonable charges. *Id.* We reasoned that it would be unconscionable to permit the school district to retain the benefits and allow it to avoid payment.

Thus, even though the officers violated a statute that limited its power to make contracts between the school district and its officers, the taxpayer could not recover funds expended in violation of the limiting statute.

[24-26] These cases illustrate that a taxpayer has no equitable right to recover funds from public officers merely because they violated a statute. The cases cited by Myers are distinguishable. It is true that if a statute explicitly prohibits a governmental entity from entering into a contract and avoids the obligation made in violation of the statute, then the contract is void ab initio and funds paid out under the contract may be recovered in suit by the governmental entity or by a taxpayer suing on its behalf. See, *Arthur v. Trindel*, 168 Neb. 429, 96 N.W.2d 208 (1959); *Heese v. Wenke*, 161 Neb. 311, 73 N.W.2d 223 (1955); *Neisius v. Henry*, 142 Neb. 29, 5 N.W.2d 291 (1942); *Village of Bellevue v. Sterba*, 140 Neb. 744, 1 N.W.2d 820 (1942). Similarly, when a governmental entity is wholly without statutory authority to make a contract, the contract is void ab initio and a taxpayer may recover funds paid out under the public contract: "In a situation . . . where the action is ultra vires and no power exists to act in the premises at all no liability may be imposed upon the statutory creature." *Fulk v. School District*, 155 Neb. 630, 643, 53 N.W.2d 56, 63 (1952).

[27] Thus, our case law shows that a taxpayer can only recover on behalf of a governmental entity if the public contract is

void ab initio such that the party providing services or materials could not recover the value of those services in a quantum meruit action. See, *Scheschy v. Binkley, supra*; *Fulk v. School District, supra*.

[28] The difference between a contract that is unenforceable against the State and a contract that is void ab initio is also present in nontaxpayer actions against the State brought by contracting parties to recover for goods or services. For example, in *Capital Bridge Co. v. County of Saunders*, 164 Neb. 304, 83 N.W.2d 18 (1957), we held that a seller of lumber could recover from a county when the county had authority to purchase lumber for a bridge, despite the county's failure to comply with a statute requiring the purchase to be made from the lowest bidder. We stated:

> [I]n the present case the statute does not avoid the obligation of a contract made in a manner contrary to the provisions of the statute. In such a situation the rule in this state is: Where a contract has been entered into in good faith by a [governmental entity], which contract was within the power of the [governmental entity] to make but was void for failure to comply with statutory requirements, an action in quantum meruit for the service performed or the material furnished may be maintained.

Id. at 310, 83 N.W.2d at 22-23.

Myers argues that the investment contracts are void ab initio and that the State is entitled to equitable relief because (1) the contracts violated § 72-1247, (2) the contracts constituted an impermissible delegation of the NIC's duties, (3) Westridge breached its implied fiduciary duty under the contracts to ensure that the State made only legal investments, and (4) the contracts were unconscionable.

(i) Violation of § 72-1247

At the time of this action, § 72-1247 provided that "[t]he state investment officer *shall not buy on margin, buy call options, or buy put options*." The statute limits investment transactions, even if it did not specifically prohibit a contract to have an agent engage in these transactions. Thus, as in *Scheschy v. Binkley*, 124 Neb. 87, 245 N.W. 267 (1932), the contracts are unenforceable.

The NIC nonetheless had general powers to contract for investment management services.

Section 72-1249.02 establishes the "State Investment Officer's Cash Fund" and requires each managed retirement fund to pay a pro rata share into the fund for an "investment management expense." Section 72-1249.02 explicitly provides:

> *Management*, custodial, and service costs which are a direct expense of state trust funds may be paid from the income of such trust funds [and these] costs shall include, but not be limited to . . . investment counsel fees for managing assets . . . . All such fees shall be approved by the [NIC] and the state investment officer.

(Emphasis supplied.) This section authorizes the investment officer to enter into contracts for investment management services.

According to a report by the NIC's outside counsel, the NIC is responsible for overseeing the investments of about $7.5 billion in state funds. It would be a Herculean task for the NIC officers to manage and invest these assets without the ability to contract for investment management services.

In sum, the NIC has the general power to contract for investment management services. We conclude that the NIC's violation of § 72-1247 would not avoid the State's obligation under the contract to pay for services received from Westridge or WG Trading. Although the contracts were unenforceable, they were not void ab initio because they violated § 72-1247. Thus, Myers cannot recover from the NIC officers on this ground.

(ii) Impermissible Delegation of Authority

Myers contends that "[t]he Nebraska State Funds Investment Act does *not* provide for delegation of *any* of the duties imposed on the NIC and the Investment Officer." Brief for appellant at 18. He first argues that the express authorization in § 72-1242 for the investment officer to retain "financial advisors" operates to exclude a more extensive delegation of investment decisions. He apparently argues the investment officer has no authority to retain investment management services. As noted, however, § 72-1249.02 explicitly provides: "*Management*, custodial, and service costs which are a direct expense of state trust funds may be paid from the income of such trust funds . . . ." We find no

merit to his argument that § 72-1242 prohibited the NIC from contracting for investment management services.

Second, Myers contends that the WG Trading contract, with a term of 49 years, constituted "a total abdication of power and control by the NIC" regarding the money it invested in Westridge and WG Trading. Brief for appellant at 16-17. But he does not direct us to, nor has our research uncovered, any case law holding that a governmental entity charged by the Legislature with the investment of state funds may not contract for any investment services.

[29] The Nebraska Constitution does not prohibit the State from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose. *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998). Compare *State ex rel. Douglas v. Thone*, 204 Neb. 836, 286 N.W.2d 249 (1979).

In *Father Flanagan's Boys Home*, the statute at issue obligated the State to pay the cost of educating state wards under defined circumstances. The Nebraska Department of Health and Human Services argued that the statute violated Nebraska's constitutional prohibition against public appropriations to private schools. This court stated that the case did "not involve a contractual delegation of the state's duty to provide a free public education to its citizens. Rather, it involves a contract made by a state agency to obtain educational services for state wards for whom it is responsible in a quasi-parental capacity." *Id.* at 315, 583 N.W.2d at 782.

[30] Similarly, regarding municipal corporations acting as state agents, this court has adopted the following rule, which is equally applicable to other governmental entities acting as state agents: " '*Unless authorized by statute or charter*, a [governmental entity], in its public character as an agent of the state, cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers . . . .' " (Emphasis in original.) *Vap v. City of McCook*, 178 Neb. 844, 850, 136 N.W.2d 220, 224-25 (1965), quoting 2 Eugene McQuillin, The Law of Municipal Corporations § 10.38 (3d ed. 1966).

In *Vap*, this court rejected the argument by resident taxpayers that the city had "bartered away its police power to regulate

parking in the future." 178 Neb. at 849, 136 N.W.2d at 224. There, the city contracted with the State Department of Roads to prohibit parking on a street, in connection with improvements planned for U.S. highways passing through the city. We concluded that unlike some of our earlier cases, the Legislature had authorized the contracts between political subdivisions and the Department of Roads for a broad array of purposes. We reversed the district court's judgment that the contract was illegal and void. *Id*.

[31] As in *Father Flanagan's Boys Home* and *Vap*, the Legislature has expressly granted power to the NIC to contract for investment management services. When a government entity is responsible for providing a service and has the power or legislative authority to contract for those services, its determination to enter into a contract for those services is a legislative act. See *Tracy v. City of Deshler*, 253 Neb. 170, 568 N.W.2d 903 (1997). See, also, *Winter v. Lower Elkhorn Nat. Resources Dist.*, 206 Neb. 70, 291 N.W.2d 245 (1980).

It is true that the NIC officials could not delegate their duty to formulate and establish policies for the investment of state funds as set out in § 72-1239. Similarly, the investment officer could not delegate his duty to direct investments and reinvestments of state funds. See § 72-1243. But if the Legislature had intended the investment officer or NIC officials to individually conduct every investment transaction involving state assets, it would not have authorized the investment officer to contract for investment management services.

Even if the investment management contracts involve the relinquishment of some discretionary decisionmaking on a day-to-day basis, the contracts are not prohibited when expressly authorized by statute. Although the term of the partnership contract with WG Trading ended on December 31, 2050, the NIC could withdraw its capital investment with 6 months' notice. And the record shows that the NIC did withdraw its capital when it voted to terminate the contracts in February 2004 and its principal and income moneys were returned in September 2004.

We conclude Myers' claim that the NIC totally abdicated its investment responsibilities by contracting to have part of those

assets managed by a private business is without merit. Thus, Myers' claim that the contracts constituted an impermissible delegation of duties did not entitle him to recover any relief on behalf of the State.

(iii) Unconscionable Contracts

Myers contends that the contracts were unconscionable because the fees were excessive on their face and the contracts do not meet the "prudent investor" standard of § 72-1239.01. Brief for appellant at 27. Myers cites no authority to support his contention that the fees were excessive. Relying on *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956), Myers also argues that the contracts were unconscionable and void as against public policy.

In *Custer Public Power District*, the district contracted to buy substantially all of its electricity from a power system for 26 years instead of generating its own electricity. We held the contract was void as injurious to public welfare. We, however, did not hold the contract was unconscionable.

[32,33] " 'The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt.' " *Id.* at 316, 75 N.W.2d at 629-30. It is the Legislature's function through the enactment of statutes to declare what is the law and public policy. *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). Unlike the utility contract in *Custer Public Power District*, this contract involved only a portion of the NIC's investment duties. Because the Legislature has authorized the NIC to contract for investment management services, the contracts did not violate public policy.

[34,35] The unconscionability of a contract provision presents a question of law. See *Melcher v. Boesch Motor Co.*, 188 Neb. 522, 198 N.W.2d 57 (1972). When considering whether an agreement is unconscionable, this court has stated that the term "unconscionable" means manifestly unfair or inequitable. See *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978).

[36-38] A contract is not substantively unconscionable unless the terms are grossly unfair under the circumstances that existed when the parties entered into the contract. *Adams v. American*

Cyanamid Co., 1 Neb. App. 337, 498 N.W.2d 577 (1992). In a commercial setting, however, substantive unconscionability alone is usually insufficient to void a contract or clause. See *id.*, citing 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28 (2d ed. 1990). A court must also consider whether the contract formation was procedurally unconscionable. See *id.*

[39] An essential fact in determining unconscionability is the disparity in respective bargaining positions of parties to a contract. See *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997).

In *Ray Tucker & Sons*, the issue was whether a limitation of liability provision in a contract for yellow pages advertising was unconscionable. We refused to address the substantive unconscionability issue because the record showed no disparity in the parties' bargaining positions. In addition, the record failed to show that the customer could not have obtained equally effective advertising elsewhere. See *id*. In general, we have been reluctant to rewrite contracts between parties experienced in business, as opposed to contracts between consumers and skilled corporate parties. See, e.g., *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002); *Darr v. D.R.S. Investments*, 232 Neb. 507, 441 N.W.2d 197 (1989).

[40] Unconscionability presents a question of law. Usually, the issue should not be determined before the plaintiffs have an opportunity to present evidence of disparity in their bargaining positions and that the provisions unreasonably favored the defendant. See, e.g., *Carlson v. General Motors Corp.*, 883 F.2d 287 (4th Cir. 1989). But here, the taxpayer is asserting unconscionability on behalf of a state agency. And the pleadings and attachments conclusively refute any disparity between the parties' bargaining positions.

Regarding the NIC's bargaining position, each NIC council member "shall have at least ten years of experience in the financial affairs of a public or private organization or have at least five years of experience in the field of investment management or analysis." § 72-1238. Section 72-1240 requires the state investment officer to have at least 5 years of experience in managing investment portfolios and be well qualified to "administer and invest the money available for investment." Myers cannot

reasonably assert that these officers were in an inferior bargaining position or ill equipped to evaluate whether the benefits of the contracts justified the clearly expressed risks and fees. Myers' claim of unconscionability must fail.

(iv) Dismissal of Westridge and WG Trading for Failure to State Cause of Action

Myers argues that if the contracts are not void ab initio, then the district court erred in concluding that he lacked standing to pursue his breach of contract claim against Westridge. In his final cause of action, Myers alleged that Westridge had breached the agreement because it knew or should have known that the NIC was prohibited from expending public funds on the WG Trading partnership. Similarly, in his third cause of action, Myers alleged that Westridge, WG Trading, Walsh, and Greenwood had breached their fiduciary duty to the State to (1) disclose that the investment contracts with the State were illegal and (2) refrain from investing the State's assets until they had obtained authorization from the Attorney General.

Myers' breach of contract allegations mirror his breach of fiduciary duties claim against Westridge and WG Trading because they could only owe fiduciary duties to the NIC through the contracts. On appeal, Myers argues that Westridge and WG Trading had an implied contractual duty to inform the NIC that the investment was illegal.

[41,42] This court has implicitly recognized that a taxpayer's standing on claims of illegal expenditures extends to seeking recovery from private parties contracting with the governmental entities. See, e.g., *Lanphier v. OPPD*, 227 Neb. 241, 417 N.W.2d 17 (1987); *Fulk v. School District*, 155 Neb. 630, 53 N.W.2d 56 (1952). But a taxpayer, in pursuing a derivative action on behalf of a governmental entity, has no greater rights against a party contracting with the governmental entity than the entity itself possesses. *Lanphier v. OPPD, supra*; *Nielsen v. SID No. 229*, 208 Neb. 542, 304 N.W.2d 385 (1981).

The district court dismissed Myers' third cause of action for failing to state a claim. For Myers to state a claim, the NIC must have a legal claim. Thus, we analyze whether the NIC was entitled to recover from Westridge and WG Trading for failing to inform the NIC that the contracts violated Nebraska statutes.

Regarding this claim, the district court concluded: "Holsapple represented throughout all of the written agreements that the NIC was able to enter into the investment agreements. There was no duty on WG Trading, Walsh, Greenwood and Westridge . . . to independently verify those representations."

[43] We believe that Myers correctly states that Westridge owed fiduciary duties to the NIC under the contract. The issue, however, is whether Myers can state a claim for breach of fiduciary duties. A broker operating a discretionary account, in which the broker determines which investments to make, is viewed as a fiduciary. *CFTC v. Heritage Capital Advisory Services, Ltd.*, 823 F.2d 171 (7th Cir. 1987). Both federal regulations and Nebraska statutes define a broker dealer's fiduciary duties as follows:

> It shall be unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:
>
> (a) To employ any device, scheme, or artifice to defraud;
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Neb. Rev. Stat. § 8-1102(1) (Reissue 1997). See, also, 15 U.S.C. § 78j(b) (2000); 17 C.F.R. § 240.10b-5 (2006).

[44] Under federal law, a broker-dealer may be liable for recommending the purchase of securities that are unsuitable for an investor's, as a violation of § 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 of the federal regulations. *O'Connor v. R.F. Lafferty & Co., Inc.*, 965 F.2d 893, 897 (10th Cir. 1992). To sustain an unsuitability claim, the investor must prove:

> (1) [T]he broker recommended (or in the case of a discretionary account purchased) securities which are unsuitable in light of the investor's objectives; (2) the broker recommended or purchased the securities with an intent to defraud or with reckless disregard for the investor's interests; and (3) the broker exercised control over the investor's account.

Id. at 898.

A similar claim was recently addressed by the Minnesota Supreme Court in *Minneapolis Emp. Ret. v. Allison-Williams*, 519 N.W.2d 176 (Minn. 1994). In that case, the executive director of the public employees' retirement fund had communicated the funds' investment objectives to one of its broker-dealers. The fund sought higher returns than had been generated by buying privately placed securities. The director approved the purchase of high-yield, high-risk bonds over a period of years, and the broker-dealer could not enter into the transactions without authorization. Eventually, the public corporation sued to recover losses based on claims that the broker-dealer (1) had breached its fiduciary duty, (2) sold unsuitable investments, and (3) failed to disclose material facts. The corporation alleged that the broker had a duty to obtain information regarding the fund's financial situation before recommending speculative securities.

[45] Relying on the *O'Connor* rule, the Minnesota Supreme Court concluded that speculative trading as identified by the fund director was consistent with the corporation's investment objectives. The court determined that the corporation had failed to show a fraudulent intent or reckless disregard for the investor's interests because the director had communicated an objective to obtain greater returns by purchasing riskier securities. *Minneapolis Emp. Ret. v. Allison-Williams, supra*. This case illustrates that a broker can rely on representations made by the investor in determining whether an investment is suitable to the investor's needs and that investments consistent with those objectives do not constitute fraudulent conduct when the broker makes the investor aware of the risks.

In the WG Trading partnership contract, Holsapple represented that (1) the NIC was a sophisticated investor and experienced in business affairs; (2) all documents, records, and books pertaining to this investment were available to its attorney and its accountant; and (3) the NIC "has full power and authority to invest in the Partnership and to enter into this Partnership Agreement and to perform its obligations hereunder without the consent of any person or entity which has not heretofore been obtained." Further, the NIC acknowledged in the contract that "the Partnership has been organized to invest primarily in arbitrage and other hedged strategies but that this type of investing

is speculative and may involve a high degree of risk, including both market and credit risks."

Because of these representations, Westridge could conclude that the NIC's investment objective was to engage in speculative investment in the hope of obtaining greater returns. Similarly, the contract refutes any intention to deceive the NIC about the risks of these investments. The WG Trading contract required a limited partner, i.e., the NIC, to represent that it had authority to enter the partnership and that it had made all investment documents available to its attorney. This requirement made the NIC aware that authority was needed to enter into the contract. The district court correctly determined that Westridge could rely on the NIC's representation that it had authority to invest in the WG Trading.

Myers relies solely on a case from the New Mexico Supreme Court to argue that Westridge breached its fiduciary duties to the NIC. See *State ex rel. Udall v. Colonial Penn*, 112 N.M. 123, 812 P.2d 777 (1991). The New Mexico Supreme Court reversed a summary judgment for the investment advisor. There, the investment advisor had recommended the purchase of stock in a company that was incorporated in the Netherlands Antilles. The New Mexico Constitution restricted the investment officer's stock purchases to the stock of businesses incorporated in the United States. After purchasing the stock, the investment officer learned that the company was a foreign corporation and, suspecting that the investment was contrary to New Mexico law, contacted the attorney general's office. After the attorney general issued an opinion that the purchase was illegal, the stock was sold at a $1.2 million loss. The state alleged that the investment advisor knew the limitations on the state's stock purchases and nonetheless advised the investment officer to make the purchase. The Supreme Court concluded that the contract had incorporated New Mexico law and that the investment advisors, as fiduciaries, had a duty to advise the state to make only lawful investments. Because the record revealed factual issues as to whether the investment advisor knew of the state's constitutional limitations, the court reversed summary judgment.

We note that the court did not impute knowledge of New Mexico law to the investment advisor. Thus, we read the case as

holding that when a broker-dealer has actual knowledge of state law limitations on investing state assets, the broker-dealer has a duty to advise a state investment officer to make only investments within those limits. Here, the district court specifically stated: "Assuming, for purposes of argument, that the investment . . . was contrary to state statute, [Myers] does not argue, or plead, that WG Trading, Walsh, Greenwood and/or Westridge . . . knew that the NIC and Holsapple were exceeding their statutory authority by entering into the investment contracts."

State ex rel. Udall is inapplicable to Myers' allegations. We conclude that the NIC could not maintain an action against Westridge for breach of a contractual duty because the documents submitted and attached to the pleadings show that Westridge's investments were consistent with the NIC's investment objectives. Also, the investment contracts put the NIC on notice that it needed authorization to enter the contracts, and the NIC represented that it had authority. Because the NIC could not recover from Westridge for breach of a contractual duty, Myers could not recover on behalf of the NIC based on this claim.

(v) Availability of Disgorgement Remedy Against Westridge and WG Trading

Myers argues that the court erred in dismissing Westridge and WG Trading because they were liable under the void public contracts to restore all moneys received from the State and to disgorge all profits. He argues that when a governmental entity makes a contract that is not within its powers, a private party to the contract must restore to the governmental entity all government funds and fees that it received under the contract, even when quantum meruit is permitted. In support, Myers cites *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004), but *Rath* is not supportive.

In *Rath*, we held that when a taxpayer seeks to *enjoin* an illegal expenditure of public funds, it is an inherently irreparable injury "if an action is 'void not because of a lack of power but because of a failure to properly exercise existing power.' " 267 Neb. at 280, 673 N.W.2d at 884, quoting *Fulk v. School District*, 155 Neb. 630, 53 N.W.2d 56 (1952). Although we did

not clearly distinguish between unenforceable and void contracts, the injury is irreparable when a governmental entity has failed to properly exercise its power because a taxpayer cannot recover the expenditure in that circumstance. *Rath v. City of Sutton, supra*.

The Nebraska cases cited by Myers show that a governmental entity or taxpayer may recover from a private party only when the public contract was void ab initio because the governmental entity was wholly without authority to make the contract or because a statute avoided the obligation. See, *Arthur v. Trindel*, 168 Neb. 429, 96 N.W.2d 208 (1959); *Heese v. Wenke*, 161 Neb. 311, 73 N.W.2d 223 (1955); *Fulk v. School District, supra*; *Village of Bellevue v. Sterba*, 140 Neb. 744, 1 N.W.2d 820 (1942). Moreover, none of the cases Myers cites from other jurisdictions hold that a taxpayer may seek disgorgement from a private party contracting with a governmental entity in good faith when the governmental entity had general power to make the contract.

As noted, this court has consistently held that a taxpayer, in pursuing a derivative action on behalf of a governmental entity, has no greater rights against a party contracting with the governmental entity than the entity itself possesses. See, e.g., *Lanphier v. OPPD*, 227 Neb. 241, 417 N.W.2d 17 (1987). Because we have determined that the contracts were not void ab initio, the NIC could not avoid its obligation under the contract to pay for services received. Because Myers' rights are derivative, he may not seek disgorgement from Westridge or WG Trading.

(c) Mootness Conclusion

As discussed, Myers was required to show that sovereign immunity did not bar his requested relief and that, as a taxpayer, he had an equitable right to recover on behalf of the State. We have concluded that sovereign immunity did not bar his relief. But to recover from officials for their actions regarding a public contract, Myers must show that the contract was void ab initio. None of his claims can support that conclusion. Although the contracts were unenforceable against the State because the NIC violated a statute limiting the State's investment transactions, the

State's principal and income have been returned. We conclude that Myers' claims did not entitle him to any further relief and are therefore moot. See *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006) (holding that because Congress had not validly abrogated State's 11th Amendment immunity and Legislature had repealed statute charging fee for handicapped parking placards, equitable claims for injunctive and declaratory relief were moot).

V. CONCLUSION

We conclude that Myers has failed to show that the NIC's obligation under these investment management contracts was avoided because the NIC has general powers to enter into these types of contracts. Although the contracts were unenforceable against the State, the statutory violation did not render the contracts void ab initio. We further conclude that the investment managers could rely upon the State's representations that it had authority to enter into these contracts. Also, the contracts put the NIC on notice that legal authorization was required and that the investment strategy was risky. Because the NIC could not recover from the investment contractors under the contracts, a taxpayer in a derivative action also cannot recover from them. Finally, because the investment management companies have returned the State's principal and income, and because Myers is entitled to no further relief from the NIC or the investment managers, the claims are now moot.

AFFIRMED.

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

JOHN C. PETERSON AND KATHY M. PETERSON, HUSBAND AND WIFE, APPELLANTS, V. THE OHIO CASUALTY GROUP, A FOREIGN INSURANCE COMPANY, ALSO KNOWN AS WEST AMERICAN INSURANCE COMPANY, APPELLEE.

724 N.W.2d 765

Filed December 8, 2006. No. S-05-691.

1. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine

the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.

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 a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
5. **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.
6. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
7. **Insurance: Contracts: Intent.** An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
8. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
9. **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.
10. **Insurance: Contracts.** Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured.
11. **Insurance: Liability.** An insurer's duty to defend is broader than its duty to indemnify.
12. **Insurance: Pleadings.** An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured.
13. **Insurance: Liability.** In determining its duty to defend, an insurer must not only look to the petition or complaint filed against its insured, but must also investigate and ascertain the relevant facts from all available sources.
14. ____: ____. An insurer is obligated to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.
15. **Insurance: Contracts: Liability.** An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.
16. **Insurance: Contracts.** An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law.

17. ____: ____. The nature of the duty to defend is defined by the insurance policy as a contract.
18. **Insurance: Contracts: Claims.** Although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.
19. **Insurance: Contracts: Proof.** The burden to prove that an exclusionary clause in a policy applies rests on the insurer.
20. **Insurance: Contracts: Liability: Pleadings.** If, according to the facts alleged in a pleading and ascertained by an insurer, the insurer has no potential liability to its insured under the insurance agreement, then the insurer may properly refuse to defend its insured.

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

Michael F. Coyle and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

Richard C. Gordon, Betty L. Egan, and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

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

STEPHAN, J.

Appellants, John C. Peterson (Peterson) and Kathy M. Peterson, filed a declaratory judgment action in the district court for Douglas County against appellee The Ohio Casualty Group, also known as West American Insurance Company (Ohio Casualty). The Petersons sought a declaration that Ohio Casualty had an obligation under two insurance policies to defend and indemnify Peterson in a lawsuit filed against him by Richard J. Holcomb. In 2003, the district court entered summary judgment in favor of Ohio Casualty, and the Petersons appealed. In a memorandum opinion, we determined that deficiencies in the record precluded meaningful appellate review, and we therefore reversed, and remanded for further proceedings. Following remand, the parties filed cross-motions for summary judgment and supplemented the record. The district court concluded that Ohio Casualty had no obligation to indemnify or defend the Petersons in the Holcomb lawsuit, and entered judgment in its favor. We affirm.

I. BACKGROUND

On May 10, 1999, Holcomb filed a lawsuit against Peterson, individually, and Anesthesia West, P.C. Thereafter, Holcomb filed several amended petitions which added parties, facts, and claims, culminating in his sixth amended petition filed on November 29, 2001. The Holcomb petition and amended petitions are included in the bill of exceptions and allege the following facts which are not disputed for purposes of this case:

Holcomb and Peterson are anesthesiologists. Both were at one time employees, directors, and shareholders of Anesthesia West, a professional corporation conducting business in Douglas County. On November 30, 1998, Holcomb's employment agreement with Anesthesia West was terminated.

In each petition and amended petition, Holcomb asserted various causes of action against one or more named parties. Included is a defamation claim against Peterson, in which Holcomb alleged that Peterson had "made false and defamatory" statements and allegations pertaining to Holcomb's professional competence and his conduct with an employee. In this claim, Holcomb further alleged that Peterson had "made unprivileged publication of . . . false and defamatory communications to third parties, including to Methodist [Hospital] and to third-party physicians and others." The Petersons' coverage claims asserted in this action are based solely on the allegations of Holcomb's defamation claim against Peterson.

At the time the Holcomb lawsuit was filed, the Petersons were insured under a homeowner's insurance policy and a personal umbrella liability endorsement (umbrella policy), both issued by Ohio Casualty. The homeowner's policy defines "[b]usiness" as including "trade, profession or occupation." The section of the homeowner's policy describing liability coverage includes the following:

> COVERAGE E - Personal Liability
>
> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" . . . caused by an "occurrence" to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which the "insured" is legally liable. . . .

> 2. Provide a defense at our expense . . . even if the suit is groundless, false or fraudulent.

The homeowner's policy also includes the following exclusion:

> 1. Coverage E - Personal Liability . . . do[es] not apply to "bodily injury" . . .
>
> a. Which is expected or intended by the "insured";
>
> b. Arising out of or in connection with a "business" engaged in by an "insured."

However, the homeowner's policy contains a "HOMEOWNERS ADDITIONAL COVERAGES ENDORSEMENT" which states:

> 2. Under Section II, Coverage E - Personal Liability, the definition "Bodily Injury" is amended to include personal injury. "Personal Injury" means injury arising out of one or more of the following offenses:
>
> . . . .
>
> b. libel, slander or defamation of character . . . .
>
> . . . .
>
> Section II Exclusions do not apply to this coverage. This coverage does not apply to:
>
> . . . .
>
> c. injury sustained by any person as a result of an offense directly or indirectly related to the employment of this person by the Insured;
>
> d. injury arising out of the business pursuits of an Insured . . . .

The umbrella policy includes the following defined terms:

> 4. "Business" includes trade, profession or occupation (but not farming).
>
> 5. "Damages" mean the total of:
>
> a. The amount the insured must pay . . . because of "personal injury" . . . covered by this endorsement; and
>
> b. Reasonable expenses the insured incurs in the . . . defense . . . of a claim or suit because of "personal injury" . . . covered by this endorsement.
>
> . . . .
>
> 8. "Personal injury" means:
>
> . . . .
>
> b. Injury arising out of:
>
> . . . .

> (2) Libel, slander, defamation, humiliation, or a publication or utterance in violation of a person's right of privacy; or
>
> . . . .
>
> 12. "Underlying insurance" . . . includes any other insurance available to the insured.

The umbrella policy includes the following coverage and exclusions:

> A. INSURING AGREEMENTS
>
> 1. Excess Liability Insurance
>
> We will pay on behalf of the insured all sums for "damages" due to "personal injury" . . . in excess of the limits of "underlying insurance" and for expenses caused by an occurrence . . . . The "personal injury" . . . must be covered by "underlying insurance."
>
> . . . .
>
> We have the right to defend any claim or suit against the insured seeking "damages" for "personal injury" . . . to which this insurance applies; but:
>
> . . . .
>
> d. We have a duty to defend all claims or suits not covered by the "underlying insurance" shown in the underlying insurance endorsement;
>
> . . . .
>
> B. EXCLUSIONS
>
> We do not cover:
>
> . . . .
>
> 6. "Personal injury" . . . due to acts committed by or at an insured's direction with intent to cause "personal injury"
>
> . . . .
>
> 7. "Personal injury" . . . due to "business" pursuits . . . . Our coverage is no broader than the "underlying insurance"
>
> . . . .
>
> . . . .
>
> 12. Liability due to activities as a member of a board of directors of, or as an officer of, an organization other than a charitable, religious or civic non-profit organization.

Through counsel, the Petersons sent a letter dated May 19, 1999, to Ohio Casualty, enclosing a copy of the original petition

filed by Holcomb and requesting that Ohio Casualty indemnify and defend Peterson. In response, Ohio Casualty denied coverage under both the homeowner's policy and the umbrella policy. Referring to the Holcomb petition and citing language from the insurance policies, Ohio Casualty stated that Holcomb's defamation claim against Peterson fell within the business pursuits exclusions of the policies and that therefore, no coverage was provided. Ohio Casualty made no references to an investigation in these letters.

Thereafter, the Petersons commenced this action in which they claimed that coverage was provided under both policies and that Ohio Casualty had a duty to defend Peterson in the pending Holcomb lawsuit. In an amended petition filed March 21, 2003, the Petersons alleged that the Holcomb lawsuit had been settled and that Ohio Casualty was bound by the unspecified terms of the settlement and obligated to pay Peterson's defense costs.

As noted above, this matter is before us now for the second time. In our memorandum opinion and judgment on appeal filed January 12, 2005, we reversed an order of the district court granting summary judgment in favor of Ohio Casualty. We stated that because of deficiencies in the record, we could not determine the correctness of the order of the district court. We therefore reversed, and remanded for further proceedings. We did not reach the substantive issue of whether coverage was provided under the policies in question. See *Peterson v. Ohio Casualty Group*, 269 Neb. xix (No. S-03-957, Jan. 12, 2005).

Following remand, the parties again filed cross-motions for summary judgment. At a hearing on the motions, the parties reoffered evidence received on the previous motions and also offered additional evidence, which was received by the district court. Subsequently, the district court entered judgment in favor of Ohio Casualty. After a detailed review and analysis of the evidence pertaining to the Holcomb lawsuit, other evidence received, and applicable legal principles, the court concluded: "The 'business pursuits' exclusion is unambiguous. The facts are not in dispute. The Holcomb lawsuit is a business dispute. The defamation claim falls with[in] the 'business pursuits' exclusion."

The Petersons perfected this timely appeal, which we removed 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).

II. ASSIGNMENTS OF ERROR

The Petersons assign, restated and consolidated, that the district court erred in (1) finding the business pursuits exclusions in the Ohio Casualty policies were unambiguous; (2) finding, as a matter of law, that the allegations in Holcomb's petitions arose out of Peterson's business pursuits; (3) finding, as a matter of law, that Ohio Casualty did not have a duty to defend or indemnify the Petersons; and (4) granting summary judgment for Ohio Casualty and against the Petersons.

III. STANDARD OF REVIEW

[1] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just. *City of Columbus v. Swanson*, 270 Neb. 713, 708 N.W.2d 225 (2005); *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002).

[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. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[4] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question. *Neff Towing Serv. v. United States Fire Ins. Co., supra*.

[5] 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. *Hillabrand v. American Fam. Mut. Ins. Co.*, 271 Neb. 585, 713 N.W.2d 494 (2006); *Neff Towing Serv. v. United States Fire Ins. Co., supra*.

IV. ANALYSIS

1. Ambiguity

[6-9] The Petersons assign error by the district court in finding the policy exclusions at issue to be unambiguous, but they do not argue this point in their brief. Errors assigned but not argued will not be addressed on appeal. *Shipferling v. Cook*, 266 Neb. 430, 665 N.W.2d 648 (2003). However, insofar as it is necessary to resolve this issue in order to address the Petersons' other assignments of error, we note that an insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003). Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *Neff Towing Serv. v. United States Fire Ins. Co., supra.* 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. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002). We agree with the conclusion of the district court that the business pursuits exclusions in the two policies are not ambiguous and clearly encompass the professional practice of anesthesiology within their scope.

2. Duty to Defend and Indemnify

(a) General Principles

[10,11] Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because

of injury caused to a third party by acts of the insured. *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004). An insurer's duty to defend is broader than its duty to indemnify. *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996).

[12-15] An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured. *Millard Warehouse, Inc. v. Hartford Fire Ins. Co.*, 204 Neb. 518, 283 N.W.2d 56 (1979). In determining its duty to defend, an insurer must not only look to the petition or complaint filed against its insured, but must also investigate and ascertain the relevant facts from all available sources. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). An insurer is obligated to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify. *Mapes Indus. v. United States F. & G. Co.*, 252 Neb. 154, 560 N.W.2d 814 (1997). An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981).

[16-20] An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law. *Chief Indus. v. Great Northern Ins. Co., supra*; *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). The nature of the duty to defend is defined by the insurance policy as a contract. *Id.* Although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. *Neff Towing Serv. v. United States Fire Ins. Co., supra*. The burden to prove that an exclusionary clause in a policy applies rests on the insurer. *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). If, according to the facts alleged in a pleading and ascertained by an insurer, the insurer has no potential liability to its insured under the insurance agreement, then the insurer may properly refuse to

defend its insured. *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993).

(b) Reasonable Investigation

The Petersons argue that Ohio Casualty conducted a less than thorough investigation of the Holcomb claim before denying coverage, thereby leaving unresolved ambiguities in the pleadings which preclude a finding that Ohio Casualty had no duty to defend. In *Allstate Ins. Co. v. Novak, supra*, we recognized that a liability insurer's duty to defend could arise either from the factual allegations of a pleading filed against the insured or from information derived from other sources including its own investigation. See, also, *Neff Towing Serv. v. United States Fire Ins. Co., supra*; *Mapes Indus. v. United States F. & G. Co., supra.* We have acknowledged that if an insurer must look beyond the pleadings in determining whether it is obligated to accept a tender of defense by an insured, so too must a court consider any relevant evidence outside the pleadings in resolving the legal issue of whether a duty to defend exists. See *Neff Towing Serv. v. United States Fire Ins. Co., supra.* For example, in *Mapes Indus.*, the policy in question provided coverage for "sudden and accidental" injury to certain property. We concluded that the insurer had no duty to defend because neither the claimant's pleadings nor the additional information furnished by the insured established or permitted an inference that damage resulted from a sudden and accidental event.

As the district court noted, in this case, "we have the benefit of a completed set of facts in the underlying Holcomb litigation." This case is thus factually distinguishable from *Allstate Ins. Co. v. Novak, supra*, in which the underlying action against the insured was still pending at the time the declaratory judgment action to determine coverage was decided. In the circumstances of the instant case, we agree with the reasoning of the district court that an insurer's incomplete investigation, without more, does not establish that it had a duty to defend a concluded lawsuit against its insured. Rather, it must be shown that a more thorough investigation would have disclosed facts which would establish the existence of the duty. The record made by the parties on their cross-motions for summary judgment discloses no

facts outside the pleadings which would bear on the issue of whether Ohio Casualty had a duty to defend Peterson in the now-completed Holcomb litigation, and we cannot assume that a more comprehensive investigation by Ohio Casualty would have disclosed any such facts. We are left with the pleadings filed in the underlying lawsuit, from which the parties agree that the coverage issue can be resolved.

(c) Resolution

In arguing that Holcomb's claim against Peterson fell outside the business pursuits exclusions, the Petersons focus on allegations that Peterson's wrongful conduct "was designed to enrich himself personally" and that he acted "both in his individual capacity and on behalf of Anesthesia West." These allegations, contained in one paragraph of Holcomb's pleading, must be read in context with the other 67 paragraphs incorporated by reference in the defamation claim against Peterson. Summarized, Holcomb alleged that for approximately 20 years, he and Peterson practiced medicine together within the structure of Anesthesia West, which had an "exclusive contractual relationship with Methodist Hospital," precluding the hospital from utilizing the services of anesthesiologists not associated with Anesthesia West. Holcomb alleged that beginning in 1997, Peterson and other employees of Anesthesia West, acting in combination with other unidentified individuals and entities, embarked upon a course of conduct designed to improperly terminate Holcomb's association with Anesthesia West, culminating in the termination of Holcomb's employment agreement in November 1998 and the resulting termination of his staff privileges at Methodist Hospital. Holcomb further alleged on information and belief that Peterson and others "desired to remove Dr. Holcomb for financial reasons, to personally enrich themselves, and to reduce Anesthesia West's overhead by replacing him with a younger, less-experienced and less-expensive physician." Holcomb alleged that this course of conduct included the making of false, misleading, and derogatory statements about his professional competence and character, including "inappropriate conduct regarding certain employees." Holcomb alleged that such false and misleading statements were "designed to provide a factual predicate" for terminating

association with Anesthesia West, "thus significantly benefiting Anesthesia West and Peterson financially." Holcomb alleged that such conduct was defamatory and interfered with his existing and prospective business relationships. He further alleged that he had not been paid compensation due from Anesthesia West.

Read together, these allegations clearly assert a claim arising out of Peterson's professional medical practice and thus fall within the business pursuits exclusions. Simply put, Holcomb alleged that Peterson defamed him as a part of a deliberate course of conduct designed to exclude him from their longstanding business relationship. Whether Peterson is alleged to have acted at the behest of the professional corporation or independently does not alter the essential nature or purpose of his alleged conduct. The allegation that Peterson was motivated by personal gain to be derived by Holcomb's ouster from the professional corporation and replacement with a "younger, less-experienced and less-expensive physician" merely underscores the fact that the dispute arose from a business pursuit. The allegations and claims against Peterson contained in Holcomb's pleadings fall squarely within the policy exclusions, and in the absence of any other facts which would support an inference of coverage, we conclude that Ohio Casualty had no duty to defend or indemnify Peterson with respect to the claims asserted against him in the Holcomb lawsuit.

V. CONCLUSION

For the reasons discussed, we conclude that the district court did not err in granting Ohio Casualty's motion for summary judgment and denying that of the Petersons, based upon its conclusion that as a matter of law, Ohio Casualty owed no duty under either of its policies to defend or indemnify the Petersons for claims asserted against Peterson in the Holcomb litigation.

AFFIRMED.

HEAVICAN, C.J., not participating.

ANGELA BRODINE, APPELLANT, V. BLUE CROSS BLUE SHIELD OF NEBRASKA, APPELLEE.

724 N.W.2d 321

Filed December 8, 2006. No. S-05-712.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Phillip G. Wright, of Wright & Associates, for appellant.

John F. Thomas, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

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

WRIGHT, J.

NATURE OF CASE

The plaintiff sued her health insurance provider for benefits the provider had denied. The district court sustained the defendant's summary judgment motion and dismissed the plaintiff's action as time barred due to the running of a 3-year limitations period in the contract. The plaintiff appealed.

SCOPE OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Riesen v. Irwin Indus. Tool Co., ante* p. 41, 717 N.W.2d 907 (2006). In reviewing a

summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id*.

[3] 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. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006).

FACTS

Angela Brodine was insured under a group policy of health insurance issued by Blue Cross Blue Shield of Nebraska (Blue Cross). The operative "Master Group Contract" issued to Brodine's employer contained the following provisions concerning procedures for filing claims under the policy:

> A. NOTICE OF CLAIM/PROOF OF LOSS: A Covered Person must notify [Blue Cross] when they have received health care Services for which this Contract will pay benefits. This notice is called a claim. The claim must give written proof of the Services provided. The claim may be filed directly by the Covered Person, the Hospital, the Physician or whoever provided the Service. . . .
>
> B. TIME LIMIT FOR FILING A CLAIM: A claim should be filed within 90 days of the time the Services are provided, or as soon thereafter as is reasonably possible. If the claim is not filed within 18 months of the date of service, and it was reasonably possible to do so, benefits will not be paid.

The contract also contained the following limitations provision:

> LEGAL ACTIONS: The Employee/Member cannot bring a legal action to recover under the Contract for at least 60 days after written proof of loss is given to [Blue Cross]. The Employee/Member cannot start a legal action after three years from the date written proof of loss is required.

Brodine had been issued a certificate of coverage in the form of a booklet entitled "A Guide to Your Blue*Preferred* Health Benefits." The booklet was designed to help participants understand their coverage under the group policy. Participants were

admonished that the booklet contained "only a partial description of the benefits, exclusions, limitations, and other terms of the Master Group Contract to which [the booklet] refers. It describes the more important parts of that document in a general way. . . . The Master Group Contract controls the coverage for your group." (Emphasis omitted.) The booklet described the limitations period in the following manner: "A lawsuit may not be filed less than 60 days after the claim is filed; nor more than three years from the time the claim is required to be filed."

Brodine received various medical treatments from January 9 to May 7, 1999, and her health care providers filed claims for services. Blue Cross denied the claims because it alleged the treatments were fertility related and therefore excluded by the terms of the policy and because the treatments were not medically necessary. By July 2, all claims for services at issue in this case had been processed by Blue Cross.

Brodine filed suit against Blue Cross in the U.S. District Court for the District of Nebraska on April 23, 2002. She sought recovery under the Employee Retirement Income Security Act of 1974 (ERISA), see 29 U.S.C. § 1001 et seq. (2000 & Supp. III 2003), for the benefits Blue Cross had denied. Upon a joint motion of the parties, the action was dismissed on November 25. The insurance policy had been issued for employees of the Nebraska State Education Association/Omaha Public Schools, a political subdivision. Because political subdivisions were not subject to ERISA, the parties questioned whether the federal court had jurisdiction.

On December 22, 2003, Brodine filed suit against Blue Cross in the district court for Douglas County. Blue Cross asserted that Brodine's claim was time barred by the 3-year limitations period set forth in the contract as described above. Blue Cross moved for summary judgment, and the court sustained this motion and dismissed Brodine's action. The court concluded that the appropriate limitations period was 3 years plus 18 months. The court also held that the limitations period was not tolled during the pendency of the federal lawsuit. Because May 7, 1999, was the last date on which Brodine had received medical treatments, the court determined that she was required to file her action no later than November 7, 2003, or 3 years 18 months from May 7, 1999.

Brodine timely appealed, and this court moved the appeal to its docket on its own motion, in accordance with the court's authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Brodine claims, summarized and restated, that the district court erred in granting Blue Cross' motion for summary judgment.

ANALYSIS

The issues are whether the 3-year limitations period set forth in the group policy was enforceable and, if so, when such period commenced. In opposition to Blue Cross' motion for summary judgment, Brodine asserted that the 3-year limitations period was unenforceable because it conflicted with the general 5-year statute of limitations for actions on written contracts, Neb. Rev. Stat. § 25-205(1) (Reissue 1995). The court held that the 3-year limitation in the contract was enforceable and that Brodine had 3 years plus 18 months from the last date of medical treatment to file her action.

On appeal, Brodine makes three arguments. She claims that the general 5-year statute of limitations should apply, which would make her action timely filed. Alternatively, if the 3-year contractual limitations period applies, then Brodine argues that the limitations period began to run on January 2, 2001, or 18 months from July 2, 1999. Such conclusion would mean that Brodine could file her lawsuit no later than January 2, 2004, in which case her action would have been timely filed. Finally, she argues that the federal lawsuit tolled the applicable limitations period. We will address Brodine's contentions in that order.

Applicable Limitations Period

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. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006). The general statute of limitations applicable to actions on written contracts is found in § 25-205, which provides a 5-year limitations period on written contracts. See *Dutton-Lainson Co. v. Continental Ins.*

Co., 271 Neb. 810, 716 N.W.2d 87 (2006). In Neb. Rev. Stat. § 44-357 (Reissue 2004), the Legislature has provided that

> [n]o insurance company shall issue in this state any policy or contract of insurance containing . . . any provision limiting the time within which an action may be brought to less than the regular period of time prescribed by the statutes of limitations of this state, *unless otherwise prescribed by this chapter*.

(Emphasis supplied.) Therefore, we examine the provisions of chapter 44 of the Nebraska Revised Statutes to see if a lesser time period for commencing an action is allowed.

Under Nebraska law,

> each policy of [individual] sickness and accident insurance . . . shall contain the provisions specified in this section . . . except that the insurer may, at its option, substitute for one or more of such provisions . . . which are in each instance not less favorable in any respect to the insured or the beneficiary.
>
> . . . .
>
> (7) A provision as follows: PROOFS OF LOSS: Written proof of loss must be furnished . . . within ninety days after the termination of the period for which the insurer is liable and in case of claim for any other loss within ninety days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time and if such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.
>
> . . . .
>
> (11) A provision as follows: LEGAL ACTIONS: . . . No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

Neb. Rev. Stat. § 44-710.03 (Reissue 2004).

A group health insurance policy like the one at issue may contain contractual limitations periods so long as they are not

"less favorable to the insured than would be permitted" under § 44-710.03. See Neb. Rev. Stat. § 44-767 (Reissue 2004). Thus, Nebraska law permits contractual limitations prohibiting legal actions more than 3 years after the time written proof of loss is required to be furnished. The group policy required that a claim be filed with Blue Cross within 18 months of the date of service, and no legal action could be started after 3 years from the date written proof of loss was required.

In *Rhodes v. Continental Ins. Co.*, 180 Neb. 10, 141 N.W.2d 415 (1966), this court held that the general statute specifying a 5-year limitations of actions on written contracts, § 25-205, yielded to a 1-year limitation period in a fire insurance policy, because such contractual provision was authorized by the statutes regulating fire insurance policies. In similar fashion, we conclude in this case that the general 5-year statute of limitations must yield to the 3-year provision in the Blue Cross policy because such provision is authorized by the statutes regulating health insurance policies.

The U.S. Court of Appeals for the Eighth Circuit faced the same issue arising from a similar contractual limitations period in *Duchek v. Blue Cross and Blue Shield of Neb.*, 153 F.3d 648 (8th Cir. 1998). In that case, the claimant filed an ERISA action in 1996 for benefits Blue Cross had denied in 1991. Although the claimant's lawsuit would have been timely filed under § 25-205, Blue Cross moved for summary judgment and argued that the action was time barred due to the 3-year limitations period established by the policy. The trial court concluded that the claim was time barred by the insurance policy provision requiring that an action challenging a claim denial be filed within " 'three (3) years from the date written proof of loss is required.' " *Duchek*, 153 F.3d at 649. The action was dismissed, and the Eighth Circuit affirmed the trial court's order. The appellate court looked to state law because ERISA contained no statute of limitations for actions to recover plan benefits. The court determined that the 3-year limitations period set forth in the policy was valid under the Nebraska insurance statutes.

The court explained its determination as follows:

> The Plan in question is a group sickness and accident insurance policy governed by Chapter 44 of the Nebraska

> Statutes. *See* Neb.Rev.Stat. § 44-760. An individual sickness and accident policy *must* contain a provision prohibiting legal actions "after the expiration of three years after the time written proof of loss is required to be furnished." *See* Neb.Rev.Stat. § 44-710.03(11). A group policy *may* contain such a contractual limitation period if it is not "less favorable to the insured than would be permitted" under § 44-710.03(11). Neb.Rev.Stat. § 44-767. The Plan's contractual limitation is precisely that authorized in § 44-710.03(11); therefore, it is expressly permitted by § 44-767. This contractual limitation is not prohibited by § 44-357 because that statute does not apply if the contractual limitation is "otherwise prescribed *by this chapter*," in other words, by another section of the Nebraska insurance laws.

Duchek, 153 F.3d at 650. The Eighth Circuit correctly determined that the 3-year contractual limitation was not prohibited by the general 5-year statute of limitations for contract actions, § 25-205. See § 44-357.

Brodine argues that *Wineinger v. United Healthcare Insurance Co.*, No. 8:99CV141, 2001 WL 688530 (D. Neb. Mar. 13, 2001) (unpublished opinion), supports her contention that the general 5-year statute of limitations should apply in this case. We disagree. The plaintiff in *Wineinger* brought an action against her insurance provider alleging she had paid a higher percentage of copayments than had been required under the group policy. The group policy at issue contained a 3-year limitations period running from the date written proof of loss was required to be furnished, as permitted by §§ 44-767 and 44-710.03(11). Despite this provision, the trial court found that Nebraska's general 5-year statute of limitations applied and that §§ 44-767 and 44-710.03(11) were inapplicable because the plaintiff's action concerned copayments under the group policy, and not an administrative denial of a claim for benefits.

We do not consider the federal court's interpretation of Nebraska law in *Wineinger* because that case is distinguishable from the case at bar. Brodine sued Blue Cross because it had denied her claims for benefits, not because of a dispute over copayments.

We conclude that the 3-year limitations period set forth in the Blue Cross policy was enforceable under Nebraska law.

Date on Which Limitations Period Began to Run

Having determined that the 3-year contractual limitation was enforceable, we turn to the question of when the 3-year limitations period commenced. Brodine argues that the period would commence on January 2, 2001, or 18 months from July 2, 1999, the date on which her claims were processed and denied by Blue Cross. However, the contractual provisions of the policy do not support Brodine's argument that July 2, 1999, was significant for determining when the 3-year period commenced. The Master Group Contract provided that an insured could not "start a legal action after three years from the date *written proof of loss* is required." (Emphasis supplied.) Thus, we must determine when Brodine was required to provide "written proof of loss" under the policy.

To receive benefits under the policy, an insured who received medical treatment was required to file with Blue Cross a "claim" containing "written proof of the Services provided." A "claim" could be filed by the insured or directly by the health care provider, as occurred in Brodine's situation. We conclude that the date on which "written proof of loss is required," as set forth in the limitations provision of the Master Group Contract, refers to the same date on which an insured was required to file with Blue Cross his or her "claim." The notion that "claim" is synonymous with "written proof of loss" is supported by the heading to the policy provision requiring insureds (or their service providers) to file claims with Blue Cross. That heading states: "NOTICE OF CLAIM/PROOF OF LOSS." This reading of the policy is consistent with the certificate of coverage given to Brodine. It stated that the insured could not file a lawsuit "more than three years from the time the *claim* is required to be filed." (Emphasis supplied.)

The contract provided two alternative deadlines for filing a claim for services with Blue Cross. The claim was to be filed within 90 days of the time medical services had been provided, and if the claim was not filed within 18 months, benefits would not be paid. The last date on which Brodine received medical treatment was May 7, 1999. Accordingly, at the earliest, she was

required to file a claim with Blue Cross within 90 days of May 7, and at the latest, within 18 months of May 7.

For purposes of our summary judgment analysis, we give Brodine the benefit of all reasonable inferences deducible from the evidence and assume that the 3-year limitations period started to run 18 months from May 7, 1999. As the district court concluded, 3 years plus 18 months from the last date of service required Brodine to file her action against Blue Cross no later than November 7, 2003. Thus, the time for filing this action had come and gone by the time Brodine filed on December 22. We conclude the district court correctly determined that Brodine's action was untimely filed. Brodine's argument is without merit.

Effect of Federal Lawsuit

Brodine next argues that the limitations period should have been tolled during the pendency of the federal lawsuit. The district court recognized that if Brodine was entitled to such tolling, she would have an extra 7 months 2 days to file this action and her action would have been timely. However, the court determined that the federal lawsuit did not toll the running of the applicable statute of limitations and that, therefore, the action was time barred. Blue Cross argues that Brodine was not prevented from bringing a timely action in state court while the federal lawsuit was pending and that Neb. Rev. Stat. § 25-201.01 (Cum. Supp. 2004) did not apply.

The question is whether the 3-year contractual limitations period was tolled by the pendency of the federal action between these same parties. Section 25-201.01 includes a savings clause for actions filed in federal court that are dismissed because of the loss of diversity jurisdiction. Section 25-201.01 reads, in relevant part, as follows:

> (1) If an action is commenced within the time prescribed by the applicable statute of limitations but the plaintiff fails in the action for a reason other than a reason specified in subsection (2) of this section and the applicable statute of limitations would prevent the plaintiff from commencing a new action, the plaintiff . . . may commence a new action within the period specified in subsection (3) of this section.
>
> (2) A new action may not be commenced in accordance with subsection (1) of this section when the original

> action failed . . . (b) as a result of voluntary dismissal by the plaintiff for a reason other than loss of diversity jurisdiction in a federal court . . . .
>
> (3) A new action may be commenced in accordance with subsection (1) of this section within a period equal to the lesser of (a) six months after the failure of the action or (b) a period after the failure of the action equal to the period of the applicable statute of limitations of the original action.

Section 25-201.01 did not toll the statute of limitations. The statute does not apply because the limitations period did not "prevent [Brodine] from commencing a new action" after the federal case was dismissed, as required by subsection (1). The federal action was dismissed on November 25, 2002. Thus, assuming for purposes of our summary judgment review that the limitations period expired on November 7, 2003, Brodine still had more than 11 months in which to file her action in state court after the federal action had been dismissed.

Section 25-201.01(2) also prevented tolling as a result of the federal action. Brodine did not file her claim in federal court based on *diversity*, but because she alleged a *federal question* existed under ERISA. The case was dismissed not as a result of the loss of diversity, but by a joint stipulation of the parties, who doubted whether a federal question actually existed and whether the federal court had subject matter jurisdiction.

We next consider whether the federal action tolled the applicable statute of limitations based on equitable principles. We have previously considered whether the filing of another lawsuit served to toll the applicable statute of limitations. In *National Bank of Commerce v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999), a bank filed an action against a defaulting borrower beyond the applicable statute of limitations. The bank argued that the statute of limitations had been tolled because the borrower had been subject to an automatic bankruptcy stay. This court held that the applicable statute of limitations was not tolled. We discussed our precedents on such issue based on equitable principles. We summarized the relevant cases in the following manner:

> In *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 236, 105 N.W. 1081 (1906), the creditor successfully litigated its right to set aside a conveyance as fraudulent, but because

> it was unable to recover from the resultant forced sale of the property, the creditor brought a later action in equity to reach the rents and profits from the land. We held that the latter action was not time barred, stating: "In this action it was necessary to show that the land had been fraudulently transferred. No recovery could be had without the existence of that fact. While that question was being litigated in the courts, the statute of limitations as to any claim that depended upon the questions there in controversy would not run in favor of one party in that controversy and against the other." *Id*. at 242, 105 N.W. at 1083.
>
> In *Macke v. Jungels*, 102 Neb. 123, 166 N.W. 191 (1918), we held that it would be inequitable to allow the statute of limitations to run on a claim for damages during the pendency of an action enjoining the plaintiff from bringing suit on that claim.
>
> In *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 8 N.W.2d 545 (1943), defendants in a mortgage foreclosure appealed a decree of foreclosure in favor of the plaintiff. The foreclosure was commenced June 7, 1928. On December 17, 1930, the case was removed from the docket but remained pending with leave to reinstate pursuant to a federal court order restraining the plaintiff from proceeding further. The action was subsequently reinstated, and the defendants contended that the plaintiff was barred by the applicable statute of limitations. We concluded that the plaintiff having been restrained from proceeding further by a paramount authority, the period thereof should not be considered in computing the time for the statute of limitations to run, and that the plaintiff was not so barred.

Ham, 256 Neb. at 690, 592 N.W.2d at 484.

We determined in *Ham* that equitable principles did not apply because the bankruptcy code provided an extra 30 days to file an action if the claim expired before the automatic stay was lifted or the bankruptcy was dismissed. We found no inequity in requiring the bank to commence its action within 30 days following the termination or dismissal of the bankruptcy.

The equitable principles discussed in *Ham* do not apply in the case at bar. The filing of this action in state court was not

dependent upon the resolution of any issues in Brodine's federal lawsuit, and the federal court did not enjoin or restrain Brodine from proceeding further against Blue Cross.

Brodine initiated her claim against Blue Cross in federal court, but it was never decided whether the federal court had jurisdiction over her complaint. More important, the limitations period had not run by the time the federal action was dismissed. Rather, viewing the evidence in the light most favorable to Brodine, we conclude that once the federal action was dismissed on November 25, 2002, more than 11 months remained still to run on the limitations period.

The district court did not err in finding that the applicable limitations period was not tolled during the pendency of the federal action.

CONCLUSION

The district court was correct in determining that the 3-year contractual limitation was enforceable under Nebraska law. Viewing the evidence in the light most favorable to Brodine and giving her the benefit of all reasonable inferences deducible from the evidence, we conclude that the 3-year limitations period started to run 18 months from May 7, 1999, the date of her last medical treatment. Three years plus 18 months from the last date of service required the action to be commenced no later than November 7, 2003. Thus, the limitations period had already expired when Brodine filed this action on December 22. The district court correctly found that the applicable limitations period was not tolled during the pendency of the federal action, and the judgment is affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LEONDRE WALKER, APPELLANT.

724 N.W.2d 552

Filed December 8, 2006. No. S-05-753.

1. **Juries: Discrimination: Prosecuting Attorneys.** Prosecutors are prohibited from using peremptory challenges to strike potential jurors solely because of their race.
2. **Juries: Discrimination: Appeal and Error.** The trial court's determination that a party's use of his or her peremptory challenges lacks purposeful discrimination is a factual determination which an appellate court will reverse only if clearly erroneous.
3. **Juries: Discrimination: Prosecuting Attorneys: Proof.** To show that a prosecutor has used peremptory challenges in a racially discriminatory manner, a defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges because of race. If the defendant makes a prima facie showing, the prosecutor must then articulate a race-neutral explanation for striking the juror in question. The trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination.
4. **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.
5. **Miranda Rights: Waiver.** *Miranda* rights can be waived if the suspect does so knowingly and voluntarily.
6. **Confessions: Appeal and Error.** A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous.
7. ____: ____. In determining whether a statement is voluntary, an appellate court applies a totality of the circumstances test. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct.
8. **Criminal Law: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress, the defendant, to preserve the issue on appeal, must object at trial to the admission of the evidence which was the subject of the suppression motion.
9. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her condition in reference to such proceedings, and to make a rational defense.
10. **Courts: Trial: Mental Competency.** The question of competency to stand trial is one of fact to be determined by the court and the means employed in resolving the question are discretionary with the court.
11. **Mental Competency: Appeal and Error.** The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.
12. **Indictments and Informations.** Objections to the form or content of an information should be raised by a motion to quash.

13. **Right to Counsel: Appeal and Error.** A trial court's decision to dismiss appointed counsel is reviewed for an abuse of discretion.
14. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
15. **Trial: Evidence: Appeal and Error.** 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.
16. **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. In making this determination, the court should not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence, as these matters are for the finder of fact.
17. **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.
18. **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.

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

Kimberly K. Carbullido, of Cohen, Vacanti, Higgins & Shattuck, and, on brief, Timothy L. Ashford for appellant.

Leondre Walker, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ. and HANNON, Judge, Retired.

CONNOLLY, J.

Leondre Walker appeals his convictions for first degree murder, two counts of use of a deadly weapon to commit a felony, attempted murder in the second degree, and possession of a deadly weapon by a felon. The district court sentenced Walker to life imprisonment for the first degree murder, 40 to 50 years' imprisonment for attempted second degree murder, 40 to 50

years' imprisonment for each conviction of use of a deadly weapon to commit a felony, and 10 to 20 years' imprisonment for possession of a deadly weapon by a felon. The court ordered all the sentences to be served consecutively. We affirm.

ASSIGNMENTS OF ERROR

Walker assigns the district court erred in (1) granting the prosecution's peremptory challenges to excuse four African-American jurors, (2) not suppressing Walker's confession, (3) allowing into evidence a victim's identification of Walker, (4) ruling Walker competent for trial, (5) allowing the prosecution to amend the charges to add additional charges which were prejudicial to Walker, (6) denying Walker's motion to dismiss his attorneys, (7) failing to find that his attorneys provided ineffective assistance, (8) finding the State had adduced sufficient evidence to sustain the convictions, and (9) imposing excessive sentences that run consecutively instead of concurrently.

BACKGROUND

Crime

Barry Thompson, James Earl Carter, and another individual resided in an apartment in Omaha, Nebraska. On September 3, 2003, Thompson, Carter, and a friend of Thompson's were in the apartment. Answering a knock on the door, Thompson opened the door and Walker and two men entered. Walker pointed a gun at Thompson and Carter and told them, "This is a robbery. If you've got any money, take it out and put it on the table and then lay out on the floor." Thompson's friend put his money on the table, but Thompson and Carter did not have any. Before they could get to the floor, Walker shot and killed Carter and shot Thompson in the jaw. When the other resident entered the apartment, Walker picked up the money from the table and left.

Investigation

At the scene, the police were told that a person by the nickname of "St. Louis" had been at the apartment during the shootings. Omaha police officer Christopher Perna combed through a gang file system and found that Walker's brother used the nickname of "St. Louis." On September 4, 2003, Walker's brother voluntarily came to the police station and Perna interviewed

him. Perna, however, did not arrest him because he had a confirmed alibi. The investigation then shifted to Walker.

Walker's Admission to Tommy Brown and Dywan Williams

Walker was staying at the apartment of Tom Johnson and Tommy Brown. Walker told Brown that he had robbed and shot Carter because Carter owed him $200. Walker also showed Brown the gun that he used to commit the crimes. Once outside of Walker's presence, Brown called Crimestoppers.

While Brown called Crimestoppers, Dywan Williams, Carter's cousin, and Carnell Jimmerson, a friend of Williams, went to the apartment to confront Walker because Williams heard Walker had killed Carter. Finding Walker, Williams assaulted him, while Jimmerson took Walker's gun away. During the assault, Walker asked Williams why they were attacking him and Williams told Walker it was because Walker had killed his cousin. In response, Walker said that he did not know Carter was Williams' cousin and that if he had known, he would not have killed him.

Williams and Johnson then grabbed Walker and threw him out the door. Outside the apartment, several other people struck and kicked Walker. Meanwhile, Jimmerson put Walker's gun into a brown paper bag, placed the bag in front of the apartment, and told Williams where the bag was. When the police arrived, Williams told them the location of the gun. An officer retrieved a Sig Sauer .380-caliber semiautomatic pistol. The police later matched the two cartridges recovered from the crime scene to the pistol.

Walker's Arrest and Confession

At about the same time the crowd was attacking Walker, police officers arrived. They observed several individuals attacking Walker on a stairway and one of the officers heard someone say, "He killed my brother." The officers broke up the attack.

When Det. Kenneth Kanger arrived, he asked Walker to go with him to police headquarters to talk about the shootings. Walker agreed and went with Kanger. Once at the police station, Kanger and Perna asked Walker about his family and background. After they covered this background information, they advised Walker of his *Miranda* rights and Walker responded

either verbally or by nodding his head that he understood each of these rights.

Kanger and Perna interviewed Walker on and off for about 4 hours 45 minutes. During the interview, the detectives offered Walker food, drink, cigarettes, and an opportunity to use the restroom. At no time did Walker request counsel, ask for the interview to be stopped, refuse to answer a specific question, or complain that he was tired. Walker eventually admitted to participating in the robbery and to shooting Thompson and Carter.

ANALYSIS

Walker's *Batson* Challenge Fails Because State's Peremptory Challenges Are Race Neutral

Walker challenges the State's peremptory challenges for 4 of the 6 African-American jurors in the jury pool of 36. Walker alleges these challenges were based on race. The State, however, argues *Batson* requires Walker to prove a purposeful racial discrimination in the use of peremptory challenges, and it argues it dismissed the four African-American jurors for nonracial reasons. Also, the State points out the jury pool still contained two African-Americans.

[1] Walker claims the court violated *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), in granting the prosecution's peremptory challenges to excuse four jurors. In *Batson*, the U.S. Supreme Court held that prosecutors are prohibited from using peremptory challenges to strike potential jurors solely because of their race.

In making his *Batson* challenge, Walker's lawyer asked the court to take judicial notice that Walker, an African-American, is a member of a cognizable racial group. He argued this raised an inference that the prosecutor used the challenges to exclude the four potential jurors based on their race.

In response, the prosecution asked the trial judge if Walker had met the first step of the *Batson* test by showing that the prosecutor had exercised the peremptory challenges based on race. The trial judge said, "My basic feeling is no, I don't. But I'm going to let you go ahead." The prosecution then articulated the following reasons: Juror No. 1 had a son who was a convicted felon and was serving time in prison. Juror No. 10's

employment concerned the prosecution because she worked as an administrator at an Omaha church. Juror No. 18 was inattentive and read other materials during voir dire. Juror No. 36 has an uncle who is a member of the Black Panthers and a convicted felon whom she has had direct contact with over the course of several years. After hearing these explanations, the judge determined that Walker had not proved purposeful discrimination and he overruled the *Batson* challenge.

[2] The trial court's determination that a party's use of his or her peremptory challenges lacks purposeful discrimination is a factual determination which an appellate court will reverse only if clearly erroneous. See *State v. Lowe*, 267 Neb. 782, 677 N.W.2d 178 (2004).

[3] To show that a prosecutor has used peremptory challenges in a racially discriminatory manner, a defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges because of race. If the defendant makes a prima facie showing, the prosecutor must then articulate a race-neutral explanation for striking the juror in question. *State v. Lowe, supra*. The prosecutor's explanation does not have to be persuasive or even plausible. In fact, the reasoning " 'may be "implausible or fantastic," even "silly or superstitious," and yet still be "legitimate." ' " *Gee v. Groose*, 110 F.3d 1346, 1351 (8th Cir. 1997). A legitimate reason does not need to make sense. *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995). Instead, it only has to be a reason that does not deny equal protection. *Id.* Finally, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. *State v. Lowe, supra*. In determining if the "real" reason was based on race, unless discriminatory intent is " 'inherent in the prosecutor's explanation, the reason offered [by the prosecution] will be deemed race neutral.' " *Purkett v. Elem*, 514 U.S. at 768.

In overcoming the *Batson* challenge, the State's explanations are similar to those we have previously found to be sufficient to satisfy *Batson*. In *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999), the prosecution used peremptory challenges to strike three African-American jurors. *State v. Myers, supra*. The State struck one juror because she was young and single,

and she might be attracted to the defendant. The State was also concerned because the juror lived in an area of high gang activity. The prosecution struck the second juror because she was unemployed, did not follow the court's instructions, and seemed to have a disagreeable attitude. The third juror was stricken because she was elderly and was inattentive. We concluded these reasons to be "sufficiently neutral to avoid reversal on a 'clearly erroneous' standard." *Id*. at 309, 603 N.W.2d at 386.

Here, jurors Nos. 1 and 36 had close family members who were convicted felons. The prosecution's concern that these jurors might sympathize with Walker is just as race neutral as the concern in *Myers* over the first juror developing a "crush" on the defendant and living in an area of high gang activity.

Although nothing in the record indicates juror No. 18 was elderly or disabled, the State had a valid concern about the juror's ability to be attentive because she was reading during voir dire.

Although it is not clear from the record why juror No. 10's employment at a church concerned the State, *Batson* does not demand the explanation for a peremptory strike to be persuasive or even plausible. See *Purkett v. Elem, supra*. The district court was not clearly erroneous in finding the prosecution's peremptory challenges did not violate *Batson*.

Walker Understood His *Miranda* Rights

When questioned by Kanger and Perna, Walker confessed to participating in the robbery and to shooting Thompson and killing Carter. He argues that these statements were given in violation of his right to counsel and that thus, his confession was not freely and voluntarily given in violation of his 5th, 6th, and 14th Amendments to the U.S. Constitution and by article I, §§ 11 and 12, of the Nebraska Constitution.

Walker argues that his confession should have been suppressed because during the interview, he asked if statements he made would be used against him. He contends that this shows he did not understand his *Miranda* rights and that questioning should have ceased. He contends that it was only after he asked if his statements would be used against him that he admitted the crimes. He primarily relies on the following exchange during the interview:

> [Perna]: No, no. Why'd you go over the house? To get the money? Or was it. . . . The truthful reason.
>
> [Walker]: The truthful reason was. . . . You sure the *other stuff* won't be used against me, right?
>
> Q: No. What stuff? The stuff that you originally told us?
>
> A: Yeah. About the, the drug.
>
> Q: Why? Now. . . . I'm not worried about the drug. We wanna know why. . . .
>
> A: The reason why. Okay. And even pay me from last time.
>
> Q: Okay.
>
> A: I told him I'm gettin' 'em some drugs.

(Emphasis supplied.) The trial court found that Walker had

> voluntarily accompanied an Omaha police officer to police headquarters to talk about the events of September 3, 2003. [Walker] was read his Miranda rights, and verbally and physically acknowledged his understanding of those rights. [Walker] never asked for further clarification of those rights, never requested that he have counsel present, never refused to answer a specific question and never cut off questioning. Instead, [Walker] sat and talked with Perna and Kanger for over four hours and eventually confessed to shooting Carter and Thompson. . . . Because the record demonstrates that [Walker] understood his constitutional rights and voluntarily waived those rights, the Court finds that it cannot grant [Walker's] requested relief because [he] never invoked his right to remain silent.

[4-6] *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. See, *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006); *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). *Miranda* rights can be waived if the suspect does so knowingly and voluntarily. *State v. Ball, supra*. A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous. *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005).

[7] A valid *Miranda* waiver must be both " 'voluntary in the sense that it was the product of a free and deliberate choice' " and " 'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.' " *Colorado v. Spring*, 479 U.S. 564, 573, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987). In determining whether a statement is voluntary, we apply a totality of the circumstances test. *State v. Williams, supra*. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct. See, *White v. Massachusetts*, 382 F. Supp. 2d 248 (D. Mass. 2005) (citing *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)); *Toste v. Lopes*, 701 F. Supp. 306 (D. Conn. 1987).

Here, the police advised Walker of his *Miranda* rights, and he acknowledged that he understood those rights. He then waived those rights by not remaining silent or requesting a lawyer. Walker asked a question later during his interrogation, which he claims shows that he did not understand that what he said could be used against him. But, his statement could also be construed that he did understand his rights. When he asked, "You sure the *other stuff* won't be used against me, right?" he was referring to previous statements he had made regarding drugs. The trial court could reasonably infer that Walker was aware the information he provided regarding the murder would be used against him.

Moreover, other factors support a finding that Walker understood his *Miranda* rights. The record shows no indication that Walker's age or intelligence would hinder his understanding of his rights. Further, Walker is familiar with the criminal legal process, having been convicted of 30 crimes, including 11 felonies. His experiences with law enforcement bolster the trial court's determination that he was aware of his rights and understood the significance of waiving them. See, *United States v. Hall*, 724 F.2d 1055, 1059 (2d Cir. 1983) (noting that defendant was not " 'a newcomer to the law' " in determining whether he understood his rights, quoting *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976)); *United States v. Isom*, 588 F.2d 858, 862 (2d Cir. 1978) (observing appellant's "rather considerable prior experience with law enforcement

officers" in upholding the trial court's ruling that he understood his rights). Based on the totality of the circumstances, the trial court was not clearly erroneous in finding that Walker understood his *Miranda* rights and knowingly waived them.

Photographic Array Procedures

While still in the hospital, police showed Thompson a photographic array that contained six pictures of individuals that looked similar to Walker. In the photographic array, Thompson identified Walker as the man who shot him. The record shows that the police did not direct Thompson to any particular photograph or indicate that they suspected that anyone in the array was the one who shot him.

[8] Walker argues that the district court erred in overruling his motion to suppress the pretrial identification because it was unduly suggestive. At trial, however, Walker failed to object to Thompson's identifying him as the man who shot him in the face and who killed Carter. After a pretrial hearing and order overruling a defendant's motion to suppress, the defendant, to preserve the issue on appeal, must object at trial to the admission of the evidence which was the subject of the suppression motion. See, *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Rodgers*, 237 Neb. 506, 466 N.W.2d 537 (1991). Walker failed to object to Thompson's identification and thus failed to preserve this issue on appeal.

Walker Competent to Stand Trial

Walker argues that the trial court erred in finding him competent to stand trial. On the first day of trial, the court granted a motion for a competency evaluation. In making this motion, Walker's counsel noted Walker's history of mental illness, the correspondences Walker had sent to the court, and discussions the defense lawyers had with Walker indicating an evaluation would be appropriate.

A psychiatrist with the Lincoln Regional Center concluded that Walker showed "no mental illness which would preclude the possibility of cooperating with his attorney in the preparation and presentation of a defense." Relying on this evaluation, the court found Walker competent to stand trial.

[9-11] A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her condition in reference to such proceedings, and to make a rational defense. *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000); *State v. Hittle, supra*. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding. *Id.*

The psychiatrist's determination that Walker had the capacity to understand the nature and object of the proceedings against him and to comprehend such proceedings provided sufficient evidence to support the trial court's finding that Walker was competent to stand trial.

Amendment of Information

Walker argues the district court erred when it allowed the State to amend the information. Four days before the trial started, the State moved to amend the information from first degree assault to attempted second degree murder and to add the charge of possession of a deadly weapon by a felon. The trial court allowed the amendment, finding that it did not prejudice Walker.

[12] Walker argues the trial court erred in granting this motion because the lateness of the additional charges were prejudicial to his case and required his attorney to conduct further investigation. Objections to the form or content of an information should be raised by a motion to quash. *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004). Walker failed to move to quash the information, and so he waives any objections to it. See *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999).

Request to Dismiss Attorneys

Before trial, the trial court considered Walker's motion to dismiss his counsel and appoint new counsel. Walker argued that his lawyers were unresponsive to his inquiries and did not keep him informed about his case and that he feared the public defender's office and the Omaha Police Department were working together against him. The court overruled this motion, noting

that Walker did not have any evidence to support his suspicions and concerns.

[13] A trial court's decision to dismiss appointed counsel is reviewed for an abuse of discretion. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). Here, Walker presented no evidence to support his suspicions and concerns. The trial court did not abuse its discretion in overruling Walker's motion to dismiss.

Record on Appeal Is Insufficient to Reach Walker's Ineffective Assistance of Counsel Claim

Walker argues he received ineffective assistance of counsel because the public defenders failed to adequately investigate and prepare his case, did not call particular witnesses, and did not present an alibi defense.

[14,15] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). The determining factor is whether the record is sufficient to adequately review the question. *Id.* 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. *Id.* See, also, *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

Here, each of Walker's claims assert that it was trial counsel's omission to do something which rendered trial counsel ineffective. The reasons for these claimed omissions would require an evaluation of trial strategy and of matters not contained in the record. We conclude that the record is not sufficient to adequately review Walker's claim of ineffective assistance of counsel.

Evidence Was Sufficient to Support Convictions

Walker claims the State failed to present sufficient evidence to convict him. Walker argues (1) there were conflicting eyewitness accounts, (2) Thompson's identification of Walker was unduly suggestive, and (3) Walker's fingerprints were not on the gun. From this, he argues the evidence presented at trial lacked sufficient probative value as a matter of law to convict him.

[16] 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 making this determination, the court should not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence, as these matters are for the finder of fact. See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

Stating the obvious, the State adduced sufficient evidence beyond a reasonable doubt that a rational juror could find Walker guilty: Walker confessed to the murder of Carter and to the shooting of Thompson; Thompson testified that it was Walker who shot him in the face and killed Carter, and Walker admitted to Brown and Williams that he committed the robbery and shot Carter; and Walker's gun fired the two cartridge cases recovered at the scene.

Excessive Sentences

Walker argues his sentences were excessive and that the sentences should run concurrently.

[17,18] 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. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002). 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. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

The sentences fall within the statutory limits, and the trial court did not abuse its discretion in imposing the sentences.

CONCLUSION

The trial court did not err in granting the prosecution's peremptory challenges, allowing Thompson's identification of Walker and Walker's confession into evidence, ruling Walker competent for trial, allowing the prosecution to amend the charges, or denying Walker's motion to dismiss his attorneys. The sentences imposed by the trial court were not excessive, and

the evidence was sufficient to sustain the convictions. Walker's convictions and sentences are affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

JEFFREY MARTIN BULLOCK, APPELLANT,
V. J.B., APPELLEE.

725 N.W.2d 401

Filed December 15, 2006. No. S-05-636.

1. **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.
2. **Actions: Paternity: Death: Abatement, Survival, and Revival.** A paternity action is personal and does not survive the death of a putative father.
3. **Actions: Parties: Death: Abatement, Survival, and Revival.** Where an action abates and does not survive the death of a party, the abatement is absolute and the action ceases to exist.
4. **Constitutional Law: Statutes: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Frank E. Robak, Sr., of Robak Law Offices, for appellant.

Deborah A. Sanwick for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Jeffrey Martin Bullock instituted a paternity action alleging that he was the father of a child born to J.B. After filing the action, but prior to the completion of genetic testing, Jeffrey died. The personal representative for Jeffrey's estate moved to revive the action. That motion was denied. The primary question presented by this appeal is whether an action for paternity survives the death of the putative father.

FACTS

On March 29, 2004, Jeffrey filed a petition in Douglas County District Court to establish paternity. In his petition, Jeffrey alleged that he was the natural father of a child born to J.B. on May 20, 2003. In her answer, J.B. denied that Jeffrey was the child's natural father and, in her cross-petition, alleged that she did not know who the child's father was as she had been sexually active with both Jeffrey and another man at the time the child was conceived.

On April 28, 2004, J.B. filed a motion for genetic testing in order to determine paternity. It appears from the record that a hearing was held on that motion on May 4. According to the record, Jeffrey committed suicide on May 13. There is no indication from the record that an order for genetic testing had been entered at that time.

On May 28, 2004, J.B. moved the district court to order the Douglas County coroner "to transmit [Jeffrey's] genetic samples to a laboratory of [J.B.'s] choosing to obtain a genetic paternity test." In her motion, J.B. alleged that the Social Security Administration required that paternity be established in order for the child to be eligible for benefits. That motion was granted on June 18.

On November 10, 2004, Jeffrey's counsel filed a motion purported to compel J.B. to disclose the results of the paternity test. In her response filed November 23, J.B. alleged that at the hearing on the motion for genetic testing after Jeffrey's death, Jeffrey's counsel had demanded the results of the paternity test in exchange for agreeing to the testing. J.B. further alleged that at that hearing, it was made clear to counsel that he had no standing to object to the testing. In her response, J.B. also indicated she had never agreed to provide the results of the testing. The record includes no bill of exceptions detailing the events of that hearing or of any other hearing in this case.

On February 9, 2005, Jeffrey's action against J.B. was dismissed pursuant to an order of dismissal on progression. On March 25, Janet Bullock, Jeffrey's mother and the personal representative of his estate, filed a motion for revivor on behalf of the estate. It appears that Janet's motivation in seeking to revive the action is her belief that a paternity determination is

necessary in order for her to be awarded grandparent visitation. On March 31, J.B. moved to dismiss with prejudice, alleging that Jeffrey was deceased and that the paternity action did not survive his death. On April 5, Janet filed an application to reinstate Jeffrey's action, which the court sustained on April 14. On April 25, the district court issued an order concluding the paternity action did not survive Jeffrey's death, and accordingly, the court denied Janet's motion for revivor.

ASSIGNMENTS OF ERROR

On appeal, Janet argues, renumbered, that the district court erred in (1) denying her motion for revivor, (2) failing to find Neb. Rev. Stat. § 43-1802(1)(c) (Reissue 2004) unconstitutional, and (3) denying her motion to compel.

STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Bronsen v. Dawes County, ante* p. 320, 722 N.W.2d 17 (2006).

ANALYSIS

Survival of Paternity Action

Janet's primary argument on appeal is that Jeffrey's paternity action survived his death. The issue of whether such an action survives the death of a putative father is one of first impression in Nebraska.

Neb. Rev. Stat. § 25-322 (Reissue 1995) provides in relevant part that

> [a]n action does not abate by the death or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survives or continues. In the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest.

Actions which survive, and thus may be revived in the name of a party's personal representative, are listed in Neb. Rev. Stat. § 25-1401 (Reissue 1995), which provides that

> [i]n addition to the causes of action which survive at common law, causes of action for mesne profits, or for an

> injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

Neb. Rev. Stat. § 25-1402 (Reissue 1995) further provides that "[n]o action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant."

Despite the language of §§ 25-1401 and 25-1402 suggesting generally that all actions except those listed in the statutes survive, Nebraska case law has limited the list of those actions which survive to exclude those which involve purely personal rights. In *Holmberg v. Holmberg*, 106 Neb. 717, 718-19, 184 N.W. 134, 135 (1921), we concluded that a divorce action did not survive the death of one of the parties to the marriage, as "[t]he purpose of the action [was] to dissolve the marriage relation, and that relation being dissolved by death, the proceedings after the death of one of the parties would be useless and of no avail." See, also, *Williams v. Williams*, 146 Neb. 383, 19 N.W.2d 630 (1945) (affirming *Holmberg* and noting personal nature of divorce action); *Fitzgerald v. Clarke*, 9 Neb. App. 898, 621 N.W.2d 844 (2001) (suit seeking enjoinment of regulations limiting inmate's ownership of personal property was personal to inmate and did not survive inmate's death).

In *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 159, 481 N.W.2d 165, 172 (1992), we concluded that the "primary purposes of the filiation statutes [were to identify] the biological fathers of children born out of wedlock and impos[e] upon them an obligation of support." The establishment of such a relationship is undoubtedly personal. The personal representative of a putative father's estate cannot be made the child's father. Nor can a support obligation be imposed upon the personal representative of a putative father's estate. See *Carlson v. Bartels*, 143 Neb. 680, 10 N.W.2d 671 (1943).

The conclusion that a paternity action is personal and does not survive the death of a putative father is consistent with the rule in most jurisdictions. See, *Hayes v. Smith,* 194 Conn. 52, 480 A.2d 425 (1984); *Matter of Mary Ellen C. v. Joseph William C.*,

79 A.D.2d 1024, 435 N.Y.S.2d 738 (1981); *Pryor v. Jump*, 183 Okla. 560, 83 P.2d 828 (1938). See, also, *Bell v. Setzer*, 375 So. 2d 61 (Fla. App. 1979) (action abates because no statute provides for its survival); *K. K. v. Estate of M. F.*, 145 N.J. Super. 250, 367 A.2d 466 (1976) (same); *Schumm v. Beery*, 100 Cal. App. 2d 407, 224 P.2d 54 (1950) (same). See, generally, 41 Am. Jur. 2d *Illegitimate Children* § 63 (2005); Annot., 58 A.L.R.3d 188 (1974). But see, e.g., *Ex parte L.F.B.*, 599 So. 2d 1179 (Ala. 1992) (statute provided that equitable actions, such as paternity action, survived death); *In re Estate of Cody*, 92 Ill. App. 3d 208, 415 N.E.2d 1131, 47 Ill. Dec. 818 (1980) (statute provided for survival of action); *People in Interest of M. E. W. F.*, 42 Colo. App. 495, 600 P.2d 108 (1979) (court concluded that statutes providing for abatement apply only to actions enumerated in statute; since paternity was not included, action did not abate).

[2] We therefore conclude that Jeffrey's paternity action was personal to him and did not survive his death. As such, the action could not be revived.

Waiver of Abatement

In addition, Janet argues that J.B.'s action in requesting genetic testing after Jeffrey's death waived J.B.'s right to argue that the paternity action did not survive Jeffrey's death. Whether abatement of an action can be waived is also a question of first impression in Nebraska.

Other courts have considered the question of whether a party could waive the abatement of an action. In *Deeg v. City of Detroit*, 345 Mich. 371, 76 N.W.2d 16 (1956), the Michigan Supreme Court concluded that where an action abated and did not survive the death of one of the parties, the abatement was absolute and the action ceased to exist. The court reasoned that

> [t]he rule is well settled that parties to a case may not give a court jurisdiction over the subject matter if such jurisdiction does not legally exist. By the same process of reasoning it must be said that they cannot by stipulation empower a court to hear and determine an alleged cause of action that does not in fact exist.

Id. at 381-82, 76 N.W.2d at 21-22. See, also, *Blodgett v. Greenfield*, 101 Cal. App. 399, 401, 281 P. 694, 694-95 (1929)

("[a]n executrix in her representative capacity could not bind the estate which she represents by inadvertently answering to a charge against the deceased which does not survive and which is barred by the event of his death").

[3] We find the above reasoning persuasive and conclude that because Jeffrey's action abated at his death and did not survive, the action abated absolutely and ceased to exist. J.B.'s action in requesting genetic testing from the district court did not act to waive that abatement. As such, the district court did not err in denying Janet's motion for revivor. Janet's first assignment of error is without merit.

Unconstitutionality of § 43-1802(1)(c)

Janet next argues that the district court erred in not finding § 43-1802(1)(c), dealing with grandparent visitation, unconstitutional. In connection with this argument, Janet contends she will be denied grandparent visitation if she is not permitted to revive Jeffrey's paternity action and get a paternity determination. With regard to this issue, the district court found that the grandparent visitation statutes were not implicated in a paternity determination, and thus the district court did not reach the question of whether § 43-1802(1)(c) was unconstitutional.

As an initial matter, we agree with the district court that the grandparent visitation statutes are not directly implicated in a paternity determination. The relevant paternity statutes, see, generally, Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 2004), make no mention of grandparent visitation. Instead, Neb. Rev. Stat. § 43-1803 (Reissue 2004) provides the procedure for requesting grandparent visitation. The record indicates that Janet has not requested grandparent visitation under this section in the case under review.

[4] Given the absence of a grandparent visitation claim, Janet lacks standing to challenge the constitutionality of § 43-1802(1)(c) in this case. Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of

a protected right. *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999). In the case before us, Janet cannot show that she has been or is about to be deprived of a protected right under § 43-1802(1)(c). This assignment of error is without merit.

Motion to Compel

Finally, Janet argues that the district court erred in denying her motion to compel release of the results of the genetic testing. We have concluded that the district court was correct in finding the paternity action abated upon Jeffrey's death and did not survive and that thus, the court did not err in denying Janet's motion for revivor. Given this determination, following Jeffrey's death, there ceased to be an action and thus the motion to compel was a nullity. Janet's assignment of error with respect to the motion to compel is without merit.

CONCLUSION

We conclude that the paternity action in this case did not survive the death of the putative father. As such, the district court did not err in denying the motion for revivor. The decision of the district court is affirmed.

Affirmed.

Gary Simms, appellee, v. Vicorp Restaurants, Inc., appellant.

725 N.W.2d 406

Filed December 15, 2006. No. S-05-827.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Damages: Marriage: Words and Phrases.** Damages for loss of consortium represent compensation for a spouse who has been deprived of rights to which he or she is entitled because of the marriage relationship, namely, the other spouse's affection, companionship, comfort, and assistance and particularly his or her conjugal society.
3. **Claims: Marriage.** Although a loss of consortium claim derives from the harm suffered by the injured spouse, it remains a personal legal claim which is separate and distinct from those claims belonging to the injured spouse.

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court affirmed.

Christopher M. Ferdico, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Jamie Gaylene Scholz, of Shasteen & Scholz, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Gary Simms brought a loss of consortium claim against Vicorp Restaurants, Inc. (Vicorp). The county court for Lancaster County dismissed Simms' claim and entered summary judgment in favor of Vicorp. The district court for Lancaster County reversed the county court's decision, and Vicorp now appeals. We affirm.

BACKGROUND

Simms' wife, Dianna Simms, was injured as a result of a slip-and-fall accident on December 20, 2000, at a Village Inn restaurant owned by Vicorp. Dianna settled her personal injury claim with Vicorp on April 5, 2004, and signed a document captioned "Release of All Claims." Simms was aware of Dianna's settlement and her release of claims, but did not sign or otherwise join in the release. Simms did not assign his loss of consortium claim to Dianna and did not release his separate claim. After Dianna signed her release, Simms brought the present claim for loss of consortium against Vicorp. Vicorp filed a motion for summary judgment, which was granted by the county court. The county court's reasoning is not in the record before this court.

Simms appealed the county court's decision, and the district court reversed. In its order, the district court determined that Simms' claim was not barred as a result of the settlement and release of Dianna's claim. Vicorp now appeals the decision of the district court.

ASSIGNMENTS OF ERROR

Vicorp assigns that the district court erred in (1) reversing the order of summary judgment in favor of Vicorp; (2) failing to apply the applicable rule from *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985); (3) interpreting *Johnston*; and (4) declining to require that Simms must have commenced his purely derivative loss of consortium claim prior to the extinguishment of the primary claim.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Crouse v. Pioneer Irr. Dist., ante* p. 276, 719 N.W.2d 722 (2006); *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006).

ANALYSIS

The question presented by this appeal is whether a husband's loss of consortium claim is barred when the injured wife signs her individual release and settles with the tort-feasor. Vicorp argues that Dianna's release bars Simms' claim for loss of consortium. We disagree.

Vicorp relies on this court's opinion in *Johnston v. State, supra*, wherein we held in a workers' compensation case that the spouse of an injured employee could not maintain an independent cause of action for loss of consortium. In *Johnston*, the injured employee sought recovery for injuries sustained as a result of consuming an industrial cleaning product, and the spouse sought recovery for his loss of consortium. We determined on appeal that the injured employee's exclusive remedy was provided under the Nebraska Workmen's Compensation Act. In accordance with Neb. Rev. Stat. § 48-148 (Reissue 1984), we held that the district court lacked jurisdiction to adjudicate the spouse's loss of consortium claim. We reasoned that states addressing the issue of whether a spouse may maintain a separate action against the employee-spouse's employer for losses "have generally held that if the employee-spouse's right of recovery must be brought under the state workmen's compensation law or not at all, the nonemployee spouse may not impose liability upon the employer." 219 Neb. at 463-64, 364

N.W.2d at 5. *Johnston* is factually distinguishable from the present case and is not controlling of our determination of the issue presented here.

In this case, Dianna had an alleged cause of action against Vicorp for injuries sustained in her fall and, unlike the injured spouse in *Johnston*, was not prohibited from bringing that claim in the district court. Under the general rule, Simms could ordinarily bring a claim for loss of consortium in the district court. The question in this case, however, is, Does Dianna's release of liability change the general rule? We conclude that it does not.

We have not previously considered whether a spouse may maintain a loss of consortium claim against a defendant when the injured spouse has released his or her claim. Courts in other jurisdictions have had occasion to do so and have generally held that a spouse may maintain a loss of consortium claim.

In *Huffer v. Kozitza*, 375 N.W.2d 480 (Minn. 1985), the Minnesota Supreme Court held that a spouse's loss of consortium claim was not barred where the injured spouse settled his claim and signed a general release before the spouse commenced her derivative claim for loss of consortium. The *Huffer* court explained, "We think claimants and defendants, in their settlement negotiations, should be left to protect themselves from duplication of damages for loss of consortium. Consequently, [the injured spouse], by releasing his personal injury claim, did not release his wife's consortium claim." 375 N.W.2d at 482.

The Wisconsin Supreme Court similarly held that an exculpatory contract entered into prior to injury, which released a defendant from liability, did not defeat the spouse's right to recover for loss of consortium. See *Arnold v. Shawano County Agr. Society*, 111 Wis. 2d 203, 330 N.W.2d 773 (1983), *overruled on other grounds, Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 401 N.W.2d 816 (1987). Despite the derivative nature of the claim, see *Peeples v. Sargent*, 77 Wis. 2d 612, 253 N.W.2d 459 (1977), the court in *Arnold v. Shawano County Agr. Society* stated that "an action for consortium occasioned by a spouse's injury is a separate cause of action which never belonged to the other spouse," 111 Wis. 2d at 214, 330 N.W.2d at 779.

The Ohio Supreme Court reached a similar decision in *Bowen v. Kil-Kare, Inc.*, 63 Ohio St. 3d 84, 585 N.E.2d 384 (1992). In

Bowen, the court noted that a spouse's consortium claim is his or her separate, independent claim, which cannot be released by the injured spouse. See, also, the following cases wherein the respective courts found that a release executed by an injured party does not bar his or her spouse's claim for loss of consortium: *Nealy v. Fluor Drilling Services, Inc.*, 524 F. Supp. 789 (W.D. La. 1981); *Fleischman v. Harwood*, 10 F.R.D. 139 (S.D.N.Y. 1950); *Ryter v. Brennan*, 291 So. 2d 55 (Fla. App. 1974), *cert. denied* 297 So. 2d 836 (Fla.); *Rosander v. Copco Steel & Engineering Co.*, 429 N.E.2d 990 (Ind. App. 1982); *Shepherd v. Consumers Cooperative Association*, 384 S.W.2d 635 (Mo. 1964); *Buttermore v. Aliquippa Hosp.*, 522 Pa. 325, 561 A.2d 733 (1989); and *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978). We agree with the reasoning of these cases.

[2,3] We have described damages for loss of consortium as representing compensation for a spouse who has been deprived of rights to which he or she is entitled because of the marriage relationship, namely, the other spouse's affection, companionship, comfort, and assistance and particularly his or her conjugal society. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). Although a loss of consortium claim derives from the harm suffered by the injured spouse, see *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985), it remains a personal legal claim which is separate and distinct from those claims belonging to the injured spouse, see *Bowen v. Kil-Kare, Inc., supra*. As explained by the Missouri Court of Appeals,

> [w]hen a married person is injured, two causes of action arise: one accrues to the injured person for the injuries suffered directly by him or her, and the other accrues to the injured person's spouse for damages suffered as a result of the loss of the injured person's services, society, companionship, and sexual relations (loss of consortium).

O'Neal v. Agee, 8 S.W.3d 238, 242 (Mo. App. 1999).

In this case, Dianna entered into a settlement with Vicorp for injuries she sustained as a result of her fall. Her settlement and subsequent release were executed only by her. There is no evidence in the record that Dianna's release was a release of the claims of her husband, Simms, arising out of her injury or that she had authority to release such claims. We find, therefore, that

Dianna's release does not bar Simms' independent claim for loss of consortium.

CONCLUSION

We affirm the decision of the district court.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD C. BARNES, APPELLANT.

724 N.W.2d 807

Filed December 15, 2006. No. S-06-351.

1. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
4. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
5. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
6. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.
7. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.

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

Ted M. Lohrberg, of Johnson, Morland, Easland & Lohrberg, P.C., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

STEPHAN, J.

Richard C. Barnes appeals from an order of the district court for Pierce County denying his motion for postconviction relief after an evidentiary hearing. We find no error and affirm.

I. BACKGROUND

On March 8, 1994, Barnes pled guilty to one count of first degree murder and one count of use of a weapon to commit a felony. Pursuant to a plea agreement, the State did not offer evidence of aggravating circumstances at sentencing, and Barnes was sentenced to life imprisonment on the murder conviction on April 14, 1994. On the same date, Barnes was sentenced to a term of no less than 6⅔ years' imprisonment and no more than 20 years' imprisonment on the use of a weapon conviction. The district court did not give Barnes credit for time served. No direct appeal was filed.

Barnes filed an amended petition seeking postconviction relief on November 10, 2004. In his petition, he alleged that he received ineffective assistance of counsel prior to the time he entered his plea because his counsel failed to secure a psychological examination of him and failed to timely file a notice of intent to use the insanity defense. Barnes also alleged that his counsel was ineffective because counsel failed to file a direct appeal after Barnes requested that he do so. Finally, Barnes alleged that he was denied "fundamental due process [and] equal protection of the law" because the sentencing court failed to give him credit for time served against his sentence on the use of a weapon conviction. After conducting an evidentiary hearing, the district court denied postconviction relief. Barnes 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).

II. ASSIGNMENTS OF ERROR

Barnes assigns, restated and consolidated, that the district court erred in (1) failing to find that his trial counsel was ineffective and (2) dismissing the allegation in his postconviction motion that the trial court erred in not crediting him with time served.

III. STANDARD OF REVIEW

[1,2] On appeal from a proceeding for postconviction relief, the trial 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); *State v. Narcisse*, 264 Neb. 160, 646 N.W.2d 583 (2002). Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Moore, ante* p. 71, 718 N.W.2d 537 (2006); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

IV. ANALYSIS

1. Ineffective Assistance of Counsel

[3] Barnes' primary argument is that his trial counsel was ineffective. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005); *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. Marshall, supra*.

[4,5] Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought

by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004). When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

(a) Failure to File Direct Appeal

[6] Barnes alleges that his trial counsel failed to file a direct appeal after Barnes requested that he do so. After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000).

In his deposition received at the postconviction hearing, Barnes testified that after sentencing, he discussed filing an appeal with his attorney. According to Barnes, his attorney advised him that an appeal was not likely to be successful, but Barnes informed the attorney that "I would like to do it anyway." Trial counsel's deposition was also admitted as an exhibit at the postconviction hearing. Trial counsel testified that he discussed the merits of an appeal with Barnes both before the plea was entered and after the sentence was imposed. Counsel testified that Barnes did not ask him to file an appeal.

The district court determined that Barnes failed to establish that he directed his attorney to file an appeal. We find no clear error in this factual finding and affirm the district court's denial of postconviction relief on this ground.

(b) Psychological Examination

Barnes alleges that his trial counsel was ineffective because he failed to obtain a psychological examination of Barnes before the entry of the guilty plea. The record reveals that a motion for psychological examination was made on January 25, 1994. An

evidentiary hearing on the motion was held on January 27. Barnes presented no evidence in support of his motion, and the State presented evidence against it. The court denied the motion, finding there was no evidence to support granting it.

Barnes' trial counsel testified at the postconviction hearing that he discussed the issue of competency during his initial meetings with Barnes. Counsel did not pursue the issue, however, because he felt that Barnes understood the nature of the proceedings and knew the seriousness of what was taking place. Counsel specifically testified that in his opinion, insanity was not a viable defense for Barnes, and that he never had any sense that there was an issue about Barnes' competency. However, as the date for trial approached, Barnes decided that he wanted to pursue an insanity defense. His counsel therefore filed the motion requesting a psychological evaluation and filed a notice of intent to raise the insanity defense. The notice was filed within 60 days of the date of trial and was therefore untimely under the applicable statute. See Neb. Rev. Stat. § 29-2203 (Reissue 1995).

There is very little evidence in the record relating to Barnes' mental health. Barnes testified at the postconviction hearing that he had served 3 years in the military. He admitted he was never disciplined for misconduct during his service and was honorably discharged. Barnes testified that he had some "incidents" related to his military service that could cause one to conclude that he was insane or abnormal, but Barnes did not elaborate on these incidents during his testimony and there is no other evidence of these incidents in the record. In addition, Barnes generally admitted that these incidents involved merely a "de-program[ing]" process after his military service. There is no other evidence in the record of Barnes' psychological condition either at the time of the postconviction hearing or at the time he entered his guilty pleas.

Barnes relies on *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), in support of his argument that his counsel was ineffective for failing to secure a psychological examination. *Ake* held that an indigent defendant has the right to a psychological examination when he demonstrates that his sanity at the time of the offense is likely to be a significant factor in his defense. Nothing in the record before us, however, indicates

that trial counsel had any reason to believe, or that an investigation would have revealed, that Barnes' sanity at the time of the offense was seriously in question. Barnes has therefore failed to demonstrate that his trial counsel performed deficiently in failing to procure the psychological examination.

(c) Notice of Insanity Defense

Barnes alleges that his trial counsel was ineffective because counsel filed a notice to raise the insanity defense out of time. As noted, the record reveals that trial counsel had no concerns about Barnes' competency prior to the time the plea was entered, and there is no showing on this record that if the notice had been timely filed insanity would have been a viable defense. Moreover, Barnes has made no showing that had the notice been timely filed, he would have forgone the plea and insisted on going to trial. Thus, for many of the same reasons articulated above with respect to counsel's failure to secure a psychological examination of Barnes, we conclude that this allegation is without merit.

2. Credit for Time Served

[7] Barnes' postconviction motion alleged that the trial court erred in failing to give him credit for time served against his sentence on the weapon conviction. Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). An alleged sentencing error with respect to credit for time served does not fall within this narrow category of relief. Moreover, 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. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004). Because the sentencing issue could have been raised on direct appeal, it is procedurally barred in this action. The district court did not err in denying postconviction relief on this ground.

V. CONCLUSION

For the foregoing reasons, the decision of the district court denying postconviction relief is affirmed.

Affirmed.

Gerrard, J., not participating.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Stephen G. Charest, respondent.

724 N.W.2d 804

Filed December 15, 2006. No. S-06-1028.

Original action. Judgment of disbarment.

Heavican, 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, Stephen G. Charest. 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 23, 1998. On September 25, 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 is "currently under investigation by the Office of the Counsel for Discipline as a result of a grievance received from a former client." Respondent further stated that the allegations in the grievance, if proved to be true, would constitute a violation of respondent's oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997), and of Neb. Ct. R. of Prof. Cond. 8.4 (rev. 2005). The factual basis for the voluntary surrender was not stated.

Rule 8.4 provides as follows:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law or

(g) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a support order, as such order is defined by Nebraska law.

On October 12, 2006, the court entered on order directing the relator to provide the court with the factual basis for the voluntary surrender and further providing an opportunity for respondent to respond thereto. Relator filed a "Factual Basis in Support of Voluntary Surrender" on October 23. Respondent did not file a pleading in response.

Relator's pleading states, in summary, that respondent was retained by a client for the purpose of filing a divorce action against her husband, but that respondent admitted during the course of the investigation that he had failed to file a case on her behalf. Further, at some point, the client inquired about the status of her case, and respondent provided to her a document purporting to be a court order (Order) in her case. The document was entitled "Order for Default Hearing" and was purportedly signed by a judge of the district court for Lancaster County in the client's case. Although the plaintiff's name on the Order is that of respondent's client, the case number on the Order was

assigned to another case, and no actual order involving the client was ever entered. The Order given to the client was prepared by respondent.

In his voluntary surrender, respondent states that he knowingly does not contest the truth of the allegations made against him by his former client. 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 made against him in the grievance filed by his former client. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent voluntarily has stated that he knowingly does not contest the truth of the allegations in the grievance filed against him by a former client and that such allegations, if true, constitute a violation of rule 8.4 of the Nebraska Rules of Professional Conduct. 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.

STATE OF NEBRASKA EX REL. COLUMBUS METAL INDUSTRIES, INC., ET AL., APPELLANTS, V. AARON FERER & SONS CO., A NEBRASKA CORPORATION, ET AL., APPELLEES.

725 N.W.2d 158

Filed December 22, 2006. No. S-05-565.

1. **Statutes.** The meaning of a statute 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. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
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. **Corporations: Sales: Words and Phrases.** The phrase "all, or substantially all," as used in Neb. Rev. Stat. § 21-20,138(1)(c) (Reissue 1997), means a sale of corporate assets that, quantitatively or qualitatively, would result in a fundamental change in the nature of the corporation.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Sam R. Brower and Thomas C. Lauritsen, of Andersen, Lauritsen & Brower, for appellants.

Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellants, Columbus Metal Industries, Inc.; Commercial Metal Co.; Alpert & Alpert Iron & Metal, Inc.; A. Tenenbaum Co., Inc.; Central Nonferrous, Inc.; Michael Rosenberg; Colonial Metals Co.; Copperweld Corporation; Essex International, Inc.; Joseph Behr & Sons, Inc.; Joseph Simon & Sons, Inc.; Leonard Levine Metals Corp.; TJN Enterprises, Inc.; Lozier Corporation; Mandel Metals, Inc.; National Compressed Steel Corporation; Owen Industries, Inc., doing business as Paxton & Vierling Steel Co.; Prudential Securities Incorporated, formerly known as Bache & Co., Inc.; Shine Bros. Corp.; Sioux City Compressed Steel Co., Inc.; State Steel Supply Co., Inc.; and Prolerized Schiabo-Neu, now known as Hugo Neu Schnitzer East, are all shareholders of appellee Aaron Ferer & Sons Co. (AFS). Appellants initiated this action on June 2, 2004, in the district court for Douglas County seeking a writ of mandamus directing AFS and appellees Matthew Ferer and Whitney Ferer, members of the board of directors of AFS, to comply with Nebraska's Business Corporation Act dissenters' rights statutes, Neb. Rev. Stat. § 21-20,137 et seq. (Reissue 1997) (dissenters' rights statutes) by providing appellants with dissenters' rights, which would result in appellants' receiving the fair value of their AFS shares of stock from AFS. Appellants alleged they were entitled to their dissenters' rights as a result of certain sale transactions entered into by AFS and further as a result of a notice AFS provided to its shareholders of a special meeting during which shareholders would vote on whether to approve the sale transactions. The district court concluded that the sale transactions did not constitute a sale of all or substantially all of the property of AFS and further that the notice provided by AFS to appellants did not give rise to dissenters' rights. The district court dismissed appellants' complaint, and appellants have appealed. We conclude that neither the sale transactions nor the notice gave rise to dissenters' rights for appellants and that, therefore, appellants had no clear right to the relief they sought. Accordingly, the

district court did not err in denying the writ of mandamus and dismissing the case. We affirm.

STATEMENT OF FACTS

AFS is a Nebraska corporation, with its principal place of business in Omaha, Nebraska. Prior to the fall of 2001, the corporate headquarters of AFS were located at 909 Abbott Drive, where AFS owned an approximately 14-acre scrapyard on which it operated a scrap metal business, among other enterprises. Appellants are former AFS creditors who, as a result of a bankruptcy workout plan in the 1980's, were issued shares of AFS stock and thus became AFS shareholders. Matthew and Whitney are also AFS shareholders, and they own approximately 70 percent of the stock of AFS.

In the mid-1990's, the city of Omaha became interested in purchasing AFS' Abbott Drive property for redevelopment purposes. AFS resisted the city's efforts until March 2001, when, under threat of condemnation from the city, AFS entered into a real estate purchase agreement with the Omaha Development Foundation which was operating on behalf of the city of Omaha. AFS agreed to sell its Abbott Drive property to the city for $14 million (the City of Omaha agreement). The $14 million amount was composed of $6 million for the purchase of the property and $8 million for relocation assistance. The agreement was signed on March 10 and required AFS to vacate the property by September 25.

At the time AFS entered into the City of Omaha agreement, it was engaged in three lines of business: the purchasing and processing of scrap metal, which business it conducted at its scrapyard on Abbott Drive (the scrap metal operation); the trading of ferrous and nonferrous metals, which business it conducted in Omaha as well as in China and South America (the metal trading operation); and the demilitarization of military ordnance, which business it conducted either in Omaha or at or near the military base where the materials were located (the demilitarization operation). The scrapyard was not necessary to either the metal trading or the demilitarization operations. In the time period from 1992 to 2001, the metal trading and demilitarization operations constituted approximately 80 percent of

AFS' sales and more than 90 percent of its profits. The scrap metal operation was profitable 4 out of the 9 years and produced less than 7 percent of AFS' total profits during that time period.

Because of concerns about finding a new location from which it could operate its scrap metal operation following the sale of its Abbott Drive property, on March 7, 2001, AFS entered into an agreement with Alter Trading Corporation to sell to that company certain inventory and equipment related to the scrap metal operation for approximately $1.5 million (the Alter agreement).

Despite entering into the City of Omaha and Alter agreements, AFS retained significant business assets. Notably, the AFS assets relating to the profitable metal trading and demilitarization operations were not included in the sale agreements. AFS retained approximately $3 million in inventory, its accounts receivable, its trade name, certain office furniture and equipment, and its corporate goodwill. AFS excluded these items in anticipation of finding suitable property to relocate its retained metal trading and demilitarization operations. These two operations were in fact relocated and continued to operate.

Because AFS was not certain in March 2001, however, that it could relocate successfully before September 25 and thus might subsequently need to liquidate all of its operations, AFS sent out a notice on March 27, 2001, to all shareholders, including appellants, of a special shareholders' meeting to be held on April 13, 2001. As indicated in the notice, the purpose of the meeting was to vote on the approval of the City of Omaha and Alter agreements. The notice also advised the shareholders that AFS "will continue to do business after the consummation of the [City of Omaha and Alter agreements]" but that "a sale of all or substantially all of" the property of AFS under Neb. Rev. Stat. § 21-20,136 (Reissue 1997) of Nebraska's Business Corporation Act could occur. Section 21-20,136 provides, inter alia, that "[a] corporation may sell . . . all, or substantially all, of its property . . . otherwise than in the usual and regular course of business . . . if the board of directors proposes and its shareholders approve the proposed transaction." Thus, the notice advised shareholders of the vote on the City of Omaha and Alter agreements and generally advised the shareholders of the existence of dissenters' rights, which, when properly exercised, would

provide to dissenters the fair value of their AFS shares in the event of a sale of all or substantially all of the property of AFS, which sale would cause AFS to cease its operations.

At the April 13, 2001, special shareholders' meeting, appellants provided written notice pursuant to § 21-20,141 of their intent to dissent from the City of Omaha and Alter agreements. The agreements were approved at the shareholders' meeting, and the sales transactions were finalized.

In July 2001, AFS found a suitable site at 155 Ida Street in Omaha to relocate its business operations. On August 1, AFS sent notice to its shareholders that it would be relocating to a new site and that it would continue to conduct its metal trading and demilitarization operations. In the August 1 notice, AFS informed shareholders that a portion of the proceeds from the City of Omaha and Alter agreements would be distributed to shareholders pursuant to a plan of partial liquidation. According to the August 1 notice, "[e]ach Shareholder, in addition to receiving their [sic] share of the net proceeds of the sale, will continue to retain ownership of all of their [sic] shares in [AFS]."

In late September 2001, AFS completed its purchase of the Ida Street property and moved its business operations to the new location. In March 2002, AFS distributed to appellants their pro rata share of the proceeds from the City of Omaha and Alter agreements, which, after deducting certain taxes and expenses, amounted to $12.83 per share. Appellants accepted these proceeds and retained their stock.

On June 2, 2004, appellants filed their complaint in the instant action, seeking a writ of mandamus directing appellees to comply with Nebraska's dissenters' rights statutes. Appellants claimed that the City of Omaha and Alter agreements constituted a sale of all or substantially all of the property of AFS and that, thus, they were entitled to dissenters' rights under § 21-20,138(1)(c) (dissenters' rights triggered by sale of all or substantially all of corporation's property). Alternatively, appellants claimed that the March 27, 2001, notice to shareholders created dissenters' rights under § 21-20,138(1)(e) (dissenters' rights triggered by provisions in articles of incorporation, bylaws, or resolution). For the sake of completeness, we

note that another lawsuit seeking dissenters' rights, initiated by AFS shareholders other than appellants, was also filed against AFS. The district court's decision in that action is on appeal to this court and is resolved by separate opinion. See *Ferer v. Aaron Ferer & Sons, post* p. 770, 725 N.W.2d 168 (2006).

An evidentiary hearing on appellants' complaint seeking the writ of mandamus in the instant case was held on September 17, 2004. Two witnesses testified live, and the parties stipulated to the district court's receipt of numerous exhibits including those reflecting the financial condition of AFS. In its opinion and order filed April 18, 2005, the court found that the City of Omaha and Alter agreements did not constitute the sale of all or substantially all of the property of AFS under § 21-20,138(1)(c), because the sales did not affect either the metal trading or demilitarization operations that generated the majority of sales for AFS. With regard to appellants' claim for dissenters' rights under § 21-20,138(1)(e), the court found no evidence of any articles of incorporation, bylaws, or the March 27, 2001, notice that created dissenters' rights. The district court denied appellants' request for a writ of mandamus and dismissed appellants' complaint.

Appellants have appealed. We affirm.

ASSIGNMENT OF ERROR

On appeal, appellants have assigned two errors that we restate as one. Appellants claim, restated, that the district court erred in failing to find that appellants were entitled to dissenters' rights either because the City of Omaha and Alter agreements constituted a sale of all or substantially all of the property of AFS pursuant to § 21-20,138(1)(c) or because the March 27, 2001, notice gave appellants dissenters' rights pursuant to § 21-20,138(1)(e).

STANDARDS OF REVIEW

[1,2] The meaning of a statute is a question of law. *Bohaboj v. Rausch, ante* p. 394, 721 N.W.2d 655 (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. *Crouse v. Pioneer Irr. Dist., ante* p. 276, 719 N.W.2d 722 (2006).

ANALYSIS

Appellants argue that the City of Omaha and Alter agreements and the March 27, 2001, notice AFS sent to its shareholders triggered dissenters' rights and that they were thus entitled to receive the fair value of their AFS stock. Appellants claim on appeal that the district court erred when it denied appellants a writ of mandamus and dismissed their complaint. In response, appellees assert that appellants had no clear right to the relief they sought in their complaint for mandamus and that, therefore, the district court did not err when it denied the writ and dismissed the complaint. We agree with appellees. Because appellants had no clear right to the relief they sought, the district court did not err in denying the writ of mandamus and dismissing appellants' complaint.

[3,4] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *Crouse v. Pioneer Irr. Dist., supra*; Neb. Rev. Stat. §§ 25-2156 to 25-2169 (Reissue 1995 & Cum. Supp. 2006). 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. *State ex rel. Musil v. Woodman*, 271 Neb. 692, 716 N.W.2d 32 (2006).

Appellants contend they are entitled to dissenters' rights pursuant to § 21-20,138(1)(c) and (e), which provide as follows:

> (1) A shareholder shall be entitled to dissent from, and obtain payment of the fair value of his or her shares in the event of, any of the following corporate actions:
>
> . . . .
>
> (c) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business if the shareholder is entitled to vote on the sale or exchange [or]

> (e) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, the bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

A dissenting shareholder is defined under § 21-20,137(3) as "a shareholder who is entitled to dissent from corporate action under section 21-20,138 and who exercises that right when and in the manner required by sections 21-20,140 to 21-20,148." Generally, under Nebraska's dissenters' rights statutes, if one of the enumerated corporate actions in § 21-20,138 occurs, a dissenting shareholder is entitled to receive the "fair value" of his or her shares. See § 21-20,138. "Fair value" is defined as "the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects." § 21-20,137(4). If the corporation and the dissenter fail to agree on the fair value of the shares, a court proceeding can be filed to obtain a judicial determination as to the fair value of the shares. § 21-20,149.

This court has previously noted the policy behind these provisions of the dissenters' rights statutes. We stated:

> "At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate. To meet the situation, legislatures authorized the making of changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted."

Rigel Corp. v. Cutchall, 245 Neb. 118, 125, 511 N.W.2d 519, 523-24 (1994) (quoting *Voeller v. Neilston Co.*, 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 322 (1941)). See, also, 12B William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 5906.10 at 338-41 (perm. ed., rev. vol. 2000 & Cum. Supp. 2005) (stating that in order to "afford some relief to dissent[ing shareholders from actions by the majority] in all jurisdictions statutes were enacted . . . that give the dissenters the right to receive the cash value of their stock and [if necessary] provide for an appraisal where no agreement as to value can be

reached. . . . The purpose of these statutes is to protect the property rights of dissenting shareholders from actions by the majority shareholders which alter the character of their investment”).

Appellants claim they are entitled to dissenters’ rights under § 21-20,138(1)(c), because the City of Omaha and the Alter agreements constituted “a sale . . . of all, or substantially all” of the property of AFS. In support of their argument, appellants assert that under the agreements, AFS sold 100 percent of its improved and unimproved real estate, together with almost 92 percent of its equipment. Appellees respond that appellants’ arguments ignore “the nature and value of the property retained by [AFS] after the consummation of the [City of Omaha and Alter sale agreements].” Brief for appellees at 16.

Resolution of appellants’ claim on appeal requires a determination of the meaning of “all, or substantially all” as used in the context of § 21-20,138(1)(c), a question this court has not previously addressed. The dissenters’ rights statutes do not define the phrase “all, or substantially all.” We note, however, that Nebraska’s Business Corporation Act, including the dissenters’ rights statutes, is based upon the 1984 version of the Model Business Corporation Act. See, generally, 1995 Neb. Laws, L.B. 109. The official comment 1 to § 12.01 of the Model Business Corporation Act, which is similar to Neb. Rev. Stat. § 21-20,135 (Reissue 1997), has explained the meaning of “all, or substantially all” in connection with a board of directors’ ability to conduct the usual and regular course of business without shareholder approval, and we believe that explanation is equally applicable to the phrase “all, or substantially all” in the Nebraska dissenters’ rights statutes, § 21-20,138(1)(c). The comment states:

> The phrase “all or substantially all,” chosen by the draftsmen of the Model Act, is intended to mean what it literally says, “all or substantially all.” The phrase “substantially all” is synonymous with “nearly all” and was added merely to make it clear that the statutory requirements could not be avoided by retention of some minimal or nominal residue of the original assets. A sale of all the corporate assets other than cash or cash equivalents is normally the sale of “all or substantially all” of the corporation’s

> property. A sale of several distinct manufacturing lines while retaining one or more lines is normally not a sale of "all or substantially all" even though the lines being sold are substantial and include a significant fraction of the corporation's former business. . . . Similarly, a sale of a plant but retention of operating assets (e.g., machinery and equipment), accounts receivable, good will, and the like with a view toward continuing the operation at another location is not a sale of "all or substantially all" the corporation's property.

3 Model Business Corporation Act Ann. § 12.01, official comment at 12-3 (3d ed. 1984 & Supp. 1996).

As anticipated by the foregoing comment, courts have compared retained assets to transferred assets to determine whether "all, or substantially all" of the property of the corporation has been sold. In this regard, it has been stated that "the mere fact that the corporation remained in business under the same name is not the critical criterion. . . . Our focus is upon the relationship between the assets transferred and those remaining." *Waters v. Double L, Inc.*, 114 Idaho 256, 268, 755 P.2d 1294, 1306 (Idaho App. 1987).

With regard to the transfer of corporate assets, the phrase "all, or substantially all" or comparable phrases have been adopted in all 50 states. *Sterman v. Hornbeck*, 156 Wis. 2d 556, 457 N.W.2d 874 (1990). See 6A William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 2949.20 (perm. ed., rev. vol. 2005). Case law from other jurisdictions is instructive as to the meaning of "all, or substantially all." It is generally acknowledged that a principle has emerged from the decisions of other courts that "a disposition of corporate assets may be considered 'substantially all' if either its quantitative or qualitative impact, or both, would fundamentally change the nature of the corporation." *Butcher v. Girl Scouts of Tribal Trails*, 779 N.E.2d 946, 949 (Ind. App. 2002). See, also, *Sterman v. Hornbeck*, 156 Wis. 2d at 564-65, 457 N.W.2d at 878 (stating that "[s]everal states have had occasion to interpret the phrase 'substantially all,' and have found it applicable to the sale or transfer of major assets which change the nature of the corporate business or purpose").

In *South End Imp. Group v. Mulliken*, 602 So. 2d 1327, 1332 (Fla. App. 1992), the court reviewed the decisions from a number of jurisdictions and stated:

> Other jurisdictions have considered both quantitative and qualitative factors in determining whether a proposed transaction triggers dissenters' rights. . . .
>
> Shareholder notice and consent requirements . . . and dissenters' rights statutes . . . are intended to [e]nsure that directors do not fundamentally change the nature of the shareholders' investments without the check and balance of informed shareholder approval, and the opportunity for dissenters to withdraw from the corporation.

See, also, *Campbell v. Vose*, 515 F.2d 256 (10th Cir. 1975) (stating that transfer of one-third of assets, which constituted entirety of operating assets, was substantially all because was last step in corporate organization); *Gimbel v. Signal Companies, Inc.*, 316 A.2d 599 (Del. Ch. 1974) (stating that sale is of all or substantially all if it substantially affects existence and purpose of corporation), *affirmed* 316 A.2d 619 (Del.).

[5] We agree with the principle recognized in the foregoing quoted material that an examination whether there has been a change in the nature of the underlying corporate business is central to a determination of whether there has been a sale of "all, or substantially all" of the corporation's property. Accordingly, we conclude that the phrase "all, or substantially all," as used in § 21-20,138(1)(c), means a sale of corporate assets that, quantitatively or qualitatively, would result in a fundamental change in the nature of the corporation. See *Sterman v. Hornbeck*, 156 Wis. 2d at 565, 457 N.W.2d at 878 (stating that "[t]he determinative factor is whether the sale changes the nature of the corporate activity").

Applying this standard to the instant case, we determine that the district court did not err when it found that the City of Omaha and the Alter agreements were not a sale of "all, or substantially all" of the property of AFS under § 21-20,138(1)(c). At the time of the sales, AFS was engaged in three distinct lines of business, the scrap metal operation, the metal trading operation, and the demilitarization operation. As a result of the City of Omaha and the Alter agreements, AFS essentially ceased one

line of business, the scrap metal operation, and the two other lines of business remained. The record supports the district court's findings that these two lines had produced approximately 80 percent of AFS' sales and more than 90 percent of its profits for the 9 years leading up to the City of Omaha and Alter agreements, whereas the scrap metal operation had lost money 5 out of those 9 years. The record further supports the district court's finding that notwithstanding the sale of its scrap metal operation, AFS retained significant assets, including two-thirds of its $4.6 million in inventory, its accounts receivable, its trade name, certain office furniture and equipment, and its corporate goodwill.

The City of Omaha and the Alter agreements did not effect a fundamental change in the nature of the business of AFS and did not constitute a sale of "all, or substantially all" of the property of AFS. Accordingly, there is no merit to appellants' claim that they are entitled to dissenters' rights under § 21-20,138(1)(c).

We similarly find no merit to appellants' argument that they were entitled to dissenters' rights under § 21-20,138(1)(e) by virtue of the March 27, 2001, notice to shareholders. Subsection (1)(e) provides that shareholders are entitled to dissenters' rights if such rights have been provided for by the corporation's "articles of incorporation, the bylaws, or by a resolution of the board of directors." In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *State v. County of Lancaster, ante* p. 376, 721 N.W.2d 644 (2006). Appellants have provided this court with no basis or authority to ignore the plain meaning of § 21-20,138(1)(e). Thus, appellants are entitled to dissenters' rights under § 21-20,138(1)(e), if entitlement is provided for by an article of incorporation, a bylaw, or a resolution. Appellants have not directed this court to any AFS articles of incorporation, bylaws, or resolutions that provide explicitly or implicitly for dissenters' rights, and the March 27, 2001, notice is not the equivalent of the enumerated forms of entitlement. See, generally, Neb. Rev. Stat. § 21-2055 (Reissue 1997) (discussing content requirements for notice of special shareholders' meeting). Accordingly, the district court did not err when it concluded that appellants were not entitled to dissenters' rights under § 21-20,138(1)(e).

In this mandamus action, appellants bear the burden of demonstrating clearly and conclusively that they are entitled to the particular thing they want, dissenters' rights, and that appellees are legally obligated to act. See *State ex rel. Musil v. Woodman*, 271 Neb. 692, 716 N.W.2d 32 (2006). We have reviewed the record in this case. As the district court concluded, appellants have failed to carry their burden of demonstrating that they were entitled to dissenters' rights. Because appellants have not demonstrated that they had a clear right to the relief they sought, we conclude that the district court did not err in denying appellants their requested writ of mandamus and in dismissing appellants' complaint.

CONCLUSION

Appellants were not entitled to the writ of mandamus ordering appellees to provide them with dissenters' rights. We affirm the order of the district court denying appellants the writ of mandamus and dismissing their complaint.

AFFIRMED.

HEAVICAN, C.J., not participating.

AARON FERER AND ROBIN MONSKY, APPELLANTS AND CROSS-APPELLEES, V. AARON FERER & SONS CO., A NEBRASKA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

725 N.W.2d 168

Filed December 22, 2006. No. S-05-954.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
4. **Prejudgment Interest: Claims.** Prejudgment interest under Neb. Rev. Stat. § 45-103.02 (Reissue 2004) is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either plaintiff's right to recover or the

amount of such recovery. A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

James D. Sherrets and Jason M. Bruno, of Sherrets & Boecker, L.L.C., for appellants.

Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellee Aaron Ferer & Sons Co.

Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers & McCormack, for appellees Matthew Ferer and Whitney Ferer.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellants, Aaron Ferer and Robin Monsky, are shareholders of Aaron Ferer & Sons Co. (AFS). Appellants initiated this action on August 15, 2001, in the district court for Douglas County against appellee AFS and additional appellees Matthew Ferer and Whitney Ferer, Aaron's brothers and members of the board of directors of AFS. Appellants' fourth amended complaint is the operative complaint for purposes of this appeal (complaint). In their complaint, appellants allege eight "causes of action." Relevant to this appeal are appellants' first through sixth "causes of action," which, in summary, sought (1) to compel appellees to comply with Nebraska's Business Corporation Act dissenters' rights statutes, Neb. Rev. Stat. § 21-20,137 et seq. (Reissue 1997) (dissenters' rights statutes) by providing appellants with dissenters' rights, which would result in appellants' receiving the fair value of their AFS shares of stock from AFS, (2) to compel appellees to pay to appellants their pro rata share of proceeds from the sale of certain AFS assets; and (3) to receive prejudgment interest from appellees.

In the course of litigation, appellants asserted they were entitled to their dissenters' rights pursuant to § 21-20,138(1)(c) as a result of certain sale transactions entered into by AFS, and pursuant to § 21-20,138(1)(e) as a result of a notice AFS provided

to its shareholders of a special meeting during which shareholders would vote on whether to approve the sale transactions. Appellants claimed that they were also entitled to their share of sale proceeds because they had satisfied all of the necessary requirements to receive the distribution of such proceeds. Finally, appellants claimed they were entitled to prejudgment interest on the unpaid proceeds.

The parties each filed motions for summary judgment, which the district court treated as cross-motions for summary judgment on appellants' first through sixth "causes of action." Following an evidentiary hearing, the district court, in summary, denied appellants' claim that they were entitled to dissenters' rights, ordered appellees to pay appellants their pro rata share of the sale proceeds, plus certain interest, and denied appellants' claim for prejudgment interest. The district court issued an order pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006) indicating that there was no reason for delay and entering judgment on the first through sixth "causes of action." This appeal and cross-appeal followed.

We determine that the district court did not err in denying appellants' claim that they were entitled to dissenters' rights claimed under § 21-20,138(1)(c) and (e). We further determine that the district court did not err in denying appellants prejudgment interest. Finally, we conclude that the district court did not err in ordering appellees to pay to appellants their pro rata share of the sale proceeds. In view of our determinations, we affirm the rulings of the district court and we do not reach appellees' cross-appeal.

STATEMENT OF FACTS

This case shares many of the underlying facts set forth in *State ex rel. Columbus Metal v. Aaron Ferer & Sons, ante* p. 758, 725 N.W.2d 158 (2006), the mandamus action. Because the record in this case contains many of the same facts as those set out in the mandamus action, we repeat the following facts recited in that opinion:

> AFS is a Nebraska corporation, with its principal place of business in Omaha, Nebraska. Prior to the fall of 2001, the corporate headquarters of AFS were located at 909

Abbott Drive, where AFS owned an approximately 14-acre scrapyard on which it operated a scrap metal business, among other enterprises. Appellants [are] AFS shareholders. Matthew and Whitney are also AFS shareholders, and they own approximately 70 percent of the stock of AFS.

In the mid-1990's, the City of Omaha became interested in purchasing AFS' Abbott Drive property for redevelopment purposes. AFS resisted the city's efforts until March 2001, when, under threat of condemnation from the city, AFS entered into a real estate purchase agreement with the Omaha Development Foundation which was operating on behalf of the city of Omaha. AFS agreed to sell its Abbott Drive property to the city for $14 million (the City of Omaha agreement). The $14 million amount was composed of $6 million for the purchase of the property and $8 million for relocation assistance. The agreement was signed on March 10 and required AFS to vacate the property by September 25.

At the time AFS entered into the City of Omaha agreement, it was engaged in three lines of business: the purchasing and processing of scrap metal, which business it conducted at its scrapyard on Abbott Drive (the scrap metal operation); the trading of ferrous and nonferrous metals, which business it conducted in Omaha as well as in China and South America (the metal trading operation); and the demilitarization of military ordnance, which business it conducted . . . in Omaha [and elsewhere] (the demilitarization operation). The scrapyard was not necessary to either the metal trading or the demilitarization operations. In the time period from 1992 to 2001, the metal trading and demilitarization operations constituted approximately 80 percent of AFS' sales and more than 90 percent of its profits. The scrap metal operation was profitable 4 out of the 9 years and produced less than 7 percent of AFS' total profits during that time period.

Because of concerns about finding a new location from which it could operate its scrap metal operation following the sale of its Abbott Drive property, on March 7, 2001, AFS entered into an agreement with Alter Trading Corporation to

sell to that company certain inventory and equipment related to the scrap metal operation for approximately $1.5 million (the Alter agreement).

Despite entering into the City of Omaha and Alter agreements, AFS retained significant business assets. Notably, the AFS assets relating to the profitable metal trading and demilitarization operations were not included in the sale agreements. AFS retained approximately $3 million in inventory, its accounts receivable, its trade name, certain office furniture and equipment, and its corporate goodwill. AFS excluded these items in anticipation of finding suitable property to relocate its retained metal trading and demilitarization operations. These two operations were in fact relocated and continued to operate.

Because AFS was not certain in March 2001, however, that it could relocate successfully before September 25 and thus might subsequently need to liquidate all of its operations, AFS sent out a notice on March 27, 2001, to all shareholders, including appellants, of a special shareholders' meeting to be held on April 13, 2001. As indicated in the notice, the purpose of the meeting was to vote on the approval of the City of Omaha and Alter agreements. The notice also advised the shareholders that AFS "will continue to do business after the consummation of the [City of Omaha and Alter agreements]" but that "a sale of all or substantially all of" the property of AFS under Neb. Rev. Stat. § 21-20,136 (Reissue 1997) of Nebraska's Business Corporation Act could occur. Section 21-20,136 provides, inter alia, that "[a] corporation may sell . . . all, or substantially all, of its property . . . otherwise than in the usual and regular course of business . . . if the board of directors proposes and its shareholders approve the proposed transaction." Thus, the notice advised shareholders of the vote on the City of Omaha and Alter agreements and generally advised the shareholders of the existence of dissenters' rights, which, when properly exercised, would provide to dissenters the fair value of their AFS shares in the event of a sale of all or substantially all of the property of AFS, which sale would cause AFS to cease its operations.

> At the April 13, 2001, special shareholders' meeting, appellants provided written notice pursuant to § 21-20,141 of their intent to dissent from the City of Omaha and Alter agreements. The agreements were approved at the shareholders' meeting, and the sales transactions were finalized.
>
> In July 2001, AFS found a suitable site at 155 Ida Street in Omaha to relocate its business operations. On August 1, AFS sent notice to its shareholders that it would be relocating to a new site and that it would continue to conduct its metal trading and demilitarization operations. In the August 1 notice, AFS informed shareholders that a portion of the proceeds from the City of Omaha and Alter agreements would be distributed to shareholders pursuant to a plan of partial liquidation. According to the August 1 notice, "[e]ach Shareholder, in addition to receiving their [sic] share of the net proceeds of the sale, will continue to retain ownership of all of their [sic] shares in [AFS]."

State ex rel. Columbus Metal v. Aaron Ferer & Sons, ante p. 758, 760-62, 725 N.W.2d 158, 161-62 (2006).

Included in the August 1, 2001, notice was a "Request for Payment Form" that each shareholder was required to execute and return to AFS in order to receive that shareholder's pro rata share of the sale proceeds. The form included such information as the "Shareholder Name" and the "Number of Shares Owned," and required the shareholder to sign a certification that the information included in the form was "true, correct, and complete."

On August 15, 2001, appellants filed the instant action, seeking, inter alia, a declaration of dissenters' rights with respect to the sale transactions. In the course of litigation, appellants claimed, in effect, that the City of Omaha and Alter agreements constituted a sale of all or substantially all of the property of AFS and that, thus, they were entitled to dissenters' rights under § 21-20,138(1)(c) (dissenters' rights triggered by sale of all or substantially all of corporation property). Alternatively, appellants claimed that the March 27, 2001, notice to shareholders created dissenters' rights under § 21-20,138(1)(e) (dissenters' rights triggered by provisions in articles of incorporation, bylaws, or resolution).

In late September 2001, AFS completed its purchase of the Ida Street property and moved its continuing business operations to the new location. In March 2002, AFS distributed $12.83 per share to those shareholders who had submitted the request for payment forms. The $12.83 represented a pro rata share of the proceeds from the City of Omaha and Alter agreements. Although appellants had completed and submitted their request for payment forms, they requested that receipt of their payment be subject to the condition that their acceptance of the distribution would not prejudice their claim of dissenters' rights in their pending lawsuit. Viewing appellants' claims for both dissenters' rights and a shareholder's pro rata share of the sale proceeds as "irreconcilable," AFS deposited appellants' share of the sale proceeds in an interest-bearing escrow account, pending the outcome of appellants' litigation.

Appellants filed their fourth amended complaint on April 8, 2004. In their complaint, appellants set forth eight "causes of action." The present appeal concerns only the first through sixth "causes of action," and accordingly, we will not further discuss the seventh or eighth "causes of action." Appellants' first through sixth "causes of action" are phrased variously. Taking the first through sixth "causes of action" together, appellants seek dissenters' rights pursuant to § 21-20,138(1)(c) and (e), their pro rata share of the sale proceeds that were distributed to shareholders, and prejudgment interest.

The parties each filed motions for summary judgment, which the district court treated as cross-motions for partial summary judgment on appellants' first through sixth "causes of action." An evidentiary hearing was held on November 23, 2004. Numerous exhibits were received into evidence, including documents pertaining to the financial condition of AFS.

In an order filed April 28, 2005, the district court determined that appellants were not entitled to dissenters' rights under either § 21-20,138(1)(c) or (e). The district court found that the City of Omaha and Alter agreements did not constitute the sale of all or substantially all of the property of AFS under § 21-20,138(1)(c), because the sales did not prevent the company from continuing to do substantial business. The district court further determined that there was no evidence of any action taken by an article of

incorporation, bylaw, or corporate resolution that authorized dissenters' rights under § 21-20,138(1)(e). The court also found that the March 27, 2001, notice did not create dissenters' rights. Finally, the district court found that appellants were entitled to receive their pro rata share of the sale proceeds and ordered appellees to pay appellants their share of those proceeds "plus interest."

After the district court's order was filed, the parties filed a series of posthearing motions. Appellants filed a motion to alter or amend judgment, which the district court denied. Both parties filed motions seeking clarification as to the sale proceeds amounts and interest to be paid to appellants. The district court sustained these motions to the extent that it ordered appellees to distribute to appellants their pro rata share of the sale proceeds deposited by appellees in the interest-bearing escrow account, along with the interest that had accrued on that account. Prejudgment interest was not awarded to appellants. Finally, the district court sustained appellants' motion under § 25-1315, indicating that there was no reason for delay and entered judgment on the first through sixth "causes of action." This appeal and cross-appeal followed.

ASSIGNMENTS OF ERROR

On appeal, appellants have assigned three errors. Appellants claim, restated, that the district court erred (1) in granting appellees' motions for summary judgment, dismissing appellants' first through sixth "causes of action," and denying appellants' motion for summary judgment; (2) in overruling their motion to alter or amend judgment, and (3) in failing to award appellants prejudgment interest under Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004).

On cross-appeal, appellees assign one error. Appellees claim that in the event appellants are successful on appeal and this court reverses the district court's order granting summary judgment in favor of appellees and dismissing appellants' dissenters' rights claims, the district court erred in ordering appellees to distribute the sale proceeds plus interest to appellants.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine

issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *National Am. Ins. Co. v. Constructors Bonding Co., ante* p. 169, 719 N.W.2d 297 (2006). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] Whether prejudgment interest should be awarded is reviewed de novo on appeal. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005).

ANALYSIS

District Court's Rulings on Appellants' Motion for Summary Judgment and Motion to Alter or Amend Judgment.

In support of their first and second assignments of error, appellants argue that the City of Omaha and Alter agreements and the March 27, 2001, notice AFS sent to its shareholders triggered dissenters' rights and that they were thus entitled to receive the fair value of their AFS stock. Appellants claim on appeal that the district court erred when it overruled appellants' motion for summary judgment and dismissed appellants' first through sixth "causes of action" and further erred when it denied appellants' motion to alter or amend judgment. For the sake of completeness, we note that appellants do not challenge on appeal that portion of the district court's decision that ordered appellees to distribute to appellants their pro rata share of the sale proceeds that had been deposited in the interest-bearing escrow account.

We have considered appellants' arguments. The issues presented to this court in appellants' first and second assignments of error are essentially a claim that given the facts in this case, they were entitled to and wrongly denied dissenters' rights. We addressed such issue in the mandamus action, *State ex rel. Columbus Metal v. Aaron Ferer & Sons, ante* p. 758, 725 N.W.2d 158 (2006), in which we concluded that dissenters' rights were not indicated under § 21-20,138(1)(c) and (e). Our reasoning in the mandamus action has equal application to this case, and no purpose would be served in reiterating it here. Therefore, viewing the evidence in the light most favorable to

appellants and giving appellants the benefit of all reasonable inferences deducible from the evidence, see *National Am. Ins. Co. v. Constructors Bonding Co., supra*, for the reasons detailed in *State ex rel. Columbus Metal*, we conclude that the district court did not err when it overruled appellants' motion for summary judgment seeking dissenters' rights, and we affirm the district court's order dismissing appellants' first through sixth "causes of action." We further determine that the district court did not err in overruling appellants' motion to alter or amend judgment, which effectively raised the same issue. Accordingly, we determine that appellants' first and second assignments of error are without merit.

Prejudgment Interest on Sale Proceeds.

For their third assignment of error, appellants claim that the district court erred in failing to award appellants prejudgment interest pursuant to § 45-103.02(2), which provides that "[e]xcept as provided in section 45-103.04, interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment."

Appellants claim that there was no disagreement regarding the amounts of the sale proceeds owed to appellants, because those amounts were based simply on appellants' pro rata share as shareholders of AFS stock. Appellants further note that they complied with the requirement that they submit the request for payment form. Accordingly, appellants argue that their claim was "liquidated" and that the district court erred in failing to award them prejudgment interest under § 45-103.02(2). Appellees respond that although there was no dispute as to the amount of sale proceeds appellants would receive under a pro rata distribution of those proceeds, by conditioning their receipt of the payment of those proceeds on their continued ability to seek dissenters' rights, appellants "created a reasonable controversy" with regard to their entitlement to the sale proceeds. See brief for appellee AFS on cross-appeal at 36. Because of this controversy, appellees argue in effect that appellants' claim was not "liquidated" and that, thus, the district court did not err in declining to award appellants prejudgment interest under § 45-103.02(2). We agree with

appellees' argument that appellants' claim was not "liquidated," and accordingly, we affirm the district court's decision denying appellants' claim for prejudgment interest under § 45-103.02(2).

[4] When discussing the award of prejudgment interest under § 45-103.02(2), this court has previously stated that

> such interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either plaintiff's right to recover or the amount of such recovery. . . . A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.

(Citations omitted.) *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 482, 507 N.W.2d 465, 477 (1993). See, also, *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 764, 600 N.W.2d 786, 796 (1999) (stating that under § 45-103.02(2), "[l]iquidated claims are those where there is no reasonable controversy as to the plaintiff's right to recover or as to the amount of such recovery" and that "unliquidated claims are those where the plaintiff's right to recover or the amount of such recovery is subject to a reasonable controversy").

In the instant case, appellants conditioned their receipt of the sale proceeds upon their continued ability to pursue their dissenters' rights litigation. By electing to pursue their litigation for dissenters' rights and refusing to receive the payment of their pro rata share of the sale proceeds, appellants in this case created a reasonable controversy with regard to their right to receive the sale proceeds. Appellants' claim was, therefore, not "liquidated" as that term is used in § 45-103.02(2), and the district court did not err in declining to award prejudgment interest pursuant to § 45-103.02(2). Accordingly, there is no merit to appellants' third assignment of error, and we affirm the decision of the district court.

Appellees' Cross-Appeal.

Because we have affirmed the district court's decisions challenged by appellants, we need not address the issue raised in appellees' cross-appeal. See *Schumacher v. Johanns, ante* p. 346, 722 N.W.2d 37 (2006).

CONCLUSION

Appellants were not entitled to receive dissenters' rights either as a result of the sale of the property of AFS under the City of Omaha and Alter agreements or as a result of the March 27, 2001, notice AFS sent to its shareholders seeking shareholder approval of the agreements. The district court did not err when it overruled appellants' motion for summary judgment and motion to alter or amend judgment and dismissed appellants' first through sixth "causes of action." Because there existed a reasonable controversy as to appellants' claim to the sale proceeds, the district court did not err in declining to award prejudgment interest to appellants under § 45-103.02(2). The district court's decisions are affirmed.

AFFIRMED.

HEAVICAN, C.J., and MCCORMACK, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. PATRICK T. RISKOWSKI, RESPONDENT.

724 N.W.2d 813

Filed December 22, 2006. No. S-05-1168.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
2. **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 offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
3. ____. In determining the appropriate sanction, each attorney discipline case must be evaluated 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.

Original action. Judgment of suspension and probation.

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

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

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

PER CURIAM.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Patrick T. Riskowski, alleging that Riskowski violated several provisions of the Code of Professional Responsibility and his oath of office as an attorney. Riskowski's conduct included the following: failing to deposit an advance fee payment into his attorney trust account, agreeing to termination of his client's temporary alimony award without his client's consent, and forging his client's signature on a court filing and instructing his secretary to notarize the same. The only issue presented is the determination of an appropriate sanction for Riskowski's conduct.

FACTS

Riskowski was admitted to the practice of law in Nebraska on October 9, 1985. At all times relevant to these proceedings, Riskowski has practiced law in Omaha, Nebraska. For the last 5 years, his practice has primarily involved domestic relations, criminal law, and personal injury.

The formal charges filed against Riskowski in this case arise out of his representation of a divorce client. On March 20, 2004, the client hired Riskowski to represent her in a dissolution of marriage action in Saunders County, Nebraska. The client paid Riskowski an advance fee of $1,500 which Riskowski was to draw against, as earned, at a rate of $150 per hour. Riskowski failed to deposit the advance fee into his attorney trust account and, instead, deposited the fee into his business account. Riskowski eventually earned the full advance fee payment of $1,500 for legal services rendered to the client.

Riskowski filed the client's petition for dissolution of marriage, and the district court entered an order awarding her temporary alimony of $800 per month. On September 13, 2004, the court issued a pretrial order that set a trial date of December 14.

The pretrial order also directed the parties to file witness and exhibit lists by November 15 and to file property statements by November 30. Riskowski failed to prepare and file the client's property statement with the court by November 30.

On December 13, 2004, Riskowski participated in a conference call with the court and opposing counsel in which Riskowski requested a continuance of the trial so that he would have more time to prepare and file the property statement. In exchange for granting the continuance, opposing counsel requested that Riskowski's client's temporary alimony award of $800 per month be terminated. Without discussing it with his client, Riskowski agreed to termination of her temporary alimony. As a result, the court granted the continuance, rescheduled the trial for January 10, 2005, and terminated the temporary alimony award as of November 30, 2004. Shortly thereafter, Riskowski informed his client that the trial had been continued to January 10, 2005, but did not inform her that her temporary alimony had been terminated.

On January 4, 2005, Riskowski, without his client's knowledge or authorization, forged her signature on the property statement and instructed his secretary to notarize the document. Riskowski filed the notarized property statement with the court and sent a copy to opposing counsel. Riskowski did not, however, send a copy of the property statement to his client. Other than the forged signature and fraudulent notarization, the property statement did not contain any false or misleading information.

A grievance against Riskowski was filed by his client. Formal charges were filed against Riskowski in this court, alleging that he violated his oath of office as an attorney and the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

. . . .

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

. . . .

(3) Prejudice or damage his or her client during the course of the professional relationship, except as required under DR 7-102(B).

. . . .

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his or her representation of a client, a lawyer shall not:

. . . .

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

. . . .

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay account charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

REFEREE'S FINDINGS

A referee was appointed, and a hearing conducted on this matter. In a report filed April 27, 2006, the referee found there

was clear and convincing evidence that Riskowski had violated Canon 1, DR 1-102(A)(1), (4), and (6); Canon 7, DR 7-101(A)(3) and DR 7-102(A)(8); and Canon 9, DR 9-102(A). The referee also concluded that Riskowski had violated his oath of office as provided by Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that Riskowski be suspended for an indefinite period, with no possibility of reinstatement for 18 months. The referee further recommended that Riskowski's reinstatement be conditioned upon the following:

> (1) the payment of all costs of the disciplinary proceeding; (2) successful completion of a law firm management or business practices course, to be approved by Counsel for Discipline; and (3) submission and approval by the court of a probation plan, to be in effect for 2 years following reinstatement, during which his compliance with the Code of Professional Responsibility would be monitored by Counsel for Discipline.

ASSIGNMENTS OF ERROR

Neither Riskowski nor the Counsel for Discipline takes exception to the factual findings of the referee or the conclusion that Riskowski had violated several provisions of the Code of Professional Responsibility. However, Riskowski does take exception to the recommended sanction and argues that a suspension of not more than 90 days would be appropriate.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee. *State ex rel. Counsel for Dis. v. Muia*, 271 Neb. 287, 711 N.W.2d 850 (2006).

ANALYSIS

Because neither party has filed exceptions to the referee's findings of fact, we consider them final and conclusive pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2005). We therefore adopt the referee's findings of fact and conclude that clear and convincing evidence establishes that Riskowski violated DR 1-102(A)(1), (4), and (6); DR 7-101(A)(3); DR 7-102(A)(8); DR 9-102(A); and his oath of office as provided by § 7-104.

Thus, the only issue remaining for this court's determination is the appropriate sanction.

[2] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Hogan, ante* p. 19, 717 N.W.2d 470 (2006).

[3] In determining the appropriate sanction, each attorney discipline case must be evaluated 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*, 271 Neb. 851, 716 N.W.2d 68 (2006).

Riskowski's conduct consisted of the following: (1) depositing an advance fee into his business account, (2) stipulating to the termination of a client's temporary alimony award without the client's knowledge or consent, (3) failing to inform the client that her temporary alimony had been terminated, and (4) forging a client's signature on a court filing and instructing his secretary to notarize the same.

It is undisputed that Riskowski received and deposited an advance fee into his business account, rather than depositing the fee into his attorney trust account. This conduct constitutes the commingling of client funds, and in similar cases, we have imposed serious sanctions. See, *State ex rel. Counsel for Dis. v. Worthman*, 268 Neb. 665, 686 N.W.2d 586 (2004) (attorney received public reprimand and 1-year probation for failing to deposit advance fee into attorney trust account); *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004) (attorney failed to deposit retainer and cost deposit into his trust account and was given 1-year suspension); *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001) (attorney received 6-month suspension for depositing unearned fees into his personal account). Also disturbing is Riskowski's decision to terminate his client's temporary alimony award without his client's permission. Compare *State ex*

rel. NSBA v. Pullen, 260 Neb. 125, 615 N.W.2d 474 (2000) (imposing 18-month sanction based, in part, on attorney's agreeing to child custody modification without client's consent).

Riskowski argues that depositing the unearned advancement fee into his business account, instead of his attorney trust account, was only a "technical violation of the commingling rule" because the fee was eventually earned in full. Brief for respondent at 8. We, of course, do not conclude that Riskowski's conduct was a mere "technical violation." The rule against commingling protects the integrity of the client funds, and we consider it a serious offense when an attorney violates this rule, regardless of whether the fee is eventually earned.

But we find most troubling Riskowski's conduct with regard to preparation of his client's property statement. Riskowski, without his client's consent, forged his client's signature on the property statement and then instructed his secretary to notarize the document. The property statement was then submitted to the court. We have consistently imposed substantial sanctions for conduct of this nature. See, *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004) (1-year suspension for knowingly filing a backdated easement); *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003) (2-year suspension based, in part, on altering and falsely acknowledging documents filed in county court).

Riskowski asserts that his act of signing his client's signature and having the document notarized is in some way less reprehensible because the document would have been valid without the client's signature and notarization. We again disagree. Whether a client's signature and an acknowledgment before a notary are required on a document is irrelevant. The fact remains that Riskowski knowingly filed with the court a document containing a forged signature and an inaccurate notarization. A purposeful misrepresentation to a court is itself a serious violation, and Riskowski jeopardized his client's interest and the integrity of the court by doing so.

In addition to considering the sanctions imposed in similar cases, we must also consider any aggravating and mitigating factors. See *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005). As an aggravating factor, we note

that Riskowski's conduct resulted in a direct pecuniary harm to his client. Specifically, Riskowski's termination of his client's temporary alimony resulted in his client's losing $800 in alimony for the month of December.

We also note as an aggravating factor that on March 15, 2003, Riskowski received a private reprimand from the Counsel for Discipline with regard to a matter in which Riskowski failed to timely perfect his client's appeal in a criminal case or to assist his client in finding alternative representation. Riskowski was privately reprimanded for violations of DR 1-102(A)(1) and (5) and Canon 2, DR 2-110(A)(1) and (2).

In the present case, we recognize that mitigating circumstances exist. The record shows that Riskowski cooperated throughout the course of the disciplinary proceedings, was genuinely remorseful for his behavior, admitted his misconduct, and acknowledged responsibility for his actions. We also acknowledge that Riskowski has taken affirmative steps to ensure that he does not repeat this type of conduct in the future. With the help of his attorney, Riskowski has created a standard fee agreement that informs his clients of the fee arrangement and directs where the funds are to be deposited.

This, however, does not diminish the seriousness of Riskowski's misconduct, particularly his deliberate decision to forge his client's signature and falsely notarize it in an attempt to avoid the consequences of his own neglect of his client's case. When this court considers the cumulative nature of Riskowski's actions, the need to protect the public, the need to deter others from similar conduct, the reputation of the bar as a whole, Riskowski's fitness to practice law, and the aggravating and mitigating circumstances, we conclude that Riskowski should be suspended from the practice of law for a period of 1 year, effective immediately. Upon application for reinstatement, Riskowski 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, Riskowski's readmission shall be conditioned upon (1) successful completion of a law firm management or business practices course, to be approved by Counsel for Discipline, and (2) submission and approval by the court of a probation plan, to be in

effect for 1 year following reinstatement, during which time his compliance with the Code of Professional Responsibility will be monitored by the Counsel for Discipline.

CONCLUSION

It is the judgment of this court that Riskowski be suspended from the practice of law for 1 year, beginning immediately. Riskowski's readmission will be contingent upon his compliance with the conditions outlined above, including the submission of a 1-year probationary plan approved by this court. Riskowski shall forthwith comply with rule 16, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, Riskowski is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), rule 10(P), and Neb. Ct. R. of Discipline 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION AND PROBATION.

IN RE ADOPTION OF JADEN M.
RONALD L. AND TRACEY L., APPELLEES, V. BRIAN H., APPELLANT.

725 N.W.2d 410

Filed December 22, 2006. Nos. S-05-1527, S-06-073.

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 the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
4. **Parental Rights: Adoption: Statutes.** The foundation of Nebraska's adoption statutes is the consent of a biological parent to the termination of his or her parental rights.
5. **Paternity: Adoption: Statutes.** Neb. Rev. Stat. § 43-104.02 (Reissue 2004) does not apply to a biological father opposing the adoption of his child who is no longer a

newborn when the father had acknowledged and supported his child and established strong familial ties.

6. **Paternity: Statutes.** Neb. Rev. Stat. § 43-104.02 (Reissue 2004) by its very terms has no application in a dispute between the biological father and mother of a child born out of wedlock.
7. ____: ____. Neb. Rev. Stat. § 43-104.22(7) (Reissue 2004) does not apply to a father who has been adjudicated the child's father in a paternity action.

Appeals from the County Court for Lancaster County: JACK B. LINDNER and LAURIE J. YARDLEY, Judges. Reversed and remanded for further proceedings.

James R. Walz for appellant.

Sheri A. Wortman, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., and Susan Kubert Sapp, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and CARLSON, Judge.

CONNOLLY, J.

Under Neb. Rev. Stat. §§ 43-104.02 and 43-104.05 (Reissue 2004) (biological father registry statutes), a putative father who intends to claim paternity and obtain custody of a child born out of wedlock must file notice with the biological father registry and adjudicate his claim within 30 days. The issue is whether a father who has previously been determined in a paternity action to be the biological father is required to comply with the registry statutes to preserve his rights in a subsequent adoption proceeding.

After Brian H. filed a paternity action in district court, the court determined he was the biological father of Jaden M. The court ordered him to pay child support and granted him visitation. Over 1 year later, with the consent of Jaden's mother, Jaden's stepfather filed for adoption. The county court determined that Brian's consent to the adoption was not required because Brian failed to comply with §§ 43-104.02 and 43-104.05. We reverse, because these statutes do not apply to a putative father who has been previously determined to be the biological father.

BACKGROUND

On July 14, 1999, Jaden was born out of wedlock to Tracey L. and Brian. For the first 3 years of Jaden's life, Brian sporadically visited Jaden.

In April 2002, Brian filed a petition in district court for determination of paternity, visitation, and an order requiring him to pay child support. On February 25, 2003, the district court determined that Brian was Jaden's biological father, awarded legal custody to Tracey, and ordered weekly and holiday visitation. The court also ordered Brian (1) to reimburse Tracey for one-half of the medical expenses she incurred in giving birth to Jaden, (2) to pay $400 per month in child support, and (3) to pay one-half of Jaden's future medical and dental expenses not covered by health insurance. Although he missed some payments, from June 1, 2002, to August, 16, 2004, Brian paid $5,603.40 in child support.

On April 5, 2003, Tracey married Ronald L. On October 14, Tracey's attorney notified Brian by certified mail that Tracey planned to consent to Jaden's adoption by Ronald. The notice informed Brian that Tracey had identified him as Jaden's biological father, that she intended to consent to Ronald's adopting Jaden, and that Brian could contact Tracey's attorney to deny paternity and waive his rights or relinquish and consent to the adoption.

Later in April, Tracey and Ronald filed an adoption petition in county court. Brian appeared with counsel and objected to the adoption. In October, Tracey filed a verified motion to obtain consent from the district court. The district court gave its consent and found that the county court had exclusive jurisdiction over the adoption and allowed the adoption proceedings to commence in county court.

Brian moved to dismiss the adoption petition, but the county court overruled his motion. In case No. S-05-1527, Tracey and Ronald moved for summary judgment, alleging that under Neb. Rev. Stat. § 43-104.22 (Reissue 2004), Brian's consent was not required. Despite the district court's previous order determining paternity and ordering Brian to pay child support and awarding visitation, the county court granted summary judgment. It held that Brian had failed to file, under § 43-104.02, a notice of

intent to claim paternity with the biological father registry and that he failed to comply with § 43-104.05 by not filing a petition to have his paternity claim adjudicated within 30 days. The court concluded that because Brian did not comply with these provisions, the only consents needed were from Tracey and the district court, which were both on file.

On December 15, 2005, the county court in case No. S-06-073 entered an adoption decree, and Brian timely appealed. Brian also appealed the county court's order in case No. S-05-1527, which granted Tracey and Ronald's motion for summary judgment, finding that Brian's consent was not required.

ASSIGNMENTS OF ERROR

In case No. S-05-1527, Brian assigns that the county court erred in granting Tracey and Ronald's motion for summary judgment. In case No. S-06-073, he assigns that the county court erred in granting the adoption decree.

STANDARD OF REVIEW

[1,2] 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. *Didier v. Ash Grove Cement Co., ante* p. 28, 718 N.W.2d 484 (2006). In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence. See *National Am. Ins. Co. v. Constructors Bonding Co., ante* p. 169, 719 N.W.2d 297 (2006).

[3] Statutory interpretation presents a question of law. When reviewing questions of law, we resolve the questions independently of the conclusions reached by the trial court. See *State v. County of Lancaster, ante* p. 376, 721 N.W.2d 644 (2006).

ANALYSIS

Comment on Jurisdiction

As noted, Brian appealed both the order granting the motion for summary judgment in case No. S-05-1527 and the adoption decree entered in case No. S-06-073. Without deciding if the

order granting the motion for summary judgment was a final, appealable order, we conclude we have jurisdiction because Brian timely appealed the adoption decree.

Putative Father Registry Provisions Do Not Apply to Brian

[4] The foundation of Nebraska's adoption statutes is the consent of a biological parent to the termination of his or her parental rights. See *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995). Consent for adoption is not required, however, of a parent who:

> (a) has relinquished the child for adoption by a written instrument, (b) has abandoned the child for at least six months next preceding the filing of the adoption petition, (c) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (d) is incapable of consenting.

Neb. Rev. Stat. § 43-104 (Reissue 2004).

Tracey and Ronald argue that in addition to these exceptions, the consent of any biological father is also not necessary if he fails to comply with §§ 43-104.02 and 43-104.05. Brian counters that the court erred in applying these statutes to him because he is not a putative father. We agree.

Section 43-104.02 requires "a person claiming to be the father of the child" to file notice of his intent to claim paternity and obtain custody with the biological father registry within 5 business days of the child's birth or published notification. Section 43-104.05 requires a "claimant-father" to petition the county court where the child was born to adjudicate his claim of paternity and right to custody within 30 days of filing notice under § 43-104.02.

[5] This court has previously held that § 43-104.02 does not apply to a biological father opposing the adoption of his child who is no longer a newborn when the father had acknowledged and supported his child and established strong familial ties. See *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987). In that case, the father lived with the child for 19 months after the child's birth, although his contacts diminished because of conflicts between the mother and father. When

the child was 24 months of age, the mother had the child placed with potential adoptive parents without the father's knowledge or consent. After he learned of the placement, the father filed notice of his intent to claim paternity under § 43-103.02, and the placement parents filed a petition for adoption. The trial court held that the father's consent was not necessary, in part, because his filing for paternity under § 43-103.02 was 2½ years too late.

This court reversed, agreeing with the father that the statute was unconstitutional as applied to him. We adopted the reasoning of a decision from the U.S. Supreme Court: " '[W]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," [citation omitted] his interest in personal contact with his child acquires substantial protection . . . .' " 225 Neb. at 768, 408 N.W.2d at 278, quoting *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

We reasoned that applying the statute would "allow a mother to singlehandedly sever a relationship between father and child." *Id.* at 769, 408 N.W.2d at 278. We concluded that such a result would fly in the face of the statute's intended purpose—to allow for the rapid placement of newborns in families that could commit to raising them when the mother does not know whether the father will claim his child. See, *id.*; *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986). See, also, *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995) (acknowledging that § 43-104.02 might be inapplicable to father but declining to decide issue based on holding that substitute consent was required even if statute applied).

[6] Similarly, in *White v. Mertens*, 225 Neb. 241, 404 N.W.2d 410 (1987), we determined that § 43-104.02 did not apply when the mother had acknowledged the father. There, the father had provided some support and arranged for visitation when the child was a little over 1 year old. Shortly thereafter, he filed suit to claim paternity. The mother, in resisting visitation rights, argued that the father had not filed a notice of intent to claim paternity under § 43-104.02 within 5 days. This court stated that the statute "by its very terms has no application in a dispute between the biological father and mother of a child born out of wedlock." 225 Neb. at 246, 404 N.W.2d at 413.

Since these decisions, the Legislature has amended the adoption statutes. These amendments clarify that the mother's representative must use due diligence to contact an actual or possible biological father before an adoption can be decreed regardless of whether the father filed notice with the registry. See 1995 Neb. Laws, L.B. 712. Before the enactment of L.B. 712, § 43-104(3) (Reissue 1993) required the written consent of "(3) both parents if living, the surviving parent of a child born in lawful wedlock, or, subject to sections 43-104.02 to 43-104.06, the mother of a child born out of wedlock." In other words, before 1995, only the mother's consent was required if the biological father did not file notice with the registry.

But the current version of § 43-104(3) omits the reference to "sections 43-104.02 to 43-104.06" (Neb. Rev. Stat. § 43-104.06 (Reissue 1993) was repealed by L.B. 712), and requires the written consent of

> (3) both parents of a child born in lawful wedlock if living, the surviving parent of a child born in lawful wedlock, the mother of a child born out of wedlock, *or both the mother and father of a child born out of wedlock as determined pursuant to sections 43-104.08 to 43-104.24*.

(Emphasis supplied.) These statutes were also added as part of L.B. 712. Most of these sections ensure that the biological father receives proper notification of his possible or actual paternity and an opportunity to assert his rights.

There are exceptions to the notification requirements. See Neb. Rev. Stat. § 43-104.15 (Reissue 1995). Other than those exceptions, unless the biological father has executed "a valid relinquishment and consent . . . or . . . a denial of paternity and waiver of rights," the court may not enter a decree of adoption without determining that proper notification of parental rights has been provided. Neb. Rev. Stat. § 43-104.11 (Reissue 2004).

That notification is not limited to the rights of biological fathers who have complied with § 43-104.02. See Neb. Rev. Stat. § 43-104.13 (Reissue 2004). Thus, while easing the procedures for newborn adoptions, the Legislature has also, through these notification provisions, protected the parental rights of biological fathers from unilateral adoption actions by mothers—and not just biological fathers who have the opportunity to protect their

rights under § 43-104.02. That conclusion is bolstered by the Legislature's requirement in § 43-104.01(1) that the biological father registry include the names of adjudicated fathers if the father requests registration, as well as the names of claimant fathers.

[7] It is true that § 43-104.22 provides that in a hearing to determine a biological father's parental rights:

> [T]he biological father's consent is not required for a valid adoption of the child upon a finding of one or more of the following:
>
> . . . .
>
> (7) Notice was provided pursuant to sections 43-104.12 to 43-104.14 and the father failed to timely file an intent to claim paternity and obtain custody pursuant to section 43.104.02.

We, however, conclude that § 43-104.22(7) does not apply to a father who has been adjudicated the child's father in a paternity action.

Applying § 43-104.22(7) infringes upon Brian's constitutionally protected parental rights. Because he has provided support and established familial ties with his biological child, his interest in personal contact with his child has acquired substantial protection. *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987). His rights must therefore be determined under the considerations delineated in § 43-104.22, apart from subsection (7).

As in *White v. Mertens*, 225 Neb. 241, 404 N.W.2d 410 (1987), Tracey and Ronald's argument fails because Brian is not "a person claiming to be the father of the child" under § 43-104.02 or a "claimant-father" under § 43-104.05—he is Jaden's biological father. The court erred in applying the registry statutes to circumvent the need for Brian's consent.

Court Erred in Granting Decree of Adoption in Case No. S-06-073

In the adoption decree proceedings, case No. S-06-073, the court initially noted that in granting Tracey and Ronald's motion for summary judgment, the trial judge (a different trial judge) had found that all the consents required by law had been properly executed. The court then entered the adoption decree.

As detailed in the previous section, the court erred in granting summary judgment. The county court also erred by granting the adoption without Brian's consent. We, therefore, vacate the adoption decree in case No. S-06-073 because it relied on the erroneously granted summary judgment.

CONCLUSION

We conclude that the county court erred in granting Tracey and Ronald's motion for summary judgment in case No. S-05-1527 because the putative father provisions of § 43-104 do not apply to a previously adjudicated father. We also reverse and vacate the adoption decree entered in case No. S-06-073 as it relied on the erroneously granted summary judgment. We reverse the judgments and remand both causes to the county court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

MICHAEL WORLINE, APPELLEE, V. ABB/ALSTOM POWER INTEGRATED CE SERVICES, APPELLANT.

725 N.W.2d 148

Filed December 22, 2006. No. S-06-038.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed upon appeal unless clearly wrong.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, and the factual findings by the compensation court have the same force and effect as a jury verdict in a civil case.

4. ____: ____: ____. If the record contains evidence to substantiate the factual conclusions reached by the trial court in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
5. **Workers' Compensation: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
6. **Workers' Compensation: Mental Health.** In addition to physical impairments, psychological injuries are compensable under the workers' compensation scheme.
7. **Workers' Compensation: Mental Health: Proof.** In workers' compensation cases involving allegations of psychological injuries, the burden is on the claimant to prove by a preponderance of evidence that his disability is the result of an accident arising out of his employment.
8. **Workers' Compensation: Mental Health.** A worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's injury and results in disability.
9. **Workers' Compensation: Mental Health: Evidence.** Where the evidence is sufficient to permit the trier of fact to find that a psychological injury is directly related to the accident and the employee is unable to work, the employee is entitled to be compensated.
10. **Workers' Compensation: Time.** The date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Paul F. Prentiss and Charles L. Kuper, of Timmermier, Gross & Prentiss, for appellant.

James R. Harris, of Harris Law Offices, P.C., L.L.O., for appellee.

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

WRIGHT, J.

NATURE OF CASE

ABB/Alstom Power Integrated CE Services (Alstom Power) appeals from the order of a Nebraska Workers' Compensation Court review panel affirming the trial court's award to Michael Worline for injuries he suffered while employed by Alstom Power. The Workers' Compensation Court found that Worline had suffered injuries to his right shoulder, neck, and lower back and awarded workers' compensation benefits in relation to those

injuries, including vocational rehabilitation services and counseling. We affirm.

SCOPE OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed upon appeal unless clearly wrong. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005).

FACTS

Worline began working as a boilermaker in 1971. His work consisted of building and repairing coal fire boilers and other physically demanding tasks. His average weekly wage in November 2000 was $1,418.29. At the time of the accident, Worline was working at a power plant in Sutherland, Nebraska. Worline testified that except for an unrelated carpal tunnel problem, both his physical and mental conditions were good before the accident.

On November 2, 2000, Worline and three coworkers were moving a turnbuckle that weighed 300 to 350 pounds. Worline carried one end of the turnbuckle with his back to his coworkers. While they were walking, one employee was sent to get a piece of equipment and another stopped carrying the turnbuckle for some unexplained reason. The third employee dropped his end of the turnbuckle. The weight of the turnbuckle caused Worline to fall to his knees and bent him over backward.

Worline was helped to his feet by his coworkers. He felt an aching pain in his neck, shoulder, and lower back, and he had trouble walking. The safety coordinator for the jobsite placed heat

and ice on Worline's neck, shoulder, and lower back throughout the day.

The following day, Worline returned to the jobsite, but he felt "real stiff" and could not move his right arm. His shoulder was making a "cracking" sound. He was examined by Dr. Jeffrey Brittan, a physician in North Platte, Nebraska. Brittan noted that Worline had "hurt his shoulder [and] low back, at work yesterday when a 300 [pound] turnbuckle knocked him to the ground" and that Worline complained of shoulder and neck pain. Brittan diagnosed Worline's injuries as muscle strain and prescribed muscle relaxants.

Worline testified that he worked for Alstom Power a few more days on "light duty." He stopped working around November 13, 2000, and returned to his home near Casper, Wyoming. He was examined by Dr. John Barrasso, a general orthopedist, who reported that Worline had injured his back and shoulder while working in Nebraska and noted that problems persisted with Worline's shoulder; specifically, a "popping" and "clicking" sound was heard when Worline moved his shoulder. Barrasso ordered an MRI, which showed some irregularity with hypertrophy at the acromioclavicular joint. On December 20, Worline was still experiencing pain in his shoulder, and Barrasso prescribed 2 weeks of physical therapy.

Worline saw Barrasso on several occasions throughout 2001. Worline continued to experience discomfort, and various alternative treatments were discussed. Barrasso noted that when Worline performed overhead work or climbing, he experienced increasing pain in the right shoulder with pain radiating up into the neck and ear.

Worline's employment records indicated that he had worked for some time each month during 2001. Because of continued discomfort, tenderness, and limited motion in Worline's shoulder, he underwent arthroscopic surgery on December 21. He returned to work as a rigger in Gillette, Wyoming, on January 18, 2002, and worked there until February 28. Worline testified that he experienced pain in his neck and lower back during that time.

When Worline returned to Barrasso on February 4, 2002, Barrasso recorded the following:

> [Worline] tells me now that he is able to distinctly tell the difference between his right shoulder pain and the neck pain and in the past he said the whole thing felt like it was running together. . . . This all relates to his work related injury and he tells me that they got onto the back issue right away when he was injured at work.

As a result of Worline's complaints of neck pain, Barrasso ordered MRI's. An MRI of the cervical spine revealed a right paracentral disk herniation at the C4-5 level. An MRI of the lumbar spine showed posterior bulging of the T12-L1 disk and the L5-S1 disk. Barrasso referred Worline to Dr. Clayton Turner, an orthopedic surgeon who specialized in spine conditions.

Turner testified that he first treated Worline on March 1, 2002. Worline described his work-related accident of November 2, 2000, and complained of chronic pain in his neck, right shoulder, right upper arm, and lower back stemming from that accident. Turner reviewed the medical reports and the MRI's and opined that Worline's cervical and lumbar injuries were sustained when the turnbuckle fell on him in November 2000.

Turner testified that Worline chose to pursue a nonsurgical option—a nerve block—and according to Turner, Worline underwent two nerve blocks between March 1 and April 15, 2002. He obtained relief, but it lasted only 2 days after each treatment. Because the relief was temporary, Turner recommended surgical treatment to include an anterior cervical diskectomy and fusion at C4-5. Turner released Worline to work with these restrictions: no repetitive lifting, stooping, or bending; no lifting greater than 20 pounds; and no driving more than 30 minutes at a time.

Worline testified that between April and October 2002, his condition deteriorated. He said that during that time, he had become increasingly depressed and angry over his injuries and treatment and he visited a psychologist in July. He also applied for Social Security disability benefits. Mark Watt, a licensed psychologist, examined Worline in July 2002 and summarized his findings as follows:

> Worline is . . . currently functioning in the average range of intellectual and estimated at least low average range in memory ability. He has been suffering from frustration, pain, and anger secondary to an injury he received on the

> job. He has been currently stressed by his difficulty in getting needed medical care and disability that he feels that he is entitled to. . . . It is obvious that he suffers from chronic pain, frustration, and anger about how he feels that he has been dealt with by the disability system.

Watt opined that the prognosis for improvement of Worline's mental state was guarded pending resolution of his physical condition.

Worline was later evaluated by Dr. Bruce Leininger, a clinical neuropsychologist. Leininger did not offer a firm diagnosis; however, based on his review of Worline's medical records and Leininger's own observation, he opined that the "diagnostic formulations" Watt had suggested concerning Worline's anger and frustration did not seem unreasonable. Leininger believed there was a psychological and emotional overlay to Worline's symptom reporting and behavior. Leininger noted that Worline would benefit from counseling.

Alstom Power requested that Worline obtain a second medical opinion in relation to his workers' compensation claim and the necessity of surgery. Dr. Mark Rangitsch, an orthopedic specialist in Cheyenne, Wyoming, examined Worline on September 23, 2002. Based upon the examination and a review of Worline's medical records, Rangitsch believed that the nature of Worline's work-related injuries on November 2, 2000, was consistent with the symptoms Worline subsequently had experienced; that the limitations on his neck, shoulder, and back were due to the injuries; and that Worline had not reached maximum medical improvement. He agreed with Turner that surgery was required. Alstom Power then authorized Worline's surgery, which was performed on October 15, 2002. Turner successfully performed a decompressive anterior cervical diskectomy and fusion at the C4-5 level.

Following surgery, Turner examined Worline and advised him to gradually resume activities as tolerated. On January 6, 2003, Turner completed a form for the Boilermakers National Health and Welfare Fund. He reported that Worline had not been released to work. On January 23, Turner noted that Worline was experiencing minimal discomfort in his neck 3 months after surgery and continued to complain of problems with his right

shoulder. Turner recommended against Worline's returning to work as a boilermaker, but believed he was capable of performing sedentary work with sitting, standing, and no lifting greater than 10 pounds. In February, Turner concluded that Worline's surgery had resolved the right-sided C-5 radiculopathy; however, persistent symptoms in the right shoulder caused Turner to suspect ongoing impingement syndrome with adhesive capsulitis. He advised Worline to return to Barrasso for further evaluation.

Barrasso concluded that Worline had significant postural limitations and could lift no more than 10 pounds. On a form for the Boilermakers National Health and Welfare Fund, Barrasso reported that Worline could not work.

On March 18, 2003, Worline saw Dr. Stuart Ruben, his family physician, and reported that he had been having dizzy spells, one of which had caused him to fall. Worline experienced dizziness and ringing in his ears over a period of 5 months. Worline also saw Dr. Karen Wildman for these symptoms in June 2003. Wildman examined Worline and noted that his main concerns were intermittent dizziness and chronic pain. Worline also expressed frustration that he had been unable to return to work. He stated that along with pain in his neck and shoulder, he had been suffering from frequent muscle tension headaches, which started in the back of the neck and went to the top of his head.

At the request of Alstom Power, Dr. Bernard Kratochvil, an orthopedic specialist, conducted an independent medical examination of Worline on August 11, 2003. Kratochvil opined that Worline's complaints of neck discomfort and the subsequent cervical surgery were caused by degenerative changes in the cervical spine that preceded the November 2000 work accident. He believed the accident resulted in a contusion of Worline's right shoulder but that the impingement syndrome was not caused by the accident. He further believed that Worline's lumbar symptoms were due to daily living activities. Kratochvil reported that Worline had reached maximum medical improvement from any injury sustained on November 2, 2000.

Dr. Tuenis Zondag conducted an independent medical evaluation in October 2003 at the request of Turner. Zondag specialized in occupation and pain medicine. Zondag reviewed Worline's medical records and met with Worline and his wife.

He opined that Worline's complaints of pain in his neck, right shoulder, and lower back were causally related to his work-related accident in November 2000. He stated that Worline had reached maximum medical improvement 6 months after the cervical surgery and that Worline had a 34-percent whole person impairment, which incorporated the neck fusion, midback pain, lumbar pain, and the right shoulder injury. In Zondag's opinion, Worline had been forced to adjust to a change in his life that resulted from the incident in November 2000 and this change had led to his anxiety, depression, and some ongoing pain. He stated that Worline's substantial work restrictions would be permanent and that Worline's inability to be employed was causally related to his work injuries.

Another independent medical examination was conducted in May 2004 by Dr. Dean Wampler. He noted that Worline complained that the workers' compensation system had caused him a great deal of emotional distress, that he believed he had been unable to get the medical care he needed, and that he had been financially ruined. Wampler opined that Worline's right shoulder injury was caused by his November 2000 work duties, but Wampler was unable to form an opinion regarding the origin of the cervical disk herniation.

Trial was held before the Workers' Compensation Court on August 13, 2004. Worline claimed that he injured his right neck, shoulder, and lower back in the work-related accident and that as a result of those injuries, he suffered emotional, psychological, and psychiatric problems. The trial court found that the injuries to his neck, shoulder, and lower back arose out of and in the course of his employment with Alstom Power and that given his physical limitations, Worline would not be able to work as a boilermaker.

The trial court found that Worline's realization that he could not continue to work as a boilermaker caused him to be angry and frustrated. The court noted that several of the medical reports in evidence discussed Worline's anger and frustration. It found that Worline's inability to deal with his present situation, inability to return to a high-paying job, and inability to perform physical activities and labor as he had done in the past were a result of the injuries suffered in the accident of November 2, 2000.

The trial court directed that Worline receive counseling and vocational rehabilitation services. It found that Worline would not reach maximum medical recovery until he had received counseling. It determined that Worline was entitled to receive temporary benefits, vocational rehabilitation services, and all future medical care arising from the work-related accident. Alstom Power was ordered to pay certain medical bills for Worline.

Alstom Power asked a review panel of the Workers' Compensation Court to reverse the trial court's award. The company alleged the trial court erred in entering the award and raised the same errors the company now sets forth in this court under the assignments of error. The review panel affirmed the award of the trial court, and this appeal timely followed. We moved the appeal to our docket.

ASSIGNMENTS OF ERROR

Alstom Power contends, in summary, that the workers' compensation court erred (1) in finding that Worline suffered a compensable injury to his neck as a result of the accident on November 2, 2000; (2) in finding that Worline suffered a compensable injury to his lower back as a result of the November 2000 accident; (3) in ordering the company to pay medical expenses related to Worline's neck injury; (4) in awarding Worline counseling for anger and frustration as a consequence of the November 2000 accident and resulting injuries; and (5) in failing to find that Worline had achieved maximum medical improvement.

ANALYSIS

Neck and Low-Back Injuries

It is undisputed that the record supports the Workers' Compensation Court's finding that Worline sustained injuries arising out of the course and scope of his employment. The first issue raised by Alstom Power is whether competent evidence established that Worline suffered an injury to his neck. Alstom Power claims the compensation court was clearly wrong in finding there was a neck injury. The company relies on the fact that Worline initially did not mention any injury to his neck. Alstom Power also relies upon the opinion of Dr. John Goldner, who conducted an independent evaluation and opined that it was

unlikely Worline would not have noticed neck pain with radicular symptoms down the right arm even in the presence of right shoulder pain. Alstom Power contends that ordinary work, not the November 2000 accident, caused the herniated C4-5 disk. The company claims that the opinions of Turner, Rangitsch, and Zondag were based upon erroneous statements regarding Worline's symptoms and that, therefore, the award of benefits for a neck injury was clearly wrong.

[3] In our review, we consider the evidence in the light most favorable to Worline, the successful party, and the findings of the Workers' Compensation Court have the same force and effect as a jury verdict in a civil case. See, *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005); *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995).

Barrasso examined Worline and recorded that he had injured his back and right shoulder while working. After arthroscopic shoulder surgery, Barrasso noted that Worline had tenderness in his neck and that he was distinctly able to tell the difference between the right shoulder pain and the neck pain; whereas before surgery, he had felt like the pain was running together. Turner opined that Worline's cervical and lumbar injuries were sustained in the accident of November 2, 2000. Rangitsch concluded that Worline's work-related injuries were consistent with the symptoms that he subsequently had experienced and that the limitations of Worline's neck, shoulder, and back were due to those injuries. Zondag conducted an independent medical evaluation of Worline and opined that his neck and low-back injuries were causally related to the work-related accident in November 2000.

[4] The evidence before the Workers' Compensation Court included the opinions of at least three physicians who expressed that Worline's neck injury was caused by the work-related accident. If the record contains evidence to substantiate the factual conclusions reached by the trial court in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

Regarding Worline's low-back injury, Alstom Power asserts that he complained of low-back symptoms immediately after the work-related accident but that thereafter, the medical records

are devoid of complaints of low-back pain. The record does not support this assertion. On March 1, 2002, Turner recorded that Worline suffered from chronic back pain and he recommended physical therapy and the use of anti-inflammatory medications. Turner testified that Worline continued to complain of an aching back. Worline also testified that he experienced pain in his neck and lower back while working in 2002. On May 11, 2004, Wampler noted that Worline was experiencing low-back pain. Turner, Rangitsch, and Zondag had all concluded that Worline's low-back symptoms were causally related to the work incident. The evidence in the record, viewed in the light most favorable to Worline, supports the finding of the trial court that he injured his lower back as a result of the November 2000 accident.

[5] The trial court is entitled to accept the opinion of one expert over another. See *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997). When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). The record before us contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court regarding Worline's neck and low-back injuries. Sufficient competent evidence in the record supports the judgment of the court, and the findings of fact by the court support the award.

Counseling for Anger and Frustration

Concurrently with awarding vocational rehabilitation services, the trial court found that Worline was entitled to receive counseling for anger and frustration. This determination was based upon evidence indicating that Worline would not achieve maximum medical recovery until he received such counseling. Alstom Power argues that the trial court was clearly wrong because the source of Worline's anger and frustration was not his physical injuries.

Worline testified that he was feeling very depressed because he did not have any money and, with regard to his anger, that he thought "something should be done about the people who were involved and working for this company." Alstom Power claims, therefore, that Worline's anger, by his own admission, is related

to mental stimuli and not to his physical injuries and that the compensation court was clearly wrong in awarding counseling.

[6] In addition to physical impairments, psychological injuries are compensable under the workers' compensation scheme. *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991). The question is whether there was sufficient evidence in the record for the trial court to determine that Worline's psychological injuries were a result of the work-related accident.

[7-9] In workers' compensation cases involving allegations of psychological injuries, the burden is on the claimant to prove by a preponderance of evidence that his disability is the result of an accident arising out of his employment. *Id*. A worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's injury and results in disability. *Sweeney v. Kerstens & Lee, Inc., supra*. Where the evidence is sufficient to permit the trier of fact to find that a psychological injury is directly related to the accident and the employee is unable to work, the employee is entitled to be compensated. *Id*.

Worline testified he had never received psychiatric or psychological treatment before his work injuries of November 2000 but that as his physical problems arising from the accident lingered, his psychological condition deteriorated. Watt, a psychologist, evaluated Worline at the request of the Social Security Administration and summarized that Worline had been "suffering from frustration, pain, and anger secondary to an injury he received on the job." Watt diagnosed Worline as suffering from pain disorder associated with both psychological and medical conditions and adjustment disorder with mixed depression and anxiety.

Dr. Jeffrey Coffman, a psychiatrist, also evaluated Worline. In Coffman's opinion, the ongoing nature of Worline's pain and the work-related disability he had endured represented the type of stressors recognized as precipitants in the criteria for adjustment disorder. Coffman found that sufficient stressors existed from the injuries and their consequences to induce an adjustment disorder causing Worline's current disability.

Zondag, an occupational medicine specialist, testified that in addition to the physical injuries, Worline experienced "an adjustment reaction to the change in his life because of all these things,

which led to this anxiety and his depression and led to some ongoing problem pain." Zondag concluded that Worline,

> because of the reaction to change that has been produced upon his body, has got a significant emotional difficulty that occurred that's exemplified by . . . over-reporting, his difficulty with interaction, his difficulty with speaking out of turn, his difficulty with not always following the lines of questions. And I think that's an adjustment reaction problem that's there.

Zondag believed that based upon Worline's work restrictions and his emotional difficulties, he would not be able to return to competitive employment or be employable or retrainable.

Zondag opined that Worline's emotional difficulties were causally related to the circumstances surrounding the work-related accident, which circumstances included the denial of his workers' compensation claims and the resulting litigation, his medical treatment, and the difficulties he had experienced functioning in his job. Although a functional capacity evaluation indicated Worline could do some work, Zondag opined that Worline was unable to work at that time due to his anger management and frustration. According to Zondag, Worline's emotional response and adjustment reaction were based upon the injuries of November 2000.

In addressing the issue of anger and frustration, the trial court found there was no doubt that Worline was unable to return to his position as a boilermaker and that Worline knew this and was angry. He had been earning approximately $50,000 to $60,000 per year and was presently in a position where he had to find employment. There were no jobs in Evansville, Wyoming, that would pay $50,000 to $60,000 per year to someone with Worline's educational background and physical restrictions. He was relegated to an entry-level job that would pay around $12,000 to $15,000 per year, assuming such job was available.

The compensation court concluded that Worline should be given counseling for his anger and frustration and that vocational rehabilitation services should be provided. It found that Worline's problem was his inability to deal with his present situation and his inability to perform physical activities and physical labor as he had in the past. It concluded that a counselor should

address these issues, which had resulted from the injuries suffered in the accident of November 2, 2000.

Alstom Power relies upon our decision in *Dyer v. Hastings Indus.*, 252 Neb. 361, 562 N.W.2d 348 (1997). In that case, the trial court concluded that the claimant's depression had resulted from a mental stimulus rather than physical trauma. *Dyer* is distinguishable because no physical injury had caused the claimant's depression. Instead, he had been demoted and his pay had been reduced as a result of alleged performance deficiencies. The claimant contended that the "accident" occurred when he was harassed by his supervisors. He asserted that his depression rendered him unable to work and forced him to seek continuing medical attention.

Dr. Terry Davis conducted a psychiatric evaluation of Worline in May 2004 and opined that he suffered from conversion disorder. Davis did not believe the disorder was caused by the work accident and injuries. Although Alstom Power points to evidence that Worline's psychological difficulties were not caused by the accident, the trial court was entitled to accept the opinions of certain experts over others. The record presented conflicting medical testimony, and we will not substitute our judgment for that of the compensation court. We conclude that the record presents sufficient evidence to permit the trial court to find that Worline's psychological injuries resulted from the work-related accident. The court did not err in finding that Worline needed counseling for anger and frustration.

Maximum Medical Improvement

The trial court found that until Worline received the recommended counseling, he would not reach maximum medical improvement, and that Worline should receive compensation. Worline's average weekly wage entitled him to temporary total disability benefits of $487 per week.

[10] The date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). Alstom Power

argues that the trial court erred in awarding temporary total disability benefits because Worline's anger and frustration were not causally related to his November 2000 accident. Having determined that the compensation court did not err in finding that Worline's anger and frustration were causally related to the accident, we also conclude that the court did not err in finding that Worline had not yet reached maximum medical improvement.

CONCLUSION

The evidence, considered in the light most favorable to Worline, is sufficient to support the findings of fact and the award made by the trial court, which determinations were affirmed by the review panel. The judgment and award of the Workers' Compensation Court are therefore affirmed. An award of attorney fees in accordance with Neb. Rev. Stat. § 48-125 (Cum. Supp. 2006) will be considered upon a motion and supporting affidavit filed consistent with Neb. Ct. R. of Prac. 9F (rev. 2006).

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL J. SIMS, APPELLANT.

725 N.W.2d 175

Filed December 22, 2006. No. S-06-249.

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. 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.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the

defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.

3. **Postconviction: Effectiveness of Counsel: Speedy Trial.** In a postconviction action, when a defendant alleges he or she was prejudiced by trial counsel's failure to properly assert the defendant's speedy trial rights, the court must consider the merits of the defendant's speedy trial rights under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
4. **Motions for Continuance: Time.** In determining whether a period of delay is attributable to defense counsel's motion to continue, an appellate court need not inquire as to what extent there was "good cause" for the delay.
5. **Speedy Trial.** The provision of Neb. Rev. Stat. § 29-1205 (Reissue 1995) to give preference of criminal over civil trials is directory.
6. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant.
7. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** 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.
8. **Judges: Witnesses.** A trial judge is not generally considered a material witness in a case unless his or her testimony is actually material and necessary to the determination of the case, and cannot be acquired by other sources.
9. **Postconviction: Judges.** There is no rule of law which automatically disqualifies a judge who has presided at trial from subsequently considering a postconviction action. To the contrary, it is generally encouraged that the postconviction petition be heard by the same judge that rendered the original judgment.
10. **Postconviction: Judges: Recusal.** It would frustrate the objectives of encouraging the trial judge to sit for the postconviction action if movants were allowed, as a matter of course, to force a trial judge's recusal from postconviction actions simply by calling the judge as a witness.
11. **Postconviction: Judges: Witnesses.** A defendant in a postconviction action can compel the postconviction judge, who was also the judge at trial, to testify only if (1) the judge possesses factual knowledge, (2) that knowledge is highly pertinent to the fact finder's task, and (3) the judge is the only possible source of testimony on the relevant factual information.

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

Jason E. Troia and Jill Daley, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

This is an appeal from the denial, after an evidentiary hearing, of Michael J. Sims' motion for postconviction relief to set aside his 1998 convictions for first degree murder, attempted first degree murder, and two counts of use of a deadly weapon to commit a felony. Sims alleged that he was denied his right to effective assistance of counsel because trial counsel failed to file a motion for discharge asserting Sims' right to a speedy trial. Sims also alleged that trial counsel was ineffective in failing to object to the impermissible impeachment of his trial testimony by reference to his postarrest, post-*Miranda* silence, in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). Sims asserts that the postconviction judge, who was also the trial judge, erred in denying his plea for postconviction relief and also erred by refusing to recuse himself in order to testify concerning the scheduling of Sims' trial for speedy trial purposes.

The postconviction court was not clearly erroneous in finding the delay beyond the 6-month statutory period attributable to trial counsel's motion to continue, and we find no violation of Sims' right to a speedy trial. We accordingly affirm the postconviction court's conclusion that Sims' trial counsel was not ineffective for failing to file a motion for discharge. Because Sims failed to show a threshold level of necessity for the postconviction judge's testimony, the judge did not abuse his discretion in refusing to recuse himself. We do not address the *Doyle* issue because it has not been preserved for appellate review.

II. BACKGROUND

Sims' trial was held on August 24 through September 1, 1998. The evidence presented at trial is fully set forth in *State v. Sims*,

258 Neb. 357, 603 N.W.2d 431 (1999). For purposes of Sims' ineffective assistance of counsel claims, we reiterate some of the procedural history, as developed by evidence presented at the postconviction hearing.

1. Procedural History

The four-count information charging Sims with the offenses for which he was convicted was filed on May 7, 1997. On May 8, Sims appeared for arraignment with appointed counsel and entered a plea of not guilty subject to a plea in abatement, which he was given leave to file within 10 days. Sims' appointed counsel moved for leave to withdraw on September 18. On September 26, the court granted the motion but, noting that Sims had elected to represent himself, required the attorney to remain as Sims' technical advisor. The court overruled Sims' plea in abatement on October 8.

Sims filed a pro se "Motion on Conflicts and Negligence of Stand by Counsel and Courts" on October 29, 1997. A hearing on this motion was held on November 4, and the matter was continued until November 10. On November 10, Sims indicated that he was interviewing attorneys in order to retain one and the court ordered that the original attorney remain as Sims' advisor until Sims secured new counsel. On December 10, another attorney entered his appearance for Sims and the originally appointed counsel was allowed to withdraw.

At a pretrial conference held on January 28, 1998, the court scheduled trial to begin on April 6. On April 6, however, the State was granted leave to endorse three additional witnesses. Sims filed a motion for continuance, which was granted, and the trial court indicated that Sims' trial would commence on May 12.

On approximately May 11, 1998, codefendant Harry Winefeldt entered into a plea agreement with the State and agreed to testify against Sims. Trial counsel, in a deposition entered into evidence at the postconviction hearing, testified as follows:

> I have a vague recollection about asking for a continuation when the State's co-defendant entered a plea and agreed to testify for the State. Do I have a specific recollection as to a particular date, I don't. I — I vaguely recall the co-defendant getting on board with the State and at that point needing more time to prepare the defense.

Trial counsel explained that upon learning that Winefeldt was going to testify against Sims, trial counsel "would not have been prepared to go forward." He would have needed more time to prepare to cross-examine Winefeldt.

Trial counsel explained that it was his recollection that Sims' trial was then rescheduled to August 24, 1998, after he and the trial judge looked at the dates and "either I was on vacation or the Judge was gone." Trial counsel explained that the "August date was the earliest we could get in for various reasons." Trial counsel further testified that he remembered speaking with Sims about the August 24 date and that Sims did not have a problem with it. Trial counsel said that Sims was always "on top of things," and trial counsel was sure that he had spoken with Sims about his right to a speedy trial.

The prosecutor for Sims' trial likewise recalled that it was Sims' trial counsel who had requested a continuance when trial counsel learned that Winefeldt had accepted a plea agreement on "the eve of trial for . . . Sims." The prosecutor explained, "I think . . . the reason the trial was moved from May to August [was] because I believe [trial counsel] said, well, if [Winefeldt is] going to testify, then I'm going to need a continuance because I have no idea what he's going to say."

Sims testified at the postconviction hearing that he had always emphasized to trial counsel that he wanted to go to trial as soon as possible. Sims said he had expected to go to trial on May 12, 1998, and that trial counsel was prepared for trial on that date. Sims asserted that trial counsel never told Sims why his trial date was moved and that when he specifically asked trial counsel for the reason for the delay, trial counsel told him that he did not know. Although Sims' testimony is not entirely clear, Sims admitted that, at some point, he was informed of Winefeldt's plea agreement.

Sims testified at the postconviction hearing that when he was informed that his trial had been delayed until August 24, 1998, he did not specifically ask trial counsel whether or not any continuances had been requested or granted. He was certain, however, that trial counsel never mentioned a continuance to him. Sims said that he could not understand why a last-minute plea agreement between Winefeldt and the State would merit a continuance

because trial counsel had already discussed the possibility of Winefeldt's testifying against Sims and they had already reviewed various statements that Winefeldt had made to the police. To Sims' knowledge, no deposition of Winefeldt was taken by trial counsel and Sims was not made aware, after May 12, of any new information relating to Winefeldt's proposed testimony. Sims claimed that trial counsel did not inform him of a right to a speedy trial and that Sims was unaware that a motion to discharge could be filed. Sims entered into evidence transportation orders which reflected that he had not been transported to court on May 12.

The docket sheet from the trial court contains no entries between the time of the April 6, 1998, continuance and an August 11 reference to a transportation order. By letter dated May 13, 1998, file stamped May 14, the trial judge informed counsel that the case was set for trial on Monday, August 24. That same date, the trial judge sent a memorandum to the office of the court administrator stating the following with regard to the date of Sims' trial:

> [O]n this date we discussed commencing trial on August 24, 1998, with jurors from the August 17, 1998, panel. . . .
>
> The reason we have requested permission from the Presiding Judge to try this case in the last week of this panel, out of turn, is that this is the soonest date available for trial for counsel and the Court.

Various subpoenas calling witnesses to trial on April 2, 1998, were file stamped May 15 with an attached notation by the Douglas County investigator stating "Case Continued 5-15-98." New subpoenas were issued calling witnesses for August 25.

2. Motion to Recuse

Before the postconviction hearing, the postconviction judge, who had also presided over Sims' trial, overruled a motion by Sims for the judge to recuse himself because Sims wished to call the judge as a witness. Sims' motion alleged that the judge had information relevant to Sims' attempt to prove prejudice from trial counsel's failure to protect his speedy trial rights. Sims explained that because there was no court entry definitively establishing the cause of the delay for Sims' trial beyond May 12, 1998, the judge would be required to testify as to his recollection of the reason Sims' trial did not take place on May 12. Sims also

wanted the judge to generally testify about the period between May 12 and August 24 to explain how the August 24 trial date was arrived at and what other trials, civil and criminal, took place during that time. In support of his motion, Sims referenced the judge's scheduling book, which he apparently wanted to subpoena or have the judge rely upon during his testimony. Sims' motion also asserted that the trial bailiff had subsequently developed Alzheimer's disease and that this fact left the judge as the only alternative witness to the scheduling of Sims' trial. Sims' motion to recuse was not accompanied by an affidavit.

The judge denied Sims' motion, explaining that he believed that any testimony he might have would not be competent because "anything I have to say about the delaying of trial can be gotten in [sic] with other sources and it is not an appropriate form of evidence for that trial." The judge explained that if it later became clear that his testimony was necessary, the judge would allow counsel to raise the issue again.

Before concluding his presentation of the evidence at the hearing, postconviction counsel called the judge as a witness. The judge denied the request to testify, explaining that he had already ruled that "at this stage of the proceeding any testimony that I would provide would be incompetent and not of any value in the proceeding as identified in case law."

3. Postconviction Court's Conclusions

The postconviction court concluded that Sims could not establish that trial counsel's performance was deficient, and it accordingly overruled Sims' motion for postconviction relief. With regard to the speedy trial issue, the postconviction court found that trial counsel had requested a second continuance on or before the May 12, 1998, trial date after learning of Winefeldt's plea and decision to testify for the State against Sims. The court concluded that even if the continuance was over Sims' objection, trial counsel waived Sims' speedy trial rights on his behalf for that period. The court concluded that the May 12 motion for a continuance was a reasonable strategic decision in light of the last-minute plea bargain agreement because a former codefendant's version of events could have changed in order to gain a more favorable position in a deal with the State. The court found that trial counsel was not ineffective for failing

to object to improper impeachment under *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), because any *Doyle* violation was harmless given the overwhelming evidence of Sims' guilt and the limited nature of the questioning.

III. ASSIGNMENTS OF ERROR

Sims assigns as error that the postconviction court erred in (1) not recusing itself and (2) finding that Sims did not receive ineffective assistance of counsel.

IV. STANDARD OF REVIEW

[1] 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).

V. ANALYSIS

1. Ineffective Assistance

[2] We first address Sims' claims that trial counsel was ineffective. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*, to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. See *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005). In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. Marshall, supra*; *State v. McHenry, supra*.

(a) Failure to File Motion for Discharge

Sims argues he was deprived of effective trial counsel because trial counsel failed to make a motion for discharge following a violation of Sims' right to a speedy trial. Sims raised this issue on direct appeal from his conviction, but we held in *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999), that the record was insufficient at that time to resolve it.

[3] In a postconviction action, when a defendant alleges he or she was prejudiced by trial counsel's failure to properly assert the defendant's speedy trial rights, the court must consider the merits of the defendant's speedy trial rights under *Strickland*. See, *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006); *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003). Only if a properly made motion should have resulted in the defendant's absolute discharge, thus barring a subsequent trial and conviction, could the failure to make a motion for discharge be deemed prejudicial. See *State v. Meers, supra*. Sims alleges that a motion for discharge, if properly made, would have been granted because, as of May 23, 1998, both his statutory and constitutional speedy trial rights were violated. We address each of these in turn.

(i) Statutory 6-Month Period

Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005). Sims concedes that under § 29-1207, 149 days should be excluded from the 6-month period as attributable to his plea in abatement. Twelve days are excluded for his motions requesting new counsel, and 36 days are excluded for his April 6, 1998, motion to continue. The State does not assert any excluded periods attributable to State motions or to the trial court. According to Sims, excluding these periods attributable to his motions, he should have been brought to trial by May 23, 1998. Sims' alleged speedy trial violation stems from his assertion that the delay from May 23 and the actual trial on August 24 is not an excluded time period under § 29-1207.

The postconviction court found that trial counsel requested a second continuance on or before the May 12, 1998, trial date after learning of Winefeldt's plea agreement to testify against Sims. On appeal from a proceeding for postconviction relief, the trial 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). Sims spends a great deal of time pointing out evidence that "suggest[s]" trial counsel did not make a motion to continue on or about May 12. Brief for appellant at 14. We conclude, based on a full review of the record, that the postconviction court was not clearly erroneous in concluding that a motion to continue was made by Sims' trial counsel on approximately May 12.

We have explained that "[w]hen a delay in trial is attributable to a defense motion for a continuance filed within the statutory period, defense counsel is not ineffective for failing to file a motion to dismiss." *State v. McHenry*, 268 Neb. 219, 230-31, 682 N.W.2d 212, 224 (2004). Sims asserts that even if trial counsel made a motion on May 12, 1998, to continue trial, the entire period of the delay until the August 24 trial is not attributable to the motion.

Section 29-1207(4)(b) provides that a period of delay *resulting from* a continuance granted at the request or with the consent of the defendant or his counsel is excluded from the speedy trial calculation. Sims, in effect, argues that the entirety of the delay after the May 12, 1998, continuance was not "resulting from" that motion. In *State v. Petty*, 269 Neb. 205, 211, 691 N.W.2d 101, 106 (2005), we considered the meaning of "resulting from" in the context of what must be shown in order to exclude from the 6-month speedy trial calculation the period of time specified by § 29-1207(4)(d), the period " 'resulting from the absence or unavailability of the defendant.' " We held that where a defendant fails to appear for a timely scheduled trial, the "resulting" delay from such absence or unavailability does not end immediately upon the defendant's reappearance. Instead, "further delay inevitably results from the fact that the court, prosecutors, witnesses, and all others involved with the case must adjust their schedules." *Id.* Indeed, other criminal cases will invariably have been set for trial and will be required in some cases to proceed

to trial to meet their own speedy trial constraints prior to the trial of the reappearing defendant. See *id*.

We also clarified in *Petty* that in order for a period of delay resulting from the defendant's absence to be excludable from the 6-month speedy trial period, no showing of "good cause," under § 29-1207(4)(f), need be made. Section 29-1207(4)(f) sets forth as excludable "[o]ther periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause." We recognized that under *State v. Letscher*, 234 Neb. 858, 861, 452 N.W.2d 767, 769 (1990), the excludable period under § 29-1207(4)(d) was limited to the period of time from the defendant's later availability to the next "reasonably available" trial date. We held that in determining whether time is excludable for speedy trial purposes under § 29-1207(4)(d), a trial date that is scheduled within 6 months after the defendant's reappearance will be presumed to be the next reasonably available trial date without the State's being required to present further evidence to justify the setting. *State v. Petty, supra*.

[4] The reasoning of *Petty* is applicable here. In determining whether a period of delay is attributable to defense counsel's motion to continue, we need not inquire as to what extent there was "good cause" for the delay. Trial counsel's testimony at the postconviction hearing indicated that the August 24, 1998, trial date was the earliest practicable date given his and the judge's schedules that had been established well before the unexpected motion. As reflected in *Petty*, we recognize the complexity of that which can properly be considered "resulting from" a sudden change in a scheduled trial date.

[5] We note that in arguing that the entire delay was not resulting from trial counsel's motion to continue, Sims sought to prove that already scheduled civil trials took precedence over the rescheduling of his criminal trial. We find this of no consequence to our resolution of Sims' ineffectiveness of counsel claim. Neb. Rev. Stat. § 29-1205 (Reissue 1995) states that "[t]o effectuate the right of the accused to a speedy trial . . . insofar as is practicable: (1) The trial of criminal cases shall be given preference over civil cases . . . ." As we stated in *State v. Watkins*, 190 Neb. 450, 452, 209 N.W.2d 184, 185 (1973), the provision of § 29-1205 to give preference of criminal over civil trials is

"obviously directory." To demand that all scheduled civil trials must accommodate the rescheduling of a criminal trial as a result of a defense motion to continue is hardly "practicable." There is nothing in the language of § 29-1207 which would demand an inquiry into whether civil trials took place between May 12 and August 24, 1998.

Sims also asserts that *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972), "was not followed." Brief for appellant at 15. In *Alvarez*, we addressed the "good cause" catchall provision of § 29-1207(4)(f) and held that in order to facilitate review, a general finding of a trial court that "good cause" existed under § 29-1207(4)(f) would no longer suffice. Rather, the trial court would be required to "make specific findings as to the cause or causes of such extensions and the period of extension attributable to such causes." *State v. Alvarez*, 189 Neb. at 292, 202 N.W.2d at 611.

Recognizing that the case was one of the first cases to reach this court involving Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 1995), we explained that "[w]e now deem it *advisable* to recommend the following for *procedural uniformity*." (Emphasis supplied.) *State v. Alvarez*, 189 Neb. at 293, 202 N.W.2d at 611. We then set forth the following:

> When the district court sets a date for trial, which date is later than the statutory time allowed by section 29-1207, R. S. Supp., 1971, the court shall:
>
> (1) Advise the defendant of his statutory right to a speedy trial and the effect of his consent to a period of delay, and
>
> (2) Ascertain of record whether the defendant does or does not waive his right to a speedy trial and consent to the trial date set.

Id.

We do not find *Alvarez* to be applicable to the case at bar. As we have explained, no showing of "good cause" is required in this case because the period of delay was a result of a continuance requested by Sims' counsel. *Alvarez* concerned a period of delay under § 29-1207(4)(f) and not an excludable period, as presented here, under § 29-1207(4)(b). In *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004), we held that the statutory right to a speedy trial is not a personal right that can we waived

only by a defendant, and a defendant is therefore bound by counsel's motion for a continuance even if the defendant is opposed to the motion. A defendant can only be deemed not so bound in the event that counsel is a " ' " ' farce and a sham.' . . ." ' " *Id.* at 232, 682 N.W.2d at 225. Sims does not argue that trial counsel was such a farce and a sham that he should not properly be considered his counsel for these purposes. Inasmuch as the procedural recommendations set forth in *Alvarez* could be deemed applicable to an excludable period under § 29-1207(4)(b), Sims fails to make any argument as to how the failure to follow such procedure violated his speedy trial rights where trial counsel waived that right on his behalf.

We conclude that the entirety of the period of delay from May 12 to August 24, 1998, is excludable under § 27-1207(4)(b), and, therefore, we find that Sims had no right to absolute discharge under the speedy trial act. Since the motion for discharge under the act would be unsuccessful, no prejudice can be shown by trial counsel's failure to make it. Trial counsel was not ineffective by failing to motion for discharge on the ground that Sims' statutory right to a speedy trial had been violated.

(ii) Constitutional Right

[6] We next consider Sims' contention that a motion for discharge would have been successful because his right to a speedy trial under U.S. Const. amend. VI and Neb. Const. art. I, § 11, was violated. Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant. *Id.* See, also, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

In analyzing the prejudice factor of this four-factor test, the U.S. Supreme Court in *Barker v. Wingo, supra*, explained that

there are three aspects: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the defendant, and (3) limiting the possibility that the defense will be impaired by dimming memories and loss of exculpatory evidence. Of these three aspects, the third is considered most important "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 U.S. at 532.

Sims' argument that his constitutional right to a speedy trial was violated is as follows:

> In the present case, the delay was substantial. Even considering any delay that was directly or indirectly the result of [Sims]. While the trial court tried to set reasonable restrictions on the delay when defense counsel requested the continuance to discover the late witnesses, the trial court allowed substantial delay in resolving the plea in abatement and trial once the three witnesses were discovered.
>
> Furthermore, [Sims] was prejudiced because he was in jail pending the trial, and the long delay allowed the [S]tate time to secure the perjury of Winefeldt.

Brief for appellant at 21. We find no merit to this argument.

In *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004), we did not specifically address counsel's ability to waive a defendant's constitutional right without the defendant's consent. But it appears clear that defense counsel's ability to waive a defendant's speedy trial right is likewise applicable to an analysis under the Sixth Amendment. Thus, in *Stewart v. Nix*, 972 F.2d 967 (8th Cir. 1992), in considering the second factor of the *Barker v. Wingo, supra*, balancing test for its resolution of the defendant's speedy trial claim, the court concluded that delays due to continuances sought by the defendant's counsel were attributable to the defendant regardless of whether the defendant authorized the continuances. See, also, *U.S. v. Titlbach*, 339 F.3d 692 (8th Cir. 2003). In *Stewart*, the court explained that "[g]enerally, motions for a continuance pertain to trial tactics or conduct of the trial process and are largely left to trial counsel's discretion. Courts will rarely interfere with or second-guess such motions unless counsel's action is so prejudicial as to make the trial unfair." 972 F.2d at 970. As the court in *People v. Bowman*, 138 Ill. 2d 131, 561 N.E.2d 633, 149 Ill. Dec. 263 (1990), further

explained, to hold otherwise would create an impractical burden on the State to inquire into the validity of counsel's representations lest the State be misled into acquiescing to a violation of a defendant's right to a speedy trial.

As already discussed, most delays in Sims' coming to trial are attributable to defense counsel. The delays were requested with the intention of adequately preparing Sims' defense. There is no contention by Sims that the delays impaired his defense. As stated by this court in *State v. Jameson*, 224 Neb. 38, 43, 395 N.W.2d 744, 747 (1986), "It would be a strange anomaly if a defendant could first ask for a series of continuances and then be immune from prosecution because he had not been granted a speedy trial. Even under the most liberal view of the sixth amendment, that argument will not 'hold water.' " Our analysis under the four-factor balancing test reveals no speedy trial violation in Sims' trial. Accordingly, we find no merit to Sims' claim that trial counsel was ineffective for failing to motion for absolute discharge for violation of his constitutional right to a speedy trial.

(b) Failure to Make *Doyle* Objection

Sims also argues that trial counsel was ineffective for failing to object to improper prosecutorial commentary on Sims' post-arrest, post-*Miranda* silence, in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). Sims does not argue that his appellate counsel was ineffective for failing to raise on direct appeal trial counsel's failure to make a *Doyle* objection. Sims apparently did not argue this issue to the postconviction court, and the postconviction court did not address the effectiveness of appellate counsel.

[7] 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. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005). Upon review of the briefs in Sims' direct appeal, it is clear that appellate counsel, who was different than Sims' trial counsel, did not raise this issue even though it was apparent from the record. Thus, although for reasons different than those articulated by

the postconviction court, we affirm the conclusion that Sims cannot recover on a postconviction claim stemming from an alleged *Doyle* violation. See *State v. Moore, ante* p. 71, 718 N.W.2d 537 (2006) (likewise affirming denial of postconviction relief, albeit for reasons different from postconviction court).

2. Failure to Recuse

Finally, we consider Sims' allegation that the postconviction judge erred in failing to grant Sims' motion to recuse. Sims argues that his motion to recuse should have been granted because Sims called the judge as a witness in the postconviction action. Sims points out that under the Code of Judicial Conduct and Neb. Evid. R. 605, Neb. Rev. Stat. § 27-605 (Reissue 1995), a judge may not testify in a trial over which that judge is presiding.

[8] Canon 3E of the Code of Judicial Conduct states that a judge shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned, including, but not limited to, instances where the judge is, to his or her knowledge, "likely to be a material witness in the proceeding." Neb. Code of Jud. Cond., Canon 3E(1)(d)(iv) (rev. 2000). A trial judge is not generally considered a "material" witness in a case unless his or her testimony is actually material and necessary to the determination of the case, and cannot be acquired by other sources. See 46 Am. Jur. 2d *Judges* § 101 (2006). See, also, *Daniels v. State*, 650 So. 2d 544 (Ala. Crim. App. 1994); *Bresnahan, Jr. v. Luby*, 160 Colo. 455, 418 P.2d 171 (1966).

Rule 605 concerns the competency of a judge as a witness and states simply: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Rule 605 was drafted as a broad rule of incompetency designed to prevent a judge presiding at a trial from testifying as a witness in that trial on any matter whatsoever. *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000).

Sims asserts that rule 605 and Canon 3E mandated that his postconviction judge recuse himself. The postconviction judge disagreed because the judge decided that he would not likely testify at the postconviction hearing. In fact, when Sims called the postconviction judge to testify, the judge refused to do so. The real question is whether the judge properly refused to testify at Sims' postconviction hearing, and thereby avoided the

prohibitions of Canon 3E and rule 605. We review the postconviction court's decision not to testify for an abuse of discretion. See, *People v. Reynolds*, 284 Ill. App. 3d 611, 673 N.E.2d 720, 220 Ill. Dec. 576 (1996); *State v. Lewis*, 147 N.C. App. 274, 555 S.E.2d 348 (2001).

[9] In *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990), we recognized that a threshold showing must be made before a postconviction judge, who was also the presiding judge at trial, will be compelled to testify at a postconviction hearing. There is no rule of law which automatically disqualifies a judge who has presided at trial from subsequently considering a postconviction action. *Id*. To the contrary, it is generally encouraged that the postconviction petition be heard by the same judge that rendered the original judgment. See, e.g., *U.S. v. Battle*, 235 F. Supp. 2d 1301 (N.D. Ga. 2001); *People v. Neal*, 123 Ill. App. 3d 148, 462 N.E.2d 814, 78 Ill. Dec. 695 (1984); *State v. Wise*, 879 S.W.2d 494 (Mo. 1994). The judge's familiarity with the case is regarded as beneficial to all concerned because it furthers the goal of an efficient, expeditious, and fair decision on the motion. See *id*.

[10] Obviously, all postconviction judges who also presided at the defendant's trial will have witnessed the trial proceedings. It would frustrate the objectives of encouraging the trial judge to sit for the postconviction action if movants were allowed, as a matter of course, to force a trial judge's recusal from postconviction actions simply by calling the judge as a witness. *State v. Wise, supra*. In *State v. Joubert, supra*, we ultimately rejected the defendant's assertion that his postconviction judge should have been disqualified in order to be available as a witness by reasoning that "the record [does not] support an assertion that the judge had any information not readily available from other sources." *Id*. at 234-35, 455 N.W.2d at 122.

Most courts have likewise recognized a "heightened scrutiny" involved in the question of whether a judge can be compelled to be a witness. *U.S. v. Roth*, 332 F. Supp. 2d 565, 567 (S.D.N.Y. 2004). These courts generally require some threshold showing of necessity for the testimony. See, *Hensley v. Alcon Laboratories, Inc*., 197 F. Supp. 2d 548 (S.D.W. Va. 2002); *People v. Kriho*, 996 P.2d 158 (Colo. App. 1999); *Gold v.*

Warden, State Prison, 222 Conn. 312, 610 A.2d 1153 (1992); *State v. Wise, supra*; *Coleman v. State*, 194 Mont. 428, 633 P.2d 624 (1981); *State ex rel. Hall v. Niewoehner*, 116 Mont. 437, 155 P.2d 205 (1944); *In re Disqualification of Schweikert*, 110 Ohio St. 3d 1209, 850 N.E.2d 714 (2005); *Inscoe v. Inscoe*, 121 Ohio App. 3d 396, 700 N.E.2d 70 (1997); *In re Whetstone*, 354 S.C. 213, 580 S.E.2d 447 (2003). Necessity is generally shown when the information sought by the proposed testimony both is relevant on a crucial point and is unobtainable from other sources. See, generally, *id*. Alleged necessity notwithstanding, judges will not be compelled to testify as to the mental processes or reasons that motivated the judge in his or her official acts. *United States v. Morgan*, 313 U.S. 409, 61 S. Ct. 999, 85 L. Ed. 1429 (1941); *United States v. Cross*, 516 F. Supp. 700 (M.D. Ga. 1981), *reversed on other grounds* 708 F.2d 631 (11th Cir. 1983).

[11] We agree that a threshold showing of necessity must be made and hold that a defendant in a postconviction action can compel the postconviction judge, who was also the judge at trial, to testify only if (1) the judge possesses factual knowledge, (2) that knowledge is highly pertinent to the fact finder's task, and (3) the judge is the only possible source of testimony on the relevant factual information. See, *U.S. v. Roth, supra*. See, also, *United States v. Frankenthal*, 582 F.2d 1102 (7th Cir. 1978). Applying these principles, it is clear that the judge did not abuse his discretion in refusing to testify at Sims' hearing on his motion for postconviction relief. Sims sought the judge's testimony to explain why, during the period between May 12 and August 24, 1998, civil cases were given preference over Sims' criminal case. The judge's testimony was also sought to generally illuminate the period of May 12 to August 24 and to explain whether trial counsel made a May 12 motion to continue the trial. As already discussed, any evidence as to civil versus criminal trials conducted during that period is largely irrelevant. The relevant issues to Sims' ineffective assistance claims were evidenced through other sources. The postconviction judge stated that any information he might have could be obtained from other sources. We conclude that the judge properly denied Sims' call to testify. Because the postconviction judge did not

testify, he also properly denied Sims' motion to recuse based upon bias incurred by a trial judge's testifying in his or her own proceedings.

VI. CONCLUSION

Delay in bringing Sims to trial is attributable to trial counsel's motions for the purpose of properly preparing Sims' defense, and we find no violation of Sims' right to a speedy trial. Therefore, trial counsel was not ineffective for failing to make a motion to discharge. The issue of trial counsel's ineffectiveness for failing to make a *Doyle* violation is procedurally barred. We find the postconviction judge did not abuse his discretion in denying Sims' motion to recuse. For these reasons, we affirm the judgment of the postconviction court.

AFFIRMED.

IN RE APPLICATION OF BRIAN BUDMAN FOR ADMISSION TO THE NEBRASKA STATE BAR.

724 N.W.2d 819

Filed December 22, 2006. No. S-34-060001.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Rules of the Supreme Court: Attorneys at Law: Waiver.** A Class I-A applicant to the Nebraska bar must have obtained a degree from a law school approved by the American Bar Association, as specified in Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005), or, in the absence of such degree, seek a waiver of rule 5A(1)(b).
4. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof: Appeal and Error.** Following the denial of an application and a hearing before the Nebraska State Bar Commission, the Nebraska Supreme Court will consider a waiver of Neb. Ct. R. for Adm. of Attys. 5A(1)(b) (rev. 2005) to allow a graduate of a foreign law school based on English common law to become licensed to practice law in Nebraska if the applicant has demonstrated that the education he or she received was functionally equivalent to that for a juris doctor degree available at a law school approved by the American Bar Association.

5. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof.** When a foreign-educated attorney seeks a waiver, the burden at all times will be on the applicant to affirmatively show that the education he or she received was functionally equivalent to that of a law school approved by the American Bar Association.
6. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska State Bar Commission does not have the authority to waive Neb. Ct. R. for Adm. of Attys. 5A(1)(b) (rev. 2005).
7. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The Nebraska State Bar Commission's function following an initial denial of a bar application is to provide the applicant with the opportunity for a hearing before the commission, which the Nebraska Supreme Court can review de novo on the record.
8. ____: ____: ____. In cases involving a Class I-A applicant seeking a waiver of the educational requirement contained in Neb. Ct. R. for Adm. of Attys. 5A(1)(b) (rev. 2005), the Nebraska State Bar Commission should include in its denial after hearing a recommendation as to whether the Nebraska Supreme Court should waive rule 5A(1)(b) and the basis for such recommendation.
9. **Rules of the Supreme Court: Attorneys at Law: Intent.** Admission rules are intended to "weed" out unqualified applicants, not to prevent qualified applicants from taking the bar examination.
10. **Rules of the Supreme Court: Attorneys at Law.** While the use of the American Bar Association's approval as a criterion allows courts to evaluate an applicant's legal education effectively and expeditiously without imposing a burden on the court's resources, a court must also ensure that applicants are treated fairly, because any qualification for admission to the bar must have a rational connection with the applicant's fitness or capacity to practice law.
11. ____: ____. The Nebraska Supreme Court will not require a strict application of the educational qualifications for admission to the bar if, in doing so, it would operate in such a manner as to deny admission to a qualified graduate of a foreign law school arbitrarily and for a reason unrelated to the essential purpose of the educational qualification rule.

Original action. Application granted.

Brian Budman, pro se.

Jon Bruning, Attorney General, Jennifer M. Tomka, and Tom Stine for Nebraska State Bar Commission.

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

MILLER-LERMAN, J.

I. INTRODUCTION

This case involves an application filed by Brian Budman with the Nebraska State Bar Commission (Commission) for admission without examination as a Class I-A applicant and requires us

to decide whether we will grant a waiver of the educational requirement contained in Neb. Ct. R. for Adm. of Attys. 5A(1)(b) (rev. 2005) and admit a graduate of a foreign law school that is not approved by the American Bar Association (ABA).

Upon our de novo review and applying our jurisprudence relative to rule 5A(1)(b), we determine that Budman has met his burden of affirmatively showing that he "had attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska," rule 5A(1)(b), and as a result, a waiver of the educational requirement under rule 5A(1)(b) is appropriate. Accordingly, we grant Budman's application for admission to the Nebraska State Bar Association.

II. FACTS

Budman is a citizen of Canada and has been granted permanent resident status to work in the United States. He currently resides in Colorado. He received a bachelor of arts degree from Concordia University in Montreal, Quebec, Canada, in 1990 and a bachelor of laws, or LL.B., degree from Queen's University in Kingston, Ontario, Canada, in 1995. Queen's University is ineligible for ABA approval because it is a Canadian law school.

Queen's University is an English-speaking, common-law, Canadian law school. Budman earned his LL.B. after successfully completing 3 years of legal studies at Queen's University. Budman's training included course study in public law, contracts, property, torts, civil procedure, constitutional law, criminal procedure, business associations, family law, remedies, evidence, labor law, land transactions, immigration law, taxation, and individual employment relations.

Budman was admitted to practice law in Ontario on April 24, 1998, and he is presently a member in good standing of the Law Society of Upper Canada. No ethical complaints have been filed against him in Canada.

Budman passed the Colorado bar examination and was admitted to practice law in Colorado on October 23, 1997. In 1998, he worked for two different Denver, Colorado, law firms, practicing in the areas of estate planning and taxation. In 1999, Budman formed his own law firm, and he is

currently practicing with this firm. Budman is a member in good standing of the Colorado bar, and no ethical complaints have been filed against him in Colorado.

While Budman was practicing law in Colorado, he took classes at the University of Denver. On November 22, 2000, he was awarded a master of laws, or LL.M., degree in taxation. His training at the University of Denver included coursework in property transactions, individual tax problems, estate planning, partnership taxation, strategic tax planning, tax research, tax accounting, civil and criminal tax law, and three corporate tax law courses.

On June 10, 2005, Budman submitted a Class I-A application to the Commission seeking admission to the Nebraska bar without examination. See rule 5A(1). In a letter dated September 20, 2005, the Commission denied Budman's application because he did not meet the educational qualifications under rule 5A(1)(b). Budman appealed the Commission's denial, and a hearing was held on January 6, 2006. Budman presented evidence at the hearing. On February 23, the Commission again denied Budman's application because he did "not meet the educational qualifications required" under rule 5A(1)(b). The Commission also stated that if Budman appealed, the Commission "will recommend that the Supreme Court waive the educational qualifications requirement of Rule 5C." By its terms, rule 5C does not relate to applicants seeking admission without examination but instead pertains to the educational requirements for applicants seeking to be admitted by examination. In essence, rule 5C requires that applicants seeking admission by examination shall have received a first professional degree from a law school approved by the ABA. Budman appealed to this court, seeking a waiver of the educational requirement. In its brief on appeal, the Commission supports Budman's request for a waiver.

III. ASSIGNMENT OF ERROR

Budman's brief does not contain an assignment of error. See Neb. Ct. R. of Prac. 9D(1)e (rev. 2006). In the concluding paragraph of his brief, he asserts that his legal education and exposure to U.S. law, taken together, justify a "waiver of the educational qualification requirement of Rule 5C." Brief for applicant

at 9. The Commission's brief states that "the Commission recommends that this Court waive the requirements of Rule 5C as to Budman." Brief for the Commission at 9. Unlike these assertions, given the undisputed nature of Budman's application as one under rule 5A seeking admission without examination, and given the Commission's denial of Budman's application because he did not meet the relevant educational qualifications, we will consider Budman's appeal as one seeking a waiver of rule 5A(1)(b).

IV. STANDARD OF REVIEW

[1] The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006); Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000).

V. ANALYSIS

1. Applicable Law

[2] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *In re Application of Brown, supra*. See Neb. Const. art. II, § 1, and art. V, §§ 1 and 25. Budman seeks admission to the Nebraska bar without examination as a Class I-A applicant pursuant to rule 5A(1), which provides as follows:

> (1) Class I-A applicants who may be admitted to practice in Nebraska upon approval of a proper application are those:
>
> (a) who, as determined by the bar commission, have been admitted to, and are active and in good standing in, the bar of another state, territory, or district of the United States, and
>
> (b) who at the time of their admission had attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska, and
>
> (c) who have passed an examination equivalent to the examination administered in the State of Nebraska, and, beginning in 1991, who have passed the Multistate Professional Responsibility Examination with the score required by Nebraska.

Regarding rule 5A(1)(c), we note that the score on the Multistate Professional Responsibility Examination (MPRE) required in Nebraska is 85 or higher. Neb. Ct. R. for Adm. of Attys. 16 (rev. 2004).

The precise educational requirement of rule 5A(1)(b) is not set forth therein. Instead, the rule references and incorporates the "educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska." The educational qualifications for admission by examination are found at rule 5C. Rule 5C requires that applicants "must have received at the time of the examination their first professional degree from a law school approved by the [ABA]." See, also, *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996).

[3] We recently examined the educational qualifications of rule 5A(1)(b) that are implicated in this case in *In re Application of Brown, supra*. In *In re Application of Brown*, we held that "the educational qualifications required of a Class I-A applicant are the same as the requirement found in rule 5C (i.e., a first professional degree from an ABA-approved law school)." 270 Neb. at 898, 708 N.W.2d at 258. Thus, as to the educational requirement, applicants such as Budman seeking admission without examination as a Class I-A applicant must meet the ABA-approved law school requirement specified in rule 5C that we have read into rule 5A(1)(b) or, in the absence of such degree, seek a waiver of rule 5A(1)(b). The waiver of rule 5A(1)(b) will be based on considerations enunciated in our jurisprudence relative to educational qualifications waivers that we have granted under various rules. See *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006).

2. Budman Does Not Meet Educational Qualifications for Class I-A Applicants

The Commission denied Budman's application because he did not meet the educational qualifications in that he lacked a first professional degree from an ABA-approved law school. Budman's LL.B. was earned from Queen's University in Canada, which is not an ABA-approved law school. We therefore conclude that Budman's LL.B. does not satisfy the educational

requirement of rule 5A(1)(b), and we turn to the issue of whether a waiver of rule 5A(1)(b) is appropriate.

3. Waiver of the Educational Qualification of Rule 5A(1)(b) Is Appropriate

[4,5] We have previously recognized that following the denial of an application and a hearing before the Commission, this court will consider a waiver of rule 5A(1)(b) to allow a graduate of a foreign law school based on English common law to become licensed to practice law in Nebraska if the applicant has demonstrated that the education he or she received was functionally equivalent to that for a juris doctor degree available at an ABA-approved law school. See *In re Application of Brown, supra*. See, also, *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998) (discussing waiver of educational requirement under rule 5C). We have also stated that when a foreign-educated attorney seeks a waiver, the burden at all times will be on the applicant to affirmatively show that the education he or she received was functionally equivalent to that of an ABA-approved law school. See *id*.

(a) Commission's Role in Waiver Cases

[6-8] As we have previously noted, and as the Commission acknowledged during oral argument, the Commission does not have the authority to waive rule 5A(1)(b). See *In re Application of Brown, supra*. See, also, *In re Application of Gluckselig*, 269 Neb. 995, 697 N.W.2d 686 (2005) (stating that Commission does not have authority to waive rule 5C educational requirement). The Commission's function following an initial denial is to provide the applicant with the opportunity for a hearing before the Commission, which this court can review de novo on the record. *Id*.; Neb. Ct. R. for Adm. of Attys. 10 (rev. 2000). In *In re Application of Gluckselig*, a case involving a Class II applicant seeking a waiver of the educational requirement under rule 5C, we requested that the Commission include in its denial after hearing a recommendation as to whether this court should waive rule 5C and the basis for such recommendation. The same procedure is appropriate for waivers sought under rule 5A(1)(b), and we note that consistent with our direction in *In re Application of*

Gluckselig, the Commission has recommended that we waive the educational requirement in the instant case on the basis that Budman's education was functionally equivalent to that of an ABA-approved school.

(b) Waiver in Present Case

[9-11] In Budman's brief, he requests that this court waive the educational requirement in his case, a request which the Commission endorses. When considering whether waiver of the educational requirement is appropriate, we are guided by certain principles. We have observed that the "admission rules [are] intended to 'weed' out unqualified applicants, not to prevent qualified applicants from taking the bar." *In re Application of Gluckselig*, 269 Neb. at 1001, 697 N.W.2d at 691. Also, while the use of ABA approval as a criterion allows courts to evaluate an applicant's legal education effectively and expeditiously without imposing a burden on the court's resources, a court must also ensure that applicants are treated fairly, because any qualification for admission to the bar " ' "must have a rational connection with the applicant's fitness or capacity to practice law." ' " *In re Application of Collins-Bazant*, 254 Neb. at 621, 578 N.W.2d at 43 (quoting *Bennett v. State Bar*, 103 Nev. 519, 746 P.2d 143 (1987)). Although the present case involves a Class I-A application as distinguished from a Class II application, in considering a foreign-educated attorney's Class II application, this court has stated that it will not require a strict application of rule 5C if, in doing so, it would operate in such a manner as to deny admission to a qualified graduate of a foreign law school arbitrarily and for a reason unrelated to the essential purpose of the rule. See, *In re Application of Gluckselig, supra*; *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998).

We recently applied the principles that were developed in cases where applicants sought admission by taking the examination to a case involving a foreign-educated attorney seeking admission without examination. See *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006). In *In re Application of Brown*, we considered the request for an educational qualification waiver of an individual who had earned his law degree from a Canadian law school. In deciding whether to waive rule 5A(1)(b), we examined

the two elements of educational background and exposure to U.S. law. We now consider these same two elements in determining whether Budman has met his burden of affirmatively showing that his education, considered as a whole, was functionally equivalent to that of an ABA-approved law school. See *In re Application of Brown, supra*.

With respect to educational background, our de novo review of the record before us indicates that Budman obtained a well-rounded legal education from Queen's University, where he earned an LL.B. based on common-law principles. This court has found significant whether a bar applicant has received his or her education based on the English common law. See *In re Application of Collins-Bazant, supra* (waiving rule 5C for applicant who graduated from foreign law school based on English common law). Moreover, we have recognized that by requiring a juris doctor degree of bar applicants, we ensure that Nebraska lawyers have received a well-rounded education because they have taken basic, core legal courses deemed " 'minimally necessary to be a properly-trained attorney.' " See *In re Appeal of Dundee*, 249 Neb. 807, 811, 545 N.W.2d 756, 759 (1996). In *In re Appeal of Dundee*, we listed the following examples of such core legal courses: civil procedure, contracts, constitutional law, criminal law, evidence, family law, torts, professional responsibility, property, and trusts and estates. In considering a foreign-educated attorney's request for a waiver of the educational requirement under rule 5A(1)(b), we recently relied upon this same list of core legal courses. See *In re Application of Brown, supra*.

The record shows that in obtaining his LL.B., Budman successfully completed courses in all but two of these subjects: trusts and estates and professional responsibility. As for these two subjects, the record reflects that in obtaining his LL.M., Budman completed coursework in trusts and estates, and he has practiced in that area. As discussed *infra*, Budman passed the MPRE in Colorado.

With respect to exposure to U.S. law, the record reflects that Budman has educated himself on and has demonstrated his exposure to U.S. law. He passed the Colorado bar examination and was admitted to the Colorado bar in 1997. He has practiced

law in Colorado for approximately 8 years, specializing in estate planning and taxation.

The record further reflects that Budman is in good standing with the Law Society of Upper Canada and the Colorado bar.

In our de novo review, we determine that Budman's education as a whole is functionally equivalent to an education received at an ABA-approved law school. See *In re Application of Brown, supra*. When Budman's education is combined with his work experience, efforts to become acquainted with U.S. law, passing of the Colorado bar examination, and admission to the Colorado bar, a waiver of the educational requirement under rule 5A(1)(b) is appropriate.

4. Record Regarding Budman's MPRE Score

Budman filed a Class I-A application for admission to Nebraska's bar, and as noted above, one of the requirements under a Class I-A application is a score of at least 85 on the MPRE. See rules 5A(1)(c) and 16. Evidently, the record before the Commission at the hearing of January 6, 2006, did not contain evidence of Budman's MPRE score in Colorado. The bill of exceptions shows that the record made at the hearing before the Commission on Budman's application was left open, so that Budman's MPRE score could be added thereto. The record transmitted to this court, however, was devoid of any indication of Budman's MPRE score. In this regard, we note that the record does contain a copy of the Commission's "Individual Personal History Information Report," which appears to be an inventory which the Commission compiles summarizing the results of its review of a bar applicant's materials. However, this report does not appear to contain a separate entry on which to record the MPRE results when the MPRE has been taken in another jurisdiction. Therefore, the record presented to this court failed to show the satisfaction of the MPRE requirement of rule 5A(1)(c) and, to the contrary, tended to show that Budman's MPRE results had not been provided at the time the hearing before the Commission concluded.

During oral argument before this court, the parties were granted leave to supplement the record with Budman's MPRE score, and following oral argument, the Commission submitted

an affidavit containing Budman's MPRE test results, demonstrating that Budman had satisfied Nebraska's MPRE requirement. See rule 5A(1)(c). The court has reviewed the record, as supplemented, in the instant case and determined that Budman has satisfied Nebraska's MPRE requirement.

VI. CONCLUSION

Based on a de novo review of the record as supplemented, we conclude that Budman has met his burden of proving his law school education was functionally equivalent to the education received at an ABA-approved law school and that as a result, a waiver of the educational qualifications requirement of rule 5A(1)(b) is appropriate. Accordingly, we waive this requirement as it applies to Budman and will allow him to be admitted to the Nebraska State Bar Association.

APPLICATION GRANTED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. JAMES E. HERSHBERGER AND SANDRA M. HERSHBERGER, APPELLEES.

725 N.W.2d 787

Filed January 5, 2007. No. S-05-1066.

1. **Contracts: Guaranty: Limitations of Actions.** The statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues.
2. **Guaranty: Liability: Debtors and Creditors.** A guarantor's liability arises when the principal debtor defaults.
3. **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.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **Contracts: Acceleration Clauses: Limitations of Actions.** In the absence of a contractual provision allowing acceleration, where an obligation is payable by installments, the statute of limitations runs against each installment individually from the time it becomes due.

6. **Contracts: Acceleration Clauses: Limitations of Actions: Debtors and Creditors.** Where a contract contains an option to accelerate, the statute of limitations for an action on the whole indebtedness due begins to run from the time the creditor takes positive action indicating that the creditor has elected to exercise the option.
7. **Guaranty: Debtors and Creditors.** As a general rule, a guarantor steps into the shoes of the original debtor and has all the same obligations and defenses of the original debtor.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Dana W. Roper, Lincoln City Attorney, and James D. Faimon for appellant.

Joel D. Nelson, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

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

GERRARD, J.

The City of Lincoln (the City) loaned money to PMI Franchising, Inc. (PMI), pursuant to a project financing agreement. James E. Hershberger and Sandra M. Hershberger were guarantors on the loan. PMI failed to repay any of the installment payments, and the City, in a letter dated February 28, 1995, exercised its right to accelerate the debt under the agreement. The City filed suit against the Hershbergers on September 20, 1999. The district court granted the Hershbergers' motion for summary judgment, concluding that the statute of limitations had run on the City's claim. The City appealed. Because the statute of limitations began to run when the City exercised its right to accelerate the debt, we conclude that the City's claim is not barred by the 5-year statute of limitations. We reverse, and remand for further proceedings.

FACTS

On June 8, 1993, the City and PMI entered into a "Project Financing Agreement." Pursuant to this agreement, the City agreed to loan PMI $49,500 and PMI agreed to repay the loan. Paragraph 5 of the financing agreement provided for monthly payments of interest only for the first 24 months and amortized

payments of principal and interest over the following 60 months, for a total term of 7 years. With regard to default and termination of the agreement, paragraph 16 provided:

> The City may terminate this Agreement, if PMI should default in the performance of any of the terms or requirements hereof. The City shall provide PMI written notice of such default and if PMI fails to correct such default within 30 days of receipt of such notice, this Agreement shall be terminated. Upon termination, the unpaid balance plus accrued interest to the date of termination shall become due and payable in full immediately on the date of termination.

As officers of PMI, the Hershbergers signed the financing agreement. As part of the financing agreement, each of the Hershbergers also signed an individual guaranty for PMI's obligations under the agreement. Each guaranty provided that the guarantor would unconditionally repay funds loaned to PMI "when due, pursuant to the financing agreement."

At some point between June 8, 1993, and March 4, 1994, the City disbursed $23,753.43 to PMI. The record reveals that PMI never made any payments to the City. On February 28, 1995, the City wrote the Hershbergers, declaring that PMI had defaulted under the minimum repayment terms of the agreement. The City's letter stated in relevant part:

> This correspondence satisfies the City's obligation to provide PMI Franchising, Inc. written notice of default as outlined in Paragraph #16 of the agreement. If the default is not corrected to the satisfaction of the City of Lincoln, the agreement will be terminated as stated in Paragraph #16 of the agreement. At that time, the entire unpaid principal balance of $23,753.43 plus accrued interest will be due and payable and the City will be forced to consider all legal alternatives available.

PMI did not correct its default, and on September 20, 1999, the City filed a petition in the district court against PMI and the Hershbergers. The City filed a second amended petition in December 1999, which is the operative petition. In the second amended petition, the City alleged that PMI failed to repay the loan contrary to the provisions of the agreement and that the Hershbergers had failed to comply with the provisions of the

guaranties. The City alleged that pursuant to the agreement, the City had sent a letter on February 28, 1995, declaring PMI to be in default. In the petition, the City asserted that the unpaid principal and accrued interest was due and payable. The City prayed for a judgment against PMI and the Hershbergers in the amount of the unpaid principal of $23,753.43 plus accrued interest, as well as costs and attorney fees.

The Hershbergers filed an answer in which, among other things, they admitted the loan of "approximately $23,000.00" and affirmatively alleged that the City's action against them was barred by the statute of limitations. Although PMI was served, no answer or other appearance was filed on behalf of PMI. During the course of the proceedings in the district court, a default money judgment was entered against PMI and the claim continued against the Hershbergers individually as guarantors.

The Hershbergers moved for summary judgment on the basis that the action was time barred by the 5-year statute of limitations found in Neb. Rev. Stat. § 25-205 (Reissue 1995). Following an evidentiary hearing, the court agreed with the Hershbergers and on January 31, 2001, dismissed the City's operative petition. The court reasoned that the statute of limitations began to run on June 8, 1993, the date the agreement was signed, and that because the City did not file its action until 1999, the suit was barred.

[1,2] The City appealed, and the case was transferred to this court's docket. In *City of Lincoln v. PMI Franchising*, 267 Neb. 562, 675 N.W.2d 660 (2004), we reversed the district court's decision. In so doing, we cited *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 749, 448 N.W.2d 123 (1989), which states that " '[t]he statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues' and that '[a] guarantor's liability arises when the principal debtor defaults.' " *PMI Franchising*, 267 Neb. at 567, 675 N.W.2d at 664. Given this language, we concluded that "the district court erred when it determined that the statute of limitations on the City's cause of action against the Hershbergers began to run when the Hershbergers signed the guaranties on June 8, 1993. Instead, the statute of limitations began to run when PMI defaulted and the Hershbergers' liability arose." *Id.*

at 568-69, 675 N.W.2d at 665. We remanded the cause for further proceedings.

Upon remand, both parties offered additional exhibits into evidence. The Hershbergers offered, among other things, the deposition of the coordinator of economic development for the City, the affidavits of the Hershbergers, and certain other documents received through discovery. The City offered exhibits 8 and 9, which included the deposition testimony of James Hershberger and a certified copy of the executive order approving the financing agreement.

The district court again granted the Hershbergers' motion for summary judgment, concluding that "the Hershbergers' liability arose before March 4, 1994, which was more than five years before September 20, 1999." As a result, the court determined that the City's claim was barred by the 5-year statute of limitations. The City appealed.

ASSIGNMENTS OF ERROR

The City assigns, restated and renumbered, that the district court erred in (1) determining that the City's claim against PMI was barred by the 5-year statute of limitations; (2) determining that the economic development coordinator, a former city employee, had authority to determine when the financing agreement was in default; (3) concluding that the City initially distributed the money to PMI on June 7, 1993; and (4) misapplying the law of the case as it relates to the application of the statute of limitations to the guarantors' liability for payment of the principal alleged to be due.

STANDARD OF REVIEW

[3,4] 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. *Didier v. Ash Grove Cement Co., ante* p. 28, 718 N.W.2d 484 (2006). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

The question before this court is: At what point in time did the statute of limitations begin to run on the City's claim against the Hershbergers? Section 25-205 provides in relevant part that an action upon any agreement, contract, or promise in writing must be commenced within 5 years of accrual of a cause of action. The contracts at issue in the present case are the financing agreement entered into between the City and PMI, and the Hershbergers' contracts of guaranty on the financing agreement.

As an initial matter, we note that the financing agreement between the City and PMI is an installment contract with an optional acceleration clause. The financing agreement is an installment contract because the agreement's repayment provision in paragraph 5 obligated PMI to make monthly installment payments to the City. The financing agreement also contained an optional acceleration clause in paragraph 16, which clause granted the City the right, upon PMI's default and the City's providing adequate notice, to accelerate the debt and declare the entire amount immediately due.

[5,6] Our determination that the financing agreement is an installment contract with an acceleration clause is significant because this affects when the statute of limitations began to run. With regard to installment contracts, we have stated that "[i]n the absence of a contractual provision allowing acceleration, where an obligation is payable by installments, the statute of limitations runs against each installment individually from the time it becomes due." *National Bank of Commerce v. Ham*, 256 Neb. 679, 682, 592 N.W.2d 477, 479-80 (1999). But, where a contract contains an option to accelerate, the statute of limitations for an action on the whole indebtedness due begins to run from the time the creditor takes positive action indicating that the creditor has elected to exercise the option. *Id.*

In *Ham*, a borrower entered into a personal money reserve plan agreement on July 5, 1989, with National Bank of Commerce (NBC). The agreement, which contained an acceleration clause, required the borrower to repay, in monthly installments, any money lent to him. The borrower was loaned $1,000, but failed to make payments in January, March, and May 1990. A representative of NBC sent a letter to the borrower on approximately

August 15, informing him that NBC was exercising its option to accelerate. On July 14, 1995, NBC sued the borrower to recover the amount due under the agreement. We concluded that NBC's claim against the borrower was not barred by the 5-year statute of limitations because the statute of limitations began to run in August, when NBC gave written notice of its election to accelerate the unpaid balance due. *Id.*

[7] The same principles apply here. Although the present case involves guarantors asserting a statute of limitations defense, as opposed to the original debtor, the principles upon which we relied in *Ham* apply equally to the original debtor and the guarantor of the same debt. See *Phoenix Acquisition v. Campcore, Inc.*, 81 N.Y.2d 138, 612 N.E.2d 1219, 596 N.Y.S.2d 752 (1993). Under these circumstances, a guarantor steps into the shoes of the original debtor and has all the same obligations and defenses of the original debtor. See, e.g., *Bessette v. Weitz*, 148 Md. App. 215, 811 A.2d 812 (2002). Therefore, the fact that the Hershbergers are guarantors of the debt, and not the original debtor, does not affect our analysis.

In the present case, it is undisputed that at some point between June 8, 1993, and March 4, 1994, the City loaned PMI $23,753.43. Although the record does not reflect the exact date the money was distributed, this uncertainty is of no consequence to our analysis. PMI never made any of its installment payments, and on February 28, 1995, the City exercised its right to accelerate the debt when the City's coordinator of economic development sent the Hershbergers a letter. The City's letter expressly stated, in writing, that PMI was in default and provided 30 days for PMI to correct its default, thus satisfying the requirements for acceleration. Because the City exercised its right to accelerate and PMI failed to correct its default within 30 days, the entire amount of the debt became due.

As previously stated, the statute of limitations for an action on the whole indebtedness due begins to run from the time the creditor takes positive action indicating that it has elected to exercise the option. We conclude that the statute of limitations began to run on the City's claim against PMI on February 28, 1995, the date the City sent its letter to the Hershbergers indicating the City's intent to exercise its right to accelerate. Because

that was the date of PMI's default for purposes of the City's action against PMI, it was also the date upon which the statute of limitations began to run on each guaranty.

The City filed its petition on September 20, 1999; accordingly, the City's claim against the Hershbergers is not barred by the 5-year statute of limitations. Because we conclude the statute of limitations has not run on the City's claim against the Hershbergers, we need not address the City's remaining assignments of error.

CONCLUSION

We conclude that the statute of limitations began to run on the date the acceleration clause was exercised. Because the City's petition was filed less than 5 years after the City exercised its right to acceleration, the City's claim against the Hershbergers is not barred by the statute of limitations. Accordingly, we reverse the judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE ADOPTION OF KENTEN H. MEAGHAN H., APPELLANT, V. MARK J. AND SHERYL J., APPELLEES.

725 N.W.2d 548

Filed January 5, 2007. No. S-06-204.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** The trial 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.** 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. **Motions to Dismiss: Rules of the Supreme Court: Summary Judgment: Pleadings.** A court may take judicial notice of matters of public record without converting a motion to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) into a motion for summary judgment.
4. **Indian Child Welfare Act: Proof.** A party to a proceeding who seeks to invoke a provision of the Nebraska Indian Child Welfare Act has the burden to show that the act applies in the proceeding.

5. **Indian Child Welfare Act: Federal Acts: Time.** The provisions of the federal Indian Child Welfare Act and the Nebraska Indian Child Welfare Act apply prospectively from the date Indian child status is established on the record.
6. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment.
7. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Reversed and remanded for further proceedings.

Patricia A. Knapp for appellant.

Susan K. Sapp and Stanton N. Beeder, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

Jon Bruning, Attorney General, and B. Gail Steen, Special Assistant Attorney General, for amicus curiae Nebraska Department of Health and Human Services.

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

STEPHAN, J.

Meaghan H., the biological mother of Kenten H., petitioned the county court for Lancaster County to vacate the adoption of Kenten pursuant to the Nebraska Indian Child Welfare Act (NICWA), Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2004). The matter was assigned to the separate juvenile court of Lancaster County, which had entered the decree of adoption, and that court granted a motion to dismiss for failure to state a claim filed by the adoptive parents, Mark J. and Sheryl J. Meaghan filed this timely appeal.

BACKGROUND

In considering the motion to dismiss, the separate juvenile court took judicial notice of documents filed in earlier juvenile

court proceedings and the adoption proceeding, which proceedings disclose the following facts: Kenten was born prematurely on August 16, 2002. On November 14, the State of Nebraska filed a petition in the separate juvenile court seeking to adjudicate Kenten and three of his siblings as minor children within the meaning of Neb. Rev. Stat. § 43-247(3) (Cum. Supp. 2002) due to the fault or habits of their parents, Meaghan and Kent H. At that time, Kenten was still hospitalized in Lincoln, Nebraska. On the same date, Kenten was placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS). On January 8, 2003, he was released from the hospital and placed in foster care.

An adjudication hearing was scheduled, and on March 19, 2003, a deputy county attorney gave notice of the hearing to the Iowa Tribe of Kansas and Nebraska (the Iowa Tribe). In an affidavit accompanying the notice, the deputy county attorney affirmatively stated that Kenten and his siblings "are a member [sic] of or may be eligible for membership" in the Iowa Tribe. The notice was given pursuant to NICWA and the federal Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 to 1963 (2000). A petition to terminate the parental rights of both parents as to Kenten was filed on April 8. Notice of a hearing on the adjudication and termination was given to the Iowa Tribe. The notice included a statement that Kenten was "a member of or may be eligible for membership in" the Iowa Tribe.

On June 24, 2003, the court determined that Kenten was a child as defined by § 43-247(3)(a) due to the fault or habits of Kent. The adjudication as to Meaghan was continued. On August 20, the court found that Kenten was a child as defined by § 43-247(3)(a) by reason of the fault or habits of Meaghan. On the same date, the court granted the State's motion for leave to withdraw the petition to terminate the parental rights of Kent and Meaghan as to Kenten.

Meanwhile, on August 19, 2003, the adoptive parents, who at that time were the foster parents, filed a petition seeking to adopt Kenten. The petition was filed in the county court for Lancaster County and transferred to the separate juvenile court, which had concurrent jurisdiction pursuant to Neb. Rev. Stat. § 43-102 (Reissue 2004) by virtue of its prior adjudication.

Attached to the petition was an "Affidavit of Identification of Father" in which Kent was identified as the biological father and his tribal affiliation was listed as "UTE." In the petition, the adoptive parents alleged that the county attorney's office had notified "the Ute tribe" of the pending adoption, but never received a response. The adoptive parents further alleged that "neither Meaghan [nor] Kent . . . is a registered member of any Indian tribe and the minor child [Kenten] is not an 'Indian child' as defined in Neb. Rev. Stat. § 43-1503(4)." Also, attached to the petition was a "Relinquishment of Child by Parent" purportedly signed by Meaghan on June 20, 2003, stating that she voluntarily relinquished to DHHS "all right to and custody of and power and control over" Kenten so that DHHS became his legal guardian. The relinquishment further provided that Meaghan authorized DHHS to place Kenten in a suitable family home and "consent to and procure" his adoption. An identical relinquishment signed by Kent was also attached to the petition.

In its decree of adoption entered on September 30, 2003, the separate juvenile court specifically found that all of the allegations in the petition were true. Eight days after the entry of the decree, the Iowa Tribe filed an "Entry of Appearance & Notice of Intervention to Monitor." This document recites that Kenten is enrolled in the tribe and assigned an enrollment number. This is the only filing by any tribe appearing in the record.

On August 24, 2005, Meaghan filed a petition to vacate the adoption pursuant to NICWA. The petition was filed in the county court for Lancaster County and assigned to the separate juvenile court. In the petition, Meaghan alleged that she was Kenten's biological mother and an enrolled member of the Iowa Tribe, that Kenten was eligible for enrollment through her family and was enrolled as a member of the tribe on June 25, 2003, and that he was therefore an "Indian child" for purposes of NICWA and ICWA. Meaghan further alleged that she was hospitalized and "under the influence of morphine and other mind-altering medications" when she signed the relinquishment on June 20 and that while she was in this condition, a DHHS caseworker told her that her only hope of keeping any of her children was to voluntarily relinquish her rights to Kenten. Meaghan alleged that the relinquishment was obtained through "fraud,

threats, coercion, and duress" and in violation of certain DHHS regulations and provisions of NICWA. Meaghan attached to her petition a "Withdrawal of Parental Consent to Adoption" purportedly signed by her on August 24, 2005, stating that she was withdrawing her consent to Kenten's adoption "on the grounds that my consent was obtained through fraud and duress and in violation of the provisions of the federal and Nebraska Indian Child Welfare Acts."

After initially filing an answer to the petition, the adoptive parents filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003) on October 20, 2005. In this motion, the adoptive parents alleged that the petition to vacate was not timely pursued, that there was a defect of the parties because DHHS was not joined, that Meaghan had waived and is estopped from asserting parental rights to Kenten, and that Meaghan had made no claims of fraud or duress until 26 months after executing the relinquishment. No evidence was received at a hearing on the motion, but at the request of the adoptive parents and without objection by Meaghan, the court took judicial notice of its file in the earlier proceedings. On January 18, 2006, the juvenile court entered an order dismissing Meaghan's petition to vacate, concluding that the showing that Kenten was an "Indian child" to whom NICWA applied came too late and that thus, Meaghan was not entitled to invoke NICWA's provisions as a basis for vacating the adoption. The court acknowledged that notice as required by NICWA had been given to the Iowa Tribe during the juvenile proceedings, but found that this was only because there was an indication that the case may involve an Indian child under NICWA. The court concluded that notwithstanding the notice, until it had knowledge from the tribe that Kenten was a child subject to NICWA or other evidence that Kenten was enrolled as a member of a tribe, Kenten was not an "Indian child" subject to NICWA. In this respect, the juvenile court specifically determined that at the time of the initial juvenile abuse and neglect proceeding and later in the adoption proceeding, it had "no knowledge or evidence" that the case involved NICWA. The court concluded that the Iowa Tribe's appearance and notice was filed too late in the adoption

proceeding to trigger the provisions of NICWA, and it therefore granted the motion to dismiss.

Meaghan filed this timely 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). Kent is not a party to these proceedings.

ASSIGNMENT OF ERROR

Meaghan assigns that the juvenile court erred in dismissing her petition to vacate the adoption.

STANDARD OF REVIEW

[1] The trial 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. *Moglia v. McNeil* Co., 270 Neb. 241, 700 N.W.2d 608 (2005).

[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. *Young v. Midwest Fam. Mut. Ins. Co., ante* p. 385, 722 N.W.2d 13 (2006); *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

ANALYSIS

Procedural Matters

The motion to dismiss does not specify which of the defenses enumerated in rule 12(b) are asserted. From the narrative content of the motion, we construe it as asserting the defenses of failure to state a claim upon which relief can be granted, pursuant to rule 12(b)(6), and failure to join a necessary party, pursuant to rule 12(b)(7). Rule 12(b) provides that a motion asserting any of the enumerated defenses "shall be made before pleading if further pleading is permitted." The motion to dismiss in this case was filed *after* the filing of the answer and is therefore technically untimely. In construing our current pleading rules, we have looked to federal cases interpreting similar

federal rules. See *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005). Generally, federal courts have considered the merits of untimely rule 12(b) motions if the defenses asserted therein were previously included in an answer. See, *Litchfield Financial v. Buyers Source Real Estate*, 389 F. Supp. 2d 80 (D. Mass. 2005); *Puckett v. U.S.*, 82 F. Supp. 2d 660 (S.D. Tex. 1999); 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 (3d ed. 2004 & Supp. 2006). Because the defenses asserted in the adoptive parents' motion to dismiss were previously asserted in their answer, the untimely filing of the motion does not preclude consideration of the merits. In addition, rule 12(h)(2) provides that the defenses of failure to state a claim upon which relief can be granted and failure to join necessary parties may be made in any pleading.

[3] According to rule 12(b), if on a motion to dismiss for failure to state a claim "matters outside the pleading are presented to and not excluded by the court," the motion shall be treated as one for summary judgment. See *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006). However, a court may take judicial notice of matters of public record without converting a rule 12(b) motion to dismiss into a motion for summary judgment. *Ferer v. Erickson, Sederstrom, ante* p. 113, 718 N.W.2d 501 (2006). We therefore consider the judicially noticed filings from the previous proceedings in resolving the motion to dismiss.

Rule 12(b)(6) Defense

In her petition to vacate, Meaghan sought to set aside Kenten's adoption because her relinquishment "was obtained through fraud, threats, coercion and duress" and because her consent was obtained in violation of certain DHHS regulations and provisions of NICWA. Her petition specifically referenced § 43-1506(4), a NICWA provision which provides:

> After the entry of a final decree of adoption of an Indian child in any state court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has

> been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under state law.

NICWA was enacted "to clarify state policies and procedures regarding the implementation by the State of Nebraska of the federal Indian Child Welfare Act, 25 U.S.C. [§] 1901 et seq." § 43-1502. The Legislature declared that "[i]t shall be the policy of the state to cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced." § 43-1502. The NICWA provisions correspond closely to the ICWA that was enacted by Congress in 1978

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902. Generally stated, the substantive portions of ICWA and the corresponding provisions of NICWA provide heightened protection to the rights of Indian parents, tribes, and children in proceedings involving custody, termination, and adoption.

[4] Applicability of these protective statutes depends on whether the proceedings involve an "Indian child." See *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990). Pursuant to § 43-1503(4) and 25 U.S.C. § 1903(4), "Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." Under Nebraska law, a party to a proceeding who seeks to invoke a provision of NICWA has the burden to show that the act applies in the proceeding. *In re Interest of A.M., C.M., and L.M.*, 235 Neb. 506, 455 N.W.2d 572 (1990); *In re Interest of J.L.M. et al., supra.* For purposes of reviewing the juvenile court's disposition of the motion to dismiss, we must accept as true Meaghan's allegation that Kenten

was enrolled as a member of the Iowa Tribe on June 25, 2003. Similarly, we assume the truth of the statement by the Iowa Tribe in its notice of intervention filed in the adoption proceeding that Kenten is an enrolled member.

Meaghan's allegation and the tribe's statement clearly establish that Kenten is an "Indian child" within the meaning of NICWA. But the critical issue in the instant case is not *whether* Kenten is an "Indian child," but, rather, *when* his status was established in these proceedings. The adoptive parents argue that because Kenten's status as an Indian child was established after the decree was entered, Meaghan has completely waived her rights under NICWA. Alternatively, they argue that Meaghan's action is untimely because no court action to invalidate the adoption occurred within 2 years of the date of the decree. We find both arguments to be unpersuasive.

In *In re Interest of A.M., C.M., and L.M., supra*, we held that the fact that notice was given to an Indian tribe prior to the entry of an order terminating parental rights was insufficient to make the provisions of NICWA applicable to the termination proceedings, where there was no other evidence of Indian child status. In *In re S.B.*, 130 Cal. App. 4th 1148, 30 Cal. Rptr. 3d 726 (2005), Indian child status was established just prior to the final hearing in a termination of parental rights case and the court applied ICWA to that proceeding. However, the court rejected the biological mother's claim that prior orders entered in the case should be invalidated on the ground of noncompliance with notice provisions of ICWA. The court determined that the mother had waived the right to claim the protection of the statute by failing to assert and establish the children's Indian child status earlier despite her "superior access to this information." 130 Cal. App. 4th at 1160, 30 Cal. Rptr. 3d at 732.

Similarly, the court in *State ex rel. Juv. Dept. v. Tucker*, 76 Or. App. 673, 710 P.2d 793 (1985), held that where Indian child status was not established until 2 years after the child was placed in foster care and the court had no reason to know that the child was an Indian child at the time of placement, the placement could not be invalidated for failure to comply with ICWA. Colorado courts hold that until the party asserting the applicability of the Colorado ICWA establishes, on the record, that the

child is an "Indian child," the ICWA is not applicable. *In Interest of A.G.-G.*, 899 P.2d 319 (Colo. App. 1995); *People in Interest of A.E.*, 749 P.2d 450 (Colo. App. 1987).

[5] These cases establish that the provisions of ICWA and NICWA apply prospectively from the date Indian child status is established on the record. In this case, Kenten's status as an Indian child was established on the record when the Iowa Tribe entered its appearance in the adoption proceeding on October 8, 2003, 8 days after entry of the decree of adoption. We hold that NICWA applies prospectively from that date.

The adoptive parents argue that Meaghan may not rely on any provision of NICWA because Kenten's status as an Indian child was not established until after the entry of the decree. We agree that Meaghan may not rely upon NICWA provisions to challenge certain matters that were completed prior to the date Kenten's status was established on the record. In this action, Meaghan's consent to Kenten's relinquishment was completed on June 20, 2003. Kenten's Indian child status was not established on the record until October 8. Because NICWA applies only prospectively from the date it is established on the record, Meaghan may not now argue that her consent to Kenten's relinquishment is invalid because it was not obtained pursuant to the substantive provisions of § 43-1506(1).

However, Meaghan also seeks to set aside the decree of adoption on the basis that her consent was obtained through fraud and duress. This type of postdecree challenge is specifically authorized by § 43-1506(4). Meaghan therefore is entitled to assert the provisions of § 43-1506(4) in her petition to vacate, assuming her petition was timely filed.

The adoptive parents assert that Meaghan's fraud and duress challenge is untimely under the last sentence of § 43-1506(4), which provides: "No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under state law." The adoptive parents contend that this language requires judicial action within the 2-year period and that because the decree was not invalidated within 2 years after its entry, it can never be invalidated under § 43-1506(4). They rely on three cases from other jurisdictions, none of which involve statutes similar to

§ 43-1506(4). See, *Kellogg-Citizens Nat. Bank v. Francois*, 240 Wis. 432, 3 N.W.2d 686 (1942); *Lawson v. Hughes et al.*, 127 Or. 16, 256 P. 1043 (1928); *Babbitt v. Hualde*, 23 Ariz. 582, 206 P. 161 (1922).

The construction of § 43-1506(4) urged by the adoptive parents is both novel and incorrect. We read § 43-1506(4) to require that the petition to vacate be filed within 2 years from the date of the decree, not to require that the court actually invalidate the decree within the 2-year period. To construe the language otherwise would ignore the phrase "unless otherwise permitted under state law." Under general Nebraska adoption law, it is

> conclusively presumed that the adoption and all instruments and proceedings in connection therewith are valid in all respects notwithstanding some defect or defects may appear on the face of the record, or the absence of any record of such court, unless an action shall be brought within two years from the entry of such decree of adoption attacking its validity.

Neb. Rev. Stat. § 43-116 (Reissue 2004). A party may challenge an adoption on the ground of fraud within the 2-year limitations period of § 43-116. See *Hiatt v. Menendez*, 157 Neb. 914, 62 N.W.2d 123 (1954). A parent of a non-Indian child thus clearly has 2 years from the date the adoption decree is entered to challenge the decree. Furthermore, ICWA provides:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

25 U.S.C. § 1921. To construe § 43-1506(4) as establishing a more restrictive limitations period than that established by § 43-116 would be incongruent with this federal requirement, as well as the language of § 43-1506(4) itself.

We find no merit in the adoptive parents' argument that Meaghan waived the right to rely on § 43-116 in arguing that her petition to vacate states a claim upon which relief can be granted. Although Meaghan's petition to vacate specifically referenced only § 43-1506(4), the petition alleged that her consent

to Kenten's relinquishment and ultimately to his adoption was obtained by fraud and duress. Such a claim based on common-law principles can be asserted within the 2-year limitations period stated in §§ 43-116 and 43-1506(4).

In their motion to dismiss, the adoptive parents alleged that "Kenten was never a member of an existing Indian family and therefore the Existing Indian Family Exception applies." They argue this as an alternative basis for affirming the judgment of dismissal. Some state courts have concluded that the purpose of ICWA is not served by applying it to children who have never been part of an existing Indian family, and these courts have thus declined to apply ICWA in situations where neither the child nor his parents have any significant contact with an Indian tribe. See, e.g., *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331 (La. App. 1995); *Adoption of Crews*, 118 Wash. 2d 561, 825 P.2d 305 (1992); *In Interest of S.A.M.*, 703 S.W.2d 603 (Mo. App. 1986); *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982). Other courts and commentators, however, argue that this judicially imposed "existing Indian family" exception to ICWA is unwarranted, unjustified, and renders many of its provisions superfluous. See, e.g., *In re Baby Boy C.*, 27 A.D.3d 34, 805 N.Y.S.2d 313 (2005); *In re A.B.*, 663 N.W.2d 625 (N.D. 2003); *Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 7 P.3d 960 (Ariz. App. 2000); *State in Interest of D.A.C.*, 933 P.2d 993 (Utah App. 1997). A number of jurisdictions have determined that the U.S. Supreme Court's decision in *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989), weighs heavily against the adoption of the exception. See, e.g., *In re Baby Boy C., supra*; *In re A.B., supra*; *Matter of Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990).

Nebraska's appellate courts have never decided whether to adopt the "existing Indian family" exception to ICWA and NICWA, and we need not do so in this appeal. Meaghan's petition to vacate the adoption on the ground that her consent was obtained through fraud and duress states a claim that is not time barred under either § 43-116 or § 43-1506(4). Thus, a determination that the exception applied would not affect the ultimate

validity of her claim. We therefore do not reach any issue involving the existing Indian family exception.

Rule 12(b)(7) Defense

As another alternative basis for affirming the judgment of dismissal, the adoptive parents argue that Meaghan failed to join DHHS and the guardian ad litem in the prior juvenile proceeding as necessary parties. The juvenile court did not reach this issue.

[6,7] The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment. *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997). An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. See *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

We conclude that neither DHHS nor the guardian ad litem is a necessary party in this action. Although DHHS was Kenten's legal custodian immediately prior to the adoption, it relinquished Kenten for purposes of adoption. The juvenile court entered an order relieving DHHS of custody. Thus, DHHS has no present interest which could be affected by a judgment in this proceeding.

Although the adoptive parents argue that the guardian ad litem appointed in the prior juvenile proceeding is a necessary party in this action, they did not raise that issue in their motion to dismiss. In any event, we conclude that the previous guardian ad litem has no present interest which could be affected by a judgment in this proceeding.

CONCLUSION

For the reasons discussed, we conclude that the petition to vacate the decree of adoption states a claim upon which relief can be granted in that it alleges that Meaghan's consent was obtained by fraud or duress. The action to obtain such relief was timely filed and included all necessary parties. We reverse the

judgment of the juvenile court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

SARA D'QUAIX, APPELLANT, V.
CHADRON STATE COLLEGE, APPELLEE.

725 N.W.2d 558

Filed January 5, 2007. No. S-06-548.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Final Orders.** As a general matter, where an order is clearly intended to serve as a final adjudication of the rights and liabilities of the parties, the silence of the order on requests for relief not spoken to can be construed as a denial of those requests under the circumstances.
3. **Workers' Compensation.** There is no requirement in the Nebraska Workers' Compensation Act that a credit against an award for payments already made be determined by the court.
4. **Damages.** As a general rule, a party may not have double recovery for a single injury.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Harry R. Meister, of Meister & Segrist, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Tracy L. Warren for appellee.

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

GERRARD, J.

Sara D'Quaix, the claimant in this workers' compensation proceeding, suffered a work-related injury, and her employer

voluntarily paid indemnity benefits. After a trial in the Workers' Compensation Court, D'Quaix was awarded further indemnity benefits. However, the award did not expressly grant her employer credit against the award for the voluntary payments it had already made. The issue presented in this appeal is whether D'Quaix's employer is nonetheless entitled to credit for the voluntary payments it made before the award was entered or whether D'Quaix should receive a waiting-time penalty and attorney fees because her employer did not pay the total amount of the award without crediting itself for voluntary payments.

BACKGROUND

D'Quaix filed a petition in the compensation court on October 10, 2003, alleging that she had been injured in an accident arising out of and in the course of her employment with Chadron State College (the State). D'Quaix alleged that her employment had required her to work with industrial chemicals and that as a result, she developed allergic contact dermatitis and a hypersensitivity to common household and commercial cleaners. D'Quaix also alleged that the State had notice of the accident and injury on or about November 4, 1997, and that some workers' compensation benefits had been paid as recently as August 8, 2003. However, D'Quaix alleged that the State had not made timely payment of disability benefits and medical expenses, entitling D'Quaix to attorney fees and a statutory penalty pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004). In response, the State denied liability and alleged that D'Quaix's injuries were the result of a preexisting condition or nonwork accident or illness.

Trial was had, and on October 1, 2004, the single judge of the Workers' Compensation Court awarded benefits to D'Quaix. The parties stipulated that D'Quaix's average weekly wage for purposes of temporary indemnity was $270 and that her monthly salary was $1,205.17. The record also established that before trial, D'Quaix's employer had voluntarily paid $17,841.03 in temporary total disability benefits, $2,340.26 in temporary total disability benefits during vocational rehabilitation, and $10,638 in permanent partial disability benefits, for an overall total of $30,819.29.

The single judge determined D'Quaix had sustained a compensable injury on July 29, 1998, and evidence in the record

indicated D'Quaix had reached maximum medical improvement as of March 2, 2000. Thus, the single judge awarded temporary total disability benefits of $180 per week for the period between July 29, 1998, and March 2, 2000. The single judge further found D'Quaix had suffered a 65-percent loss of earning capacity, entitling her to permanent partial disability benefits of $120.52 per week for 217 weeks. In sum, the single judge awarded D'Quaix disability benefits totaling $39,370.24. The October 1, 2004, award did not give the State credit for payments already made and was silent as to a penalty or attorney fees. No one appealed from the October 1 award.

The State issued a check to D'Quaix on October 29, 2004, in the amount of $12,052. No other payments were made after the entry of the October 1 award. In a letter dated January 13, 2005, D'Quaix demanded an additional payment of $40,977.36, on the basis that $27,318.24 remained due on the October 1, 2004, award, and an additional $13,659.12 had accrued as a waiting-time penalty. On June 20, 2005, D'Quaix filed a motion in the compensation court seeking a waiting-time penalty and attorney fees.

A hearing was held before the single judge on July 7, 2005. Over D'Quaix's objection, the State adduced evidence that prior to the October 1, 2004, award, D'Quaix had been paid 112⅕ weeks of temporary total disability benefits at a rate of $180 per week, for a total of $20,186.29, and 88⅖ weeks of permanent partial disability benefits at a rate of $120.50 per week, for a total of $10,638. We note that although the evidence presented at trial and at the postaward hearing is in substantial agreement, there is a $5 discrepancy in the amount of temporary total disability benefits that is not explained by the record. This discrepancy is not significant to our analysis.

The State contended that when the postaward payment of $12,052 was included, D'Quaix had actually received $1,753.25 *more* than she had been awarded by the October 1, 2004, award. D'Quaix did not dispute that the payments evidenced by the State had been made, but argued that the evidence was "a collateral attack on that final judgment and is inadmissible."

The single judge overruled D'Quaix's objection and her motion for a waiting-time penalty and attorney fees. The single judge

acknowledged that the October 1, 2004, award "did not provide that [the State] was entitled to credit for indemnity paid, as is the practice of the Court when the evidence established past voluntary payments of indemnity by the employer or its insurer." However, the single judge found that the preaward indemnity payments had been made as claimed by the State, and because no indemnity remained unpaid 30 days after the entry of the award, D'Quaix "is therefore not entitled to what would be a double recovery, plus a waiting time payment and attorney's fee."

D'Quaix appealed, and the review panel of the Workers' Compensation Court affirmed the decision of the single judge. D'Quaix again appealed, and we moved the case to our docket on our own motion pursuant to our statutory authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

D'Quaix assigns, consolidated and restated, that the Workers' Compensation Court erred in (1) failing to award a waiting-time penalty, attorney fees, and interest on the October 1, 2004, award when the award did not provide that the State was entitled to credit for benefits already paid; (2) revisiting evidence previously received by the court in drafting the October 1 award; and (3) accepting evidence at the postaward hearing that collaterally attacked the October 1 award.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

ANALYSIS

Section 48-125(1) provides, in relevant part, that

> all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death, except that fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court.

Section 48-125(2) further provides for attorney fees to be awarded when an employer refuses to pay compensation and proceedings are held before the Workers' Compensation Court. D'Quaix argues that she was entitled to a waiting-time penalty and attorney fees because, according to D'Quaix, the entire amount of the October 1, 2004, award was not paid within 30 days from the entry of the award. The State disagrees, arguing that the award was paid within 30 days because a substantial part of the ultimate award was paid, voluntarily, before it was entered.

All of D'Quaix's assignments of error rest on the same premise: The failure of the October 1, 2004, award to set off a credit against the judgment, for benefits already paid, operated to deny such a credit. Therefore, the underlying issue presented in this appeal is whether the State is entitled to credit for the voluntary payments it made before the award was entered.

[2] D'Quaix presents little in the way of authority to support her contention that the October 1, 2004, award represents a denial of credit for previously made payments. As a general matter, where an order is clearly intended to serve as a final adjudication of the rights and liabilities of the parties, the silence of the order on requests for relief not spoken to can be construed as a denial of those requests under the circumstances. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). But in this case, there is no indication that the trial court was asked to decide the extent to which the State was entitled to a credit. A request for relief cannot be implicitly denied if it was never made in the first place.

D'Quaix argues that the issue was before the single judge because the State presented evidence, before the October 1, 2004, award was entered, of payments it had voluntarily made. But D'Quaix's petition sought attorney fees and a waiting-time penalty on the basis that the State had allegedly not made payments after being notified of D'Quaix's injury. See § 48-125(1). The State's evidence of voluntary payment was relevant to its denial of that allegation. Adducing that evidence did not amount to asking the single judge to decide whether the State was entitled to a credit against the award for those payments.

[3] Nor is there any requirement in the Nebraska Workers' Compensation Act, see Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2004 & Cum. Supp. 2006), that a credit against an award for payments already made be determined by the court. In an ordinary civil action, for instance, "the matter of any credit to be deducted from a judgment shall be determined by the court in a separate hearing or upon the stipulation of the parties." Neb. Rev. Stat. § 25-1222.01 (Reissue 1995). But the workers' compensation statutes contain no comparable provision. As the single judge acknowledged here, it is certainly better practice when the credit for voluntary payments is addressed in the award. But where the court, by oversight, fails to give credit for the amount already paid, the defendant is still entitled to receive credit. See *Rapp v. Hale*, 170 Neb. 620, 103 N.W.2d 851 (1960), *overruled on other grounds, Gifford v. Ag Lime, Sand & Gravel Co.*, 187 Neb. 57, 187 N.W.2d 285 (1971).

[4] In this case, the single judge's award was clearly intended to provide D'Quaix with all the compensation to which she was entitled under the Nebraska Workers' Compensation Act. As a general rule, a party may not have double recovery for a single injury. See *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998). There was no requirement, in the Nebraska Workers' Compensation Act or the October 1, 2004, award, that the State provide D'Quaix with a double recovery. Instead, the State properly acted to voluntarily pay D'Quaix indemnity benefits after being notified of her injury and paid D'Quaix the balance of her award after the award was entered. The record establishes, beyond dispute, that D'Quaix received all of the indemnity benefits she was awarded in the October 1 award.

Because the State paid the balance of the October 1, 2004, award within 30 days after it was entered, the Workers' Compensation Court did not err in denying D'Quaix's motion for a waiting-time penalty and attorney fees. Similarly, the evidence adduced at the hearing on D'Quaix's motion was not a collateral attack on the October 1 award because the issue raised at the hearing had not been decided by the previous award, and the single judge did not err in accepting the State's evidence. D'Quaix's assignments of error are without merit.

CONCLUSION

The single judge's October 1, 2004, award did not deny the State a credit for payments it had voluntarily made prior to the award. The State was entitled to credit for the voluntary payments it made before the award was entered, and the Workers' Compensation Court did not err in admitting the State's evidence and denying D'Quaix's motion for a waiting-time penalty and attorney fees. The order of the Workers' Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ANDREW TOMPKINS, APPELLANT.

727 N.W.2d 423

Filed January 12, 2007. No. S-05-212.

SUPPLEMENTAL OPINION

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Scotts Bluff County, RANDALL L. LIPPSTREU, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Brian J. Lockwood, Deputy Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

PER CURIAM.

Case No. S-05-212 is before us on the motion for rehearing filed by the State of Nebraska, appellee, regarding our opinion reported at *State v. Tompkins, ante* p. 547, 723 N.W.2d 344 (2006). We overrule the motion, but for purposes of clarification, modify the opinion as follows:

That portion of the opinion designated "CONCLUSION," *id.* at 554, 723 N.W.2d at 349, is withdrawn, and the following language is substituted in its place:

CONCLUSION

> The Court of Appeals correctly concluded that the search warrant used to obtain certain evidence used against Tompkins was not based on an affidavit with sufficient indicia of probable cause as to Tompkins. However, because the State waived the *Leon* good faith exception by failing to raise it, the Court of Appeals erred in raising the issue on its own motion and in affirming the judgment of the district court on that basis. The evidence, including that erroneously received, was sufficient to sustain the conviction. Accordingly, Tompkins' convictions should be reversed and he may be given a new trial at which the evidence obtained through the defective search warrant shall not be admissible. See *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). See, also, *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005); *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *overruled on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We therefore reverse the judgment of the Court of Appeals and remand the cause to that court with directions to reverse the judgment of the district court and remand the cause to that court for a new trial consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

HEAVICAN, C.J., not participating.

City of Elkhorn, Nebraska, a municipal corporation, et al., appellants and cross-appellees, v. City of Omaha, Nebraska, a municipal corporation, et al., appellees and cross-appellants.

725 N.W.2d 792

Filed January 12, 2007. No. S-05-1006.

1. **Annexation: Ordinances: Equity.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.
2. **Actions: Equity: Public Meetings: Appeal and Error.** An appellate court reviews actions for relief under the Open Meetings Act in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable.
3. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides 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 trial court's determination.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Constitutional Law.** Constitutional interpretation is a question of law.
6. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.
7. **Public Meetings: Ordinances.** The reading of ordinances constitutes a formal action under Neb. Rev. Stat. § 84-1414(1) (Cum. Supp. 2004).
8. **Statutes: Appeal and Error.** In the absence of anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
9. ____: ____. It is not within an appellate court's province to read a meaning into a statute that is not there.
10. **Public Meetings: Legislature: Notice.** Under Neb. Rev. Stat. § 84-1411(1) (Cum. Supp. 2004), the Legislature has imposed only two conditions on the public body's notification method of a public meeting: (1) It must give reasonable advance publicized notice of the time and place of each meeting and (2) it must be recorded in the public body's minutes.
11. **Public Meetings: Notice.** Any defect in notice intended for the benefit of a public body's members does not invalidate a meeting of the public body when all of the members attend without objection.
12. **Public Meetings: Statutes: Appeal and Error.** An appellate court construes public meetings laws broadly so as to obtain the objective of openness in favor of the public.
13. **Public Meetings.** Informational sessions of less than a quorum of a public body's members do not constitute public meetings under the Open Meetings Act.
14. **Municipal Corporations: Annexation: Standing.** A municipality that is in the crosshairs of annexation has standing to challenge the annexation.
15. **Annexation: Jurisdiction.** The prior jurisdiction rule is not applicable when different territories are the subject of the competing annexations.
16. **Annexation: Statutes: Words and Phrases.** The terms contiguous and adjacent in annexation statutes are synonymous.
17. **Municipal Corporations: Annexation.** Substantial adjacency between a municipality and annexed territory exists when a substantial part of the municipality's boundary is adjacent to a segment of the boundary of the city or village.

18. ____: ____. A municipality may annex several tracts as long as one tract is substantially adjacent to the municipality and the other tracts are substantially adjacent to each other.
19. **Statutes: Appeal and Error.** An appellate court will not read anything plain, direct, or unambiguous out of a statute.
20. ____: ____. If possible, an appellate court will try to avoid a statutory construction which would lead to an absurd result.
21. **Annexation: Words and Phrases.** The terms "contiguous" and "adjoining" in Neb. Rev. Stat. § 14-117 (Cum. Supp. 2006) are synonymous.
22. **Municipal Corporations: Annexation.** Under the "contiguous or adjacent" standard in annexation statutes, municipalities are not required to have common boundaries with the territory to be annexed, and they may annex territory nearby in proximity through the simultaneous annexation of a substantial link of connecting territory.
23. ____: ____. The "contiguous or adjacent" standard for annexations also applies to "adjoining city" under Neb. Rev. Stat. § 14-117 (Cum. Supp. 2006).
24. **Municipal Corporations: Annexation: Legislature: Intent.** Under Neb. Rev. Stat. § 14-117 (Cum. Supp. 2006), the Legislature intended to permit a metropolitan city to extend its corporate limits so that it adjoins the corporate limits of a city to be annexed.
25. **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.
26. ____: ____. The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Jeff C. Miller and Duncan A. Young, of Young & White, for appellants.

William M. Lamson, Jr., Lawrence F. Harr, and Craig F. Martin, of Lamson, Dugan & Murray, L.L.P., and Paul D. Kratz, Omaha City Attorney, and Alan M. Thelen for appellees.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

CONNOLLY, J.

The City of Omaha, Nebraska, and the City of Elkhorn, Nebraska, raced to pass ordinances to annex territories that would expand their respective boundaries. Omaha's ordinances sought to annex land that would make it contiguous and adjacent to Elkhorn, thus allowing Omaha to annex Elkhorn. Elkhorn's

annexation ordinance, on the other hand, sought to annex surrounding sanitary improvement districts (SIDs) to raise Elkhorn's population to over 10,000, which would immunize it from unilateral annexation by Omaha. See Neb. Rev. Stat. § 14-117 (Cum. Supp. 2006).

Despite Elkhorn's attempt to annex the SIDs without Omaha's knowledge, Omaha learned of Elkhorn's efforts, and the race was on. The pivotal issue is whether Omaha, in adopting its annexation ordinance, "jumped the gun" by violating the Open Meetings Act (the Act), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 1999 & Cum. Supp. 2004), thus voiding its ordinance. We conclude that (1) the district court correctly decided that Omaha did not violate the Act and (2) because Omaha, a metropolitan class city, had less statutory hurdles to overcome than Elkhorn, Omaha adopted its annexation ordinance first. We affirm.

I. BACKGROUND

In April 2000, the U.S. Census Bureau estimated Elkhorn's population at 7,623. Beginning in the late 1990's, the Omaha Planning Department began studying the possible annexation of Elkhorn. Within a year or two after his June 2001 election, the Omaha mayor directed the planning department to plan for the annexation of Elkhorn. Omaha and Elkhorn then began having formal discussions about annexation. The cities did not resolve their differences.

1. Elkhorn Is Out of Gate First

In October or November 2004, the Elkhorn mayor and Don Eikmeier, Elkhorn's city administrator, began looking at much broader annexations than the parcels recommended in Elkhorn's 2003 comprehensive plan. In addition to 8 parcels that were in the 2003 plan, their new plan called for annexing 13 additional SIDs that were not in that plan.

Some time before January 17, 2005, Eikmeier stated to the Omaha World-Herald newspaper that Elkhorn had no current annexation plans. Despite his work on an annexation plan for 2005, Eikmeier also stated that he was not aware of an annexation plan that Elkhorn would adopt before 2007. The Eikmeier interview was apparently triggered by the Omaha mayor's earlier

statement in an interview that Omaha's annexation of Elkhorn was inevitable. Eikmeier admitted that Elkhorn proceeded with its aggressive annexation plan to prevent Omaha from annexing Elkhorn. See § 14-117 (providing that metropolitan class cities can extend boundaries over land that includes or annexes city of first class with population less than 10,000).

Moving forward, on Monday, February 14, 2005, Elkhorn posted a special meeting notice at three locations: the city hall, the post office, and a bank. The notice provided that the council and mayor would meet in the public library on February 21 and that an agenda was available for inspection at the city clerk's office. The only item listed on the agenda was the street plan. On February 15, the Douglas County Post-Gazette newspaper published a notice of the special meeting that also provided that the street plan was on the agenda.

On Friday, February 18, 2005, at 1:50 p.m., Elkhorn added the annexation resolution to its special meeting agenda. The city clerk made a note of the addition in a notebook that was available to the public upon request, but an agenda was not printed until 4:55 p.m., after the city offices had closed. Eikmeier continued to work on the plan through Saturday, and on Sunday morning, he made copies for council members and faxed copies of the amended agenda to the Omaha World-Herald and Douglas County Post-Gazette newspapers. Elkhorn posted the amended agenda to its Web site on Saturday.

Elkhorn held its special meeting on February 21, 2005, President's Day, as planned. Less than 10 residents and a reporter from the Douglas County Post-Gazette attended. Eikmeier admitted that the holiday meeting was partially motivated by a desire to "beat Omaha to the punch" because of state laws favoring Omaha's annexation powers. Elkhorn was at a disadvantage because a city of the first class must adopt a specified annexation resolution and plan for extending services before annexing land. See Neb. Rev. Stat. § 16-117(3) (Reissue 1997). On the other hand, Omaha can extend its limits "at any time" by ordinance. § 14-117. At the February 21 meeting, Elkhorn adopted resolution No. 2005-08, its annexation resolution, and a plan to extend services to the designated areas. Elkhorn admitted that it did not hold a public meeting that day on its annexation actions.

2. Omaha Lags Behind

On the same day, Omaha's planning director learned about Elkhorn's annexation plans. The director stated that Elkhorn's plan surprised him because Eikmeier had publicly stated that Elkhorn did not have immediate annexation plans.

On Tuesday, February 22, 2005, Omaha prepared legal documents and ordinances to annex Elkhorn and began an extensive annexation report, detailing the necessity of the annexation and the cost of providing services to the annexed area. At 9:51 a.m., the Omaha mayor called a special meeting to be held at 10 o'clock that night. The meeting concerned Omaha's annexation plan for Elkhorn and specific SIDs and other properties to be annexed. The city clerk issued a call for the meeting and contacted all council members to verify where he could serve notice; none of the members objected to the meeting, and all of them signed the call within 1 hour. An agenda of the special meeting was faxed to 19 area media outlets between 10:16 and 10:54 a.m. Notice was also posted on bulletin boards in the city's offices and on its Web site. The Omaha World-Herald published an article about the meeting in its afternoon edition of the February 22 paper. All council members attended and made no objections to the meeting.

Before the special meeting on February 22, 2005, the Omaha Planning Department drafted two alternative ordinances for annexing Elkhorn and other areas: one included the Elk Valley subdivision, and the other did not. At the February 22 meeting, Omaha read the two ordinances for the first time.

3. Homestretch: Both Cities Race to Finish Line

Meanwhile, on February 22, 2005, Elkhorn published notice of a special meeting for March 1. On February 25, Omaha published notice of a public hearing and administrative meeting of the Omaha Planning Board for Wednesday, March 2. It also published notice of its precouncil briefing and regular city council meeting for March 1.

On Tuesday, March 1, 2005, Omaha held a public meeting at which it read the annexation ordinance for the second time. Omaha city department heads briefed every member of the Omaha City Council on the annexation issues in three nonpublic meetings conducted at 8:30, 9:30, and 11:30 a.m. No more

than three council members attended a briefing. The department heads' briefings occurred before and after the public precouncil meeting at 10:30 a.m. None of the council members asked questions about the annexation at the public precouncil meeting. Also, on March 1, Elkhorn published its annexation resolution and notice of a public meeting to be held on March 11 for consideration of its plans.

4. Omaha Pulls Ahead

On March 2, 2005, the Omaha Planning Board conducted a public hearing and approved the ordinances. At the Omaha City Council's regularly scheduled meeting on March 8, the ordinances were read for the third time. The council voted to adopt annexation ordinance No. 36947, which did not include the Elk Valley subdivision.

Falling behind, Elkhorn, on March 8, 2005, published notices of special meetings for March 14 and 15. On March 11, Elkhorn conducted a public hearing, at which the planning commission recommended approval of the annexation plans and the ordinances were read for the first time. At the March 14 meeting, Elkhorn's ordinances were read for the second time. On March 15, 7 days after Omaha had adopted its ordinance, Elkhorn's annexation ordinances were read for the final time and the city council voted to adopt them.

5. Elkhorn Cries Foul

On March 9, 2005, Elkhorn filed a complaint, seeking a temporary injunction and a declaration that Omaha's ordinance was invalid. On March 17, Omaha filed an answer, with affirmative defenses and a counterclaim for a temporary restraining order and temporary and permanent injunctions against Elkhorn's ordinances. In addition, Omaha sought a declaration that its ordinance was valid and that Elkhorn's ordinances were invalid.

On March 21, 2005, the district court, with the agreement of the parties, issued a temporary injunction enjoining the enforcement of both cities' ordinances.

In August 2005, Elkhorn filed its operative complaint. In sum, Elkhorn alleged that (1) Omaha had violated the Act; (2) Elkhorn had taken the first valid step toward annexation, thereby preempting Omaha's annexation proceedings; (3) Omaha could not

annex Elkhorn because the corporate limits of the cities did not adjoin; (4) the Nebraska Constitution prohibited the annexation without a vote; and (5) Omaha's annexation was an unsound and arbitrary response to Elkhorn's annexation plan.

6. Court's Decision

Following a bench trial, the court rejected all of Elkhorn's claims that Omaha's ordinance was invalid. Regarding Omaha's claims, the court concluded that Elkhorn had violated the Act at its February 21, 2005, meeting. The court stated that "Elkhorn endeavored to exercise stealth in providing notice of the real purpose of the February 21 Special Meeting." It rejected Omaha's claims that Elkhorn had attempted to annex land that was not adjacent or contiguous. But the court concluded that Elkhorn's annexations were unreasonable and improperly motivated. The court also determined that the annexations were invalid because Elkhorn would be annexed before its ordinances could take effect. Finally, the court accepted Elkhorn's expert's testimony that its population would be over 10,000 if the annexed area were included in the count. It concluded, however, that the evidence did not preclude the annexation because Elkhorn admitted in its complaint that its population on February 21, 2005, was 7,906. In addition to these findings, the court concluded that the Legislature had given Omaha statutory priority over Elkhorn by requiring first class cities to fulfill more statutory requirements than metropolitan class cities and limiting first class cities' annexing authority to only urban and suburban land.

Accordingly, the court permanently enjoined Elkhorn from enforcing its ordinances and declared that Elkhorn would cease to be a city of the first class as of the date the order was filed if Elkhorn did not file an appeal. Elkhorn filed a notice of appeal on August 19, 2005, and on the same day, the court entered a supersedeas order, enjoining both parties from enforcing their ordinances pending an appeal.

II. ASSIGNMENTS OF ERROR

Elkhorn assigns that the district court erred in (1) ruling that Omaha's annexation proceedings did not violate the Act; (2) ruling that Elkhorn's annexation proceedings violated the Act

when the court did not have jurisdiction to decide that issue; (3) ruling that Omaha could annex Elkhorn because Elkhorn was within the territory Omaha annexed, despite the lack of adjoining boundaries between the cities; (4) failing to conclude that Elkhorn had obtained exclusive jurisdiction to complete its annexations under the prior jurisdiction rule; (5) ruling that Elkhorn's annexation was improperly motivated and unreasonable and that Elkhorn could not provide adequate services when the court lacked jurisdiction over those issues; (6) alternatively, failing to rule Omaha's annexation was improperly motivated, unreasonable, arbitrary, capricious, and void if the court did have jurisdiction to consider those issues; (7) failing to rule that Omaha's annexation was a consolidation or merger without a vote, in violation of Neb. Const. art. XV, § 18(2); and (8) failing to rule that Omaha's ordinance was void and ruling that Elkhorn's ordinances were void.

In its cross-appeal, Omaha assigns that the district court erred in (1) finding that all of the area proposed to be annexed by Elkhorn was adjacent and contiguous to Elkhorn; (2) finding that Riverside Lakes subdivision, across the Elkhorn River from Elkhorn, was adjacent and contiguous; (3) receiving into evidence expert testimony regarding estimates of Elkhorn's population under its proposed annexation plan; and (4) finding that Elkhorn's population would be over 10,000 when the areas proposed for annexation were included.

III. STANDARD OF REVIEW

[1-3] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity. *Cornhusker Pub. Power Dist. v. City of Schuyler*, 269 Neb. 972, 699 N.W.2d 352 (2005); *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993). We review actions for relief under the Act in equity because the relief sought is a declaration that action taken in violation of the act is void or voidable. See, *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003); *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 944, 653 N.W.2d 240 (2002). On appeal from an equity action, we decide factual questions de novo on the record and, as to questions of both fact and law, we are obligated to reach a

conclusion independent of the trial court's determination. See, *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005); *Cornhusker Pub. Power Dist. v. City of Schuyler, supra*.

[4-6] Statutory interpretation presents a question of law. *State v. County of Lancaster, ante* p. 376, 721 N.W.2d 644 (2006). Constitutional interpretation is a question of law. *Stewart v. Advanced Gaming Tech., ante* p. 471, 723 N.W.2d 65 (2006). When reviewing questions of law, we resolve the questions independently of the trial court's conclusions. See, *State v. County of Lancaster, supra*; *Reed v. State, ante* p. 8, 717 N.W.2d 899 (2006).

IV. ANALYSIS

1. Omaha's Alleged Violations of Act

Elkhorn argues that the district court erred in failing to find that Omaha's annexation proceedings violated the Act. Regarding Elkhorn's standing, its complaint joined two private citizens as plaintiffs. And any citizen of the state may commence an action to declare a public body's action void. See § 84-1414(3). Thus, there is no standing issue presented by Elkhorn's challenge of Omaha's alleged violations of the Act. Omaha argues that even if Elkhorn can challenge its meeting procedures, Omaha did not take any formal action at the first and second readings of its annexation ordinances, which took place on February 22 and March 1, 2005.

[7] Section 84-1414(1) provides: "Any motion, resolution, rule, regulation, *ordinance*, or formal action of a public body made or taken in violation of the Open Meetings Act shall be declared void by the district court if the suit is commenced within one hundred twenty days of the meeting . . . ." (Emphasis supplied.) The Omaha City Charter, art. II, § 2.12 (1984), requires an ordinance to be read three times at separate meetings. Accordingly, the readings were necessary steps for passing the ordinance that the Omaha City Council ultimately voted to adopt. Compare *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (1993). If any of these readings were declared void because of violations of the Act, the ordinance would necessarily be void as well. We conclude that the readings constituted formal actions.

(a) Omaha's February 22, 2005, Meeting Gave Reasonable Advance Public Notice

Elkhorn contends that Omaha's February 22, 2005, meeting violated § 84-1411(1) of the Act because Omaha failed to give reasonable advance public notice of the meeting. Section 84-1411(1) provides:

> Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting . . . .

Elkhorn argues that because Omaha cannot alter its agenda later than 24 hours before a scheduled meeting, it also cannot create an agenda later than 24 hours before a meeting. Omaha counters that the Act does not prohibit holding a special meeting with less than 24 hours' notice.

[8,9] In the absence of anything to the contrary, we will give statutory language its plain and ordinary meaning. *State v. County of Lancaster, ante* p. 376, 721 N.W.2d 644 (2006). It is not within our province to read a meaning into a statute that is not there. See *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

As noted, § 84-1411(1) provides that "[e]xcept for items of an emergency nature, the agenda shall not be *altered* later than . . . twenty-four hours before the scheduled commencement of the meeting . . . ." If we adopt Elkhorn's interpretation, we would be imposing an unstated requirement: "the agenda shall not be altered [*or created*] later than . . . twenty-four hours before the scheduled commencement of the meeting." Because the statute's 24-hour requirement is directed only at alterations, we decline to read an additional requirement into the statute.

[10] Unlike many states, the Legislature has not imposed a minimum time period for public notification of a special meeting. See, e.g., Cal. Gov't Code § 54956 (West 1997 & Cum. Supp. 2007). Instead, the Legislature permits each public body to designate its own method of notification for all meetings. Under § 84-1411(1), the Legislature has imposed only two conditions on the public body's notification method of a public meeting: (1) It must "give reasonable advance publicized notice of the time and place of each meeting" and (2) it must be recorded in the public body's minutes. *Id.*

Here, the record shows that in 1975, in response to the Legislature's passage of what is now the Act, the Omaha City Council passed resolution No. 1962. This resolution deals with the notification of regular and special meetings. The Omaha City Council minutes contain a record of the action and vote. The resolution designated The Daily Record as the official newspaper for notices of regular meetings. It provided that "notice of special or called meetings of the City Council may be publicized by posting on the bulletin board in the Omaha-Douglas [County] Civic Center in accordance with [the Act] and Section 2.10 of the Home Rule Charter of the City of Omaha." At the time at issue, the Omaha City Charter, art. II, § 2.10 (1976), provided: "Council Members shall be given at least twelve hours written notice of the time and place of such special meetings, except that only two hours notice shall be required when an emergency has been declared."

Omaha conceded that "[a]t no time prior to or during the special meeting of February 22, 2005, did the Mayor or the City Council of Omaha declare the special meeting to be an emergency meeting." So the emergency provision of § 2.10 is not at issue.

Regarding resolution No. 1962, the Omaha city clerk testified that notice was posted to the public on the bulletin boards of the city's offices and on its Web site and that the agenda was available to the public by 10:15 a.m. The agenda provided that two ordinances to extend Omaha's city limits would be read for the first time. Thus, Omaha's notice to the public of its special meeting complied with resolution No. 1962.

Elkhorn, however, argues that Omaha's notice was nonetheless deficient. It argues that Omaha's notice did not comply with § 2.10 of the Omaha City Charter because the council members did not receive a full 12 hours' notice and did not file written waivers of the noncompliance.

Rule 1 of the Omaha City Council's rules of order provides that "[a]ny member by his or her attendance [at a special meeting] shall be deemed to have waived all objections as to notice." Omaha's waiver rule regarding notice to council members parallels our holding regarding notice to the public: a person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or that person has waived the right to object on that ground at a later date. See *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003). We conclude that a written waiver of objection is not required.

[11] Moreover, any defect in notice intended for the benefit of council members would not invalidate a council meeting when all of the members attended without objection. See *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). Five of the Omaha City Council members were present at the city's offices when the city clerk received the mayor's notification of a special meeting. And the city clerk immediately called the two remaining members. The city clerk provided each member with a copy of the call and the mayor's letter requesting the special meeting. Both documents stated that the purpose for the special meeting was the annexation of Elkhorn and surrounding SIDs or other properties.

Additionally, all the members signed the call by 11:01 a.m., and no member objected to the meeting when served with notice. Every council member attended the 10 p.m. meeting and did not object to the meeting or the notification. As in *Pokorny v. City of Schuyler, supra*, the 12-hour notification in § 2.10 of the Omaha City Charter is for the benefit of council members, not the general public. Thus, any defect in the notice did not affect the validity of Omaha's special meeting on February 22, 2005, because they all attended without objection.

Finally, Elkhorn argues that under *Pokorny*, a notification of approximately 12 hours does not comport with the "reasonable

advance publicized notice" requirement in § 84-1411(1). In addition to the defective call issue in *Pokorny*, this court also considered whether the actual notice to the public of a special meeting was sufficient. At a regularly scheduled meeting, the city council scheduled a special meeting to take place the next morning at 10:30 a.m. At 10 o'clock on the night of the regular meeting, the city posted notice of the special meeting in three public places. This court noted that the city did not claim that the Act's emergency meeting provisions were applicable. We concluded that "notice of the meeting of March 16 . . . given by a notice posted in three public places at 10 p.m., on March 15 . . . could hardly be considered to be reasonable advance publicized notice as required by [§ 84-1411]." *Pokorny v. City of Schuyler*, 202 Neb. at 338, 275 N.W.2d at 284.

Elkhorn argues that because 12½ hours notice was insufficient in *Pokorny*, a notice of slightly less than 12 hours cannot be sufficient here. Omaha, however, argues that its notice is factually distinguishable from the notice in *Pokorny* because that notice was posted late at night when it was unlikely to reach the public. We agree that *Pokorny* is not controlling.

In *Pokorny*, we did not state that a 12-hour notice is always insufficient under § 84-1411(1). Instead, we determined that the short time between the notice and the meeting was insufficient because the notice was unlikely to reach the public before the scheduled meeting. In contrast, Omaha provided public notice early on a business day and the city moved quickly to notify many local media outlets. The record shows that Omaha faxed an agenda of the special meeting to the main Omaha newspaper by 10:16 a.m. on February 22, 2005, and to 18 other local media outlets by 10:54 a.m. The Omaha World-Herald published an article about the meeting in its afternoon edition of the February 22 paper. Four television broadcasters were at the meeting, and one station broadcast the meeting live. Therefore, unlike the notice in *Pokorny*, the record shows that Omaha's notice reached a substantial part of the public before the scheduled meeting.

Also, Elkhorn's maneuvers unsurprisingly placed Omaha in a dilemma. Section 2.12 of the Omaha City Charter provides that no ordinance "shall be passed earlier than two weeks after its introduction," except for emergency circumstances which

were not applicable here. So once Omaha learned of Elkhorn's intent to annex surrounding land, its choices were limited. It could act swiftly in giving public notice or face the possibility of being unable to annex if Elkhorn enacted its annexation ordinances first. Although we do not condone the practice of providing only 12 hours' notice before a public meeting, we conclude that under these circumstances, Omaha's notification efforts were reasonable and sufficient.

(b) Omaha's Prepublic Meeting and Informational Sessions Did Not Constitute Additional Public Meetings

Elkhorn also contends that Omaha violated the Act on March 1, 2005, by conducting secret meetings with less than a quorum of council members before and after the public meeting. Elkhorn argues that these informal meetings gave council members an opportunity to formulate public policy in private, which violated § 84-1410(4). This statute provides that informal meetings shall not "be used for the purpose of circumventing the requirements of the act." *Id.*

Omaha counters that informational sessions attended by less than a quorum of council members do not violate the Act when no public business is conducted. It argues that "requirements of the Act" are triggered by a meeting of a "public body" and that the Act defines a public body to exclude subgroups of less than a quorum. Brief for appellee at 32.

[12] We have construed public meetings laws broadly so as to obtain the objective of openness in favor of the public. *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002).

Section 84-1408 provides that "[e]very meeting of a public body shall be open to the public . . . ." Section 84-1409(1)(a) defines "[p]ublic body" to include "governing bodies of all political subdivisions of the State of Nebraska." However, § 84-1409(1)(b) provides: "Public body does not include . . . subcommittees of such bodies *unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body*." (Emphasis supplied.)

Although the Act does not define "subcommittee," a subcommittee is generally defined as a group within a committee

to which the committee may refer business. See Black's Law Dictionary 290 (8th ed. 2004). Here, no business was referred to the groups of three council members. But even construing § 84-1409(1)(b) broadly, we conclude that if the Act does not apply to a subcommittee, it would also not apply to an even lesser subgroup.

The evidence shows that no more than three council members attended any of the informational sessions conducted on March 1, 2005. Section 2.10 of the Omaha City Charter specifies that a quorum of the Omaha City Council is four members for all purposes. Accordingly, the subgroups did not constitute a public body on that ground. Further, the Omaha City Charter, art. II, § 2.11 (1956), provides that apart from disasters, "[n]o less than a majority [a quorum] of the whole Council shall be sufficient to make any determination or effect any action . . . ." Therefore, at the informational sessions, none of the subgroups could have taken formal action. The subgroups were unquestionably not conducting hearings, nor were the subgroups making policy by receiving background information about a policy issue to be decided.

The Act's purpose is to prevent "the formation of public policy . . . in secret." § 84-1408. But it does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy. The public would be ill served by restricting policymakers from reflecting and preparing to consider proposals, or from privately suggesting alternatives. See *Hispanic Educ. Com. v. Houston Ind. Sch. Dist.*, 886 F. Supp. 606 (S.D. Tex. 1994). By excluding nonquorum subgroups from the definition of a public body, the Legislature has balanced the public's need to be heard on matters of public policy with a practical accommodation for a public body's need for information to conduct business.

Also, other courts have declined to apply public meeting laws to nonquorum gatherings intended to obtain information or voice opinions. See, e.g., *id.*; *Freedom Newspapers v. Orange Cty.*, 6 Cal. 4th 821, 863 P.2d 218, 25 Cal. Rptr. 2d 148 (1993); *Delaware Solid Waste Authority v. News-Journal*, 480 A.2d 628 (Del. 1984); *Lyon v. Lake County*, 765 So. 2d 785 (Fla. App. 2000); *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349 (Iowa 2005).

It is true that we have been concerned with a public body's perfunctorily approving a decision in a public meeting that was apparently reached in a private meeting. "The prohibition against decisions or formal action in a closed session also proscribes . . . rubberstamping or reenacting by a pro forma vote any decision reached during a closed session." *Grein v. Board of Education*, 216 Neb. 158, 168, 343 N.W.2d 718, 724 (1984). But *Grein* is distinguishable on two counts.

First, *Grein* involved a closed session of a full school board. Obviously, a private meeting of a full public body, or a quorum thereof, raises the concern that the members will reach consensus on a matter of public concern out of the public's view. See, also, *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (1993).

Second, the school board in *Grein* immediately voted on an agenda item after a closed session, without further discussion or deliberations. "The necessary inference is that the vote during the reconvened open session was the extension, culmination, and product of the closed session." 216 Neb. at 167-68, 343 N.W.2d at 724. Here, Omaha informed the public of all relevant facts supporting the annexation, and the public had full opportunity to voice its concerns.

Omaha's deputy chief of staff testified that the department heads met with subgroups of council members to familiarize them with the annexation plan that would be presented at the public meeting—specifically, the financial details and geographic areas to be annexed. The minutes of Omaha's March 1, 2005, meeting show that it presented the annexation plan to the public. Therefore, the public received the same information that the individual council members received. See *Centinela Hosp. Ass'n v. Inglewood City*, 225 Cal. App. 3d 1586, 275 Cal. Rptr. 901 (1990). Twenty people spoke against the ordinances, and seven city officials spoke in favor of them. In addition, the public responded with numerous letters, e-mails, and telephone calls. On March 2, the Omaha Planning Board conducted another public meeting regarding the proposed annexation and recommended approval. The city council did not vote on or pass an annexation ordinance until March 8. Thus, the evidence shows

that the Omaha City Council did not reach a final decision on the annexation until it had received the public's input on the plan.

[13] Elkhorn counters that under § 84-1410(4), "no public body shall designate itself a subcommittee of the whole body for the purpose of circumventing the Open Meetings Act." We need not decide whether, under this section, a subcommittee need be composed of the entire body or a quorum before it could circumvent the Act, because here, the evidence shows Omaha did not attempt to circumvent the Act. As noted, Omaha gave the public access to the same information as the council received and an opportunity to be heard. We conclude that the informational sessions of less than a quorum of the Omaha City Council members did not constitute a public meeting under the Act.

2. Validity of Omaha's Annexation

[14] A municipality that is in the crosshairs of annexation has standing to challenge the annexation. See, *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004); *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952). Elkhorn has standing. Elkhorn alleges that Omaha's annexation was invalid for three reasons: (1) Omaha's annexation was second in time to Elkhorn's annexations and therefore void under the prior jurisdiction rule, (2) Elkhorn and Omaha are not adjoining as required under § 14-117, and (3) Omaha's annexation violates Neb. Const. art. XV, § 18(2).

(a) Prior Jurisdiction Rule Does Not Apply

Elkhorn argues that it took the first valid step toward annexation and that under the prior jurisdiction rule, Omaha's attempted annexation was therefore void. Omaha counters that the prior jurisdiction rule does not apply to these proceedings because the cities were not attempting to annex the same land. We agree.

Under the prior jurisdiction rule, when two public bodies claim jurisdiction over the same territory in annexation proceedings, the public body which takes the first valid step toward annexation has the superior claim. And it may complete its proceedings if it acts promptly and in accordance with statutory requirements. See, *Emerson Electric Mfg. Co. v. City of Ferguson*, 376 S.W.2d 643 (Mo. App. 1964); *City of West Fargo v. City of*

Fargo, 251 N.W.2d 918 (N.D. 1977); 2 Eugene McQuillin, The Law of Municipal Corporations § 7:39 (3d ed. 2006 & Cum. Supp. 2006). Omaha correctly points out that in more recent decisions, some courts have declined to apply the prior jurisdiction rule as antiquated or superseded by statutory procedures. See, *Des Moines v. City Development Bd.*, 473 N.W.2d 197 (Iowa 1991); *Village of Farmington v. Minnesota Municipal Comm.*, 284 Minn. 125, 170 N.W.2d 197 (1969); *In re Enlargement and Ext. of D'Iberville*, 867 So. 2d 241 (Miss. 2004). Further, Elkhorn has not directed our attention to any case in which a court applied the rule to annexations of different territories.

[15] The same subject matter is assumed in the "prior in time is prior in jurisdiction" rule because it promotes the orderly administration of conflicting interests. 2 McQuillin, *supra* at 674. We need not determine whether to adopt the prior jurisdiction rule because we conclude that the rule is not applicable when different territories are the subject of the competing annexations. A map introduced into evidence by Elkhorn for demonstrative purposes shows that Omaha and Elkhorn were not attempting to annex the same land. Therefore, the prior jurisdiction rule does not apply to invalidate Omaha's annexation.

(b) Omaha and Elkhorn Are Adjoining
as Required by § 14-117

Section 14-117, in relevant part, provides:

> The city council of any city of the metropolitan class may at any time extend the corporate limits of such city over any contiguous or adjacent lands, lots, tracts, streets, or highways, such distance as may be deemed proper in any direction, and may include, annex, merge, or consolidate with such city of the metropolitan class, *by such extension of its limits*, any adjoining city of the first class having less than ten thousand population or any adjoining city of the second class or village.

(Emphasis supplied.)

Elkhorn does not dispute Omaha's general power to simultaneously annex several contiguous tracts to reach Elkhorn's boundary. And the district court correctly concluded that Elkhorn's proposed annexations were also dependent upon this principle.

Nonetheless, Elkhorn contends that § 14-117 limits Omaha's annexation of cities to those with which Omaha has a common corporate border without any intervening land. Elkhorn argues that the term " 'adjoining' city" has a meaning distinct from contiguous or adjacent land. Brief for appellant at 36. Omaha, however, contends that the terms " 'contiguous' " and " 'adjoining' " are synonymous and that the Legislature was not attempting to create a legal distinction between the annexation of cities and other land. Brief for appellees at 54.

The Legislature recently added the "contiguous or adjacent" requirement to a metropolitan city's annexation of surrounding lands and removed a restriction against the annexation of agricultural and rural lands. See 1998 Neb. Laws, L.B. 611. This court, however, has previously analyzed annexations under § 14-117 to determine whether the annexed area was sufficiently joined. See *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952). In *Bierschenk v. City of Omaha*, 178 Neb. 715, 722, 135 N.W.2d 12, 16 (1965), we held that "a city of the metropolitan class may annex an area by extending its boundaries to form a common one with the portion annexed if the area so attached is urban in nature and is connected to the city by a substantial link of narrower land of the same character." Similarly, in *Wagner v. City of Omaha, supra*, we stated that "[i]t was clearly not the intention of the Legislature, if [a residential] area develops outside the boundaries of a metropolitan city, to prevent such city from annexing it." 156 Neb. at 168, 55 N.W.2d at 494.

[16-18] We have interpreted the "contiguous or adjacent" requirement in statutes governing the annexation powers of other classes of cities to determine how substantial the link between a city and annexed area must be under this standard. We have held that the terms contiguous and adjacent in annexation statutes are synonymous. And substantial adjacency between a municipality and annexed territory exists when a substantial part of the municipality's boundary is adjacent to a segment of the boundary of the city or village. *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993). A city may not annex a tract of land by simultaneously annexing a 120-foot-wide strip of land to reach the tract. *Johnson v. City of Hastings*, 241 Neb. 291,

488 N.W.2d 20 (1992). But we have upheld an annexation of a residential area reached through the simultaneous annexation of connecting land six blocks wide. See *Swedlund v. City of Hastings*, 243 Neb. at 611, 501 N.W.2d at 306 ("entire eastern boundary of the annexed [connecting] property is contiguous with the entire western boundary of a residential area [reached through connecting property]"). Thus, we have implicitly recognized in *Wagner*, *Bierschenk*, and *Swedlund* that a municipality may annex several tracts as long as one tract is substantially adjacent to the municipality and the other tracts are substantially adjacent to each other. See 2 Eugene McQuillin, The Law of Municipal Corporations § 7:32 (2006). The question remains, however, whether the "adjoining city" language in § 14-117 required Omaha to have a common border with Elkhorn before annexing it.

[19,20] Absent anything to the contrary, we give statutory language its plain and ordinary meaning. *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006). We will not read anything plain, direct, or unambiguous out of a statute. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006). And if possible, we will try to avoid a statutory construction which would lead to an absurd result. See *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

[21-23] Omaha correctly argues that the terms "contiguous" and "adjoining" in § 14-117 are synonymous. See Webster's Third New International Dictionary of the English Language, Unabridged 27, 492 (1993). Any of the three terms—contiguous, adjacent, and adjoining—could be literally applied to require that a city's boundaries abut or touch the boundaries of territory to be annexed. See *id*. at 26-27, 492. But under the "contiguous or adjacent" standard, we have not required common boundaries. As noted, we have interpreted the standard to require the city and annexed territory to be nearby in proximity and allowed cities to reach annexed territory through the simultaneous annexation of a substantial link of connecting territory. We conclude that § 14-117 requires the same application for the term "adjoining city."

[24] Under Elkhorn's interpretation of § 14-117, part of the statute's language is meaningless. If "adjoining city" meant that

Omaha could annex only cities with which it shared a common border, then the Legislature would not have specified that a metropolitan city could annex an adjoining city by "extension of its limits." *Id*. Similarly, § 14-117 allows Omaha to "include" an "adjoining city" in an annexation of contiguous or adjacent lands. But even if Omaha had annexed all of the land surrounding Elkhorn so that Elkhorn was merely "included" within a larger territory, under Elkhorn's interpretation, the annexation would still be invalid because its corporate limits did not touch Omaha's corporate limits. This would lead to the absurd conclusion that the Legislature intended to give Omaha power to annex large tracts of land in any direction, but not the cities eligible for annexation within that land unless they shared a common border. We conclude that under § 14-117, the Legislature intended to permit a metropolitan city to extend its corporate limits so that it adjoins the corporate limits of a city to be annexed.

(c) Omaha's Annexation Ordinance Is Constitutional

Elkhorn contends that under Neb. Rev. Stat. §§ 14-120 to 14-124 (Reissue 1997), Omaha's annexation of Elkhorn is effectively a merger and consolidation. Those sections explain the rights and responsibilities of a metropolitan city and any city that it annexes or merges with. Elkhorn argues that because the effects of an annexation or merger are the same, Omaha was required to comply with Neb. Const. art. XV, § 18(2), which provides:

> The Legislature may provide for the merger or consolidation of counties or other local governments. No merger or consolidation of municipalities or counties shall occur without the approval of a majority of the people voting in each municipality or county to be merged or consolidated as provided by law. . . . Annexation shall not be considered a merger or consolidation for purposes of this section.

Despite this section's explicit provision that it does not apply to annexations, Elkhorn argues that the provision was intended to apply only to unincorporated territories or SIDs. It argues that article XV, § 18(2) would be meaningless if it applied to the annexation of a city or village. Elkhorn's argument runs wide and shallow. It does not explain why it concludes the provision

would be meaningless if it applies only to mergers or consolidations of municipalities and counties, nor do we find it necessary to reach that issue.

[25,26] 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. *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006). The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense. *State ex rel. Lemon v. Gale, ante* p. 295, 721 N.W.2d 347 (2006).

Here, the provision needs no interpretation and could not be more plainly stated. If the people had intended to prevent unilateral annexations, the provision excluding annexations from the requirement of a vote would not have been included. Further, the Legislature undertook no simultaneous amendments of Nebraska's annexation statutes. We conclude that this argument is without merit.

3. Effect of Omaha's Annexation on Elkhorn

The district court concluded that Elkhorn's annexations were invalid for several reasons. We need not reach those issues because we agree with the district court's conclusion that Elkhorn would be annexed before its ordinances could take effect.

Upon the effective date of a metropolitan city's annexation ordinance

> the laws, ordinances, powers, and government of such metropolitan city shall extend over the territory embraced within such city or village so annexed . . . . [A]nd after said date the metropolitan city shall succeed to all the property and property rights of every kind . . . held by or belonging to the city or village annexed . . . .

Neb. Rev. Stat. § 14-118 (Reissue 1997).

In addition, upon a metropolitan city's annexation of a city taking effect, "the terms and tenure of all offices and officers [of the annexed city] shall terminate and entirely cease." § 14-124. The only exception is their duty to deliver to the officers of the metropolitan city any "books, papers, bonds, funds, effects or

property of any kind in their hands or under their control belonging to [the annexed city].” *Id*. Therefore, upon the effective date of Omaha’s annexation of Elkhorn, it ceased to exist as a separate municipality, and its former territory was governed solely by Omaha’s laws. See, *State ex rel. Andersen v. Leahy*, 189 Neb. 92, 199 N.W.2d 713 (1972); 62 C.J.S. *Municipal Corporations* § 64 (1999). Compare *School Dist. of Bellevue v. Strawn*, 185 Neb. 392, 176 N.W.2d 42 (1970).

The district court correctly noted that Omaha’s annexation ordinance became effective on March 24, 2005, and that Elkhorn’s annexation ordinances would have become effective on March 30. However, Elkhorn’s annexation proceedings were nullified on March 24, when it ceased to exist as a separate municipality.

V. CONCLUSION

We conclude that the Omaha City Council did not violate the Act during its meetings on February 22 or March 1, 2005. We further conclude that the prior jurisdiction rule did not apply to abate Omaha’s annexation proceedings; that § 14-117 authorized Omaha to annex Elkhorn, despite the lack of a common municipal border; and that Neb. Const. art. XV, § 18(2), did not apply to require a vote on the annexation. Finally, we conclude that Elkhorn ceased to exist as a separate municipality on March 24, 2005, the date that Omaha’s annexation ordinance became effective. Elkhorn’s annexation ordinances were accordingly nullified before they took effect.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. MARY C. WICKENKAMP, RESPONDENT.

725 N.W.2d 811

Filed January 12, 2007. No. S-05-1251.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.

2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.
5. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
6. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
7. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
8. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Mary C. Wickenkamp, pro se.

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

PER CURIAM.

INTRODUCTION

On October 14, 2005, formal charges were filed by the office of the Counsel for Discipline, relator, against Mary C. Wickenkamp, respondent. The formal charges set forth three counts that included allegations that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 7, DR 7-101(A)(2) (failing to carry out contract of employment for professional services), as well as her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent's answer disputed the allegations.

A referee was appointed who heard evidence. The referee filed a report on May 22, 2006. With respect to the formal charges, the referee concluded that respondent's conduct had violated DR 1-102(A)(1), (4), and (5); DR 6-101(A)(3); DR 7-101(A)(2); and her oath as an attorney. The referee recommended that respondent receive a public reprimand and be placed on probation for a period of 12 months, during which probationary period, respondent would engage and work with a practicing attorney to monitor respondent's practice.

On June 6, 2006, relator filed a motion for judgment on the pleadings, requesting that this court accept the referee's recommendation and enter judgment thereon. The motion was not opposed. We sustain in part, and in part overrule relator's motion. Because we adopt the referee's findings of fact, we sustain that portion of the motion that seeks a determination that respondent has violated the Code of Professional Responsibility provisions set forth above, as well as her oath of office as an attorney. However, to the extent relator's motion for judgment on the pleadings asks this court to adopt the discipline proposed by the referee, the motion is overruled, and we impose discipline as indicated below.

FACTS

The referee's hearing was held on March 30, 2006. Respondent testified during the hearing. A total of 11 exhibits were admitted into evidence. Included in the exhibits were two private reprimands that respondent had previously received involving two prior and unrelated attorney discipline proceedings. The first private reprimand was dated December 18, 2000, and the second was dated October 30, 2003.

The substance of the referee's findings may be summarized as follows:

Respondent was admitted to the practice of law in the State of Nebraska in 1980. She has practiced in Lancaster County, Nebraska.

With regard to count I of the formal charges, the referee found that in May 2004, respondent was retained by Mauro Martinez to represent him in a postconviction action in district court. On September 27, Martinez signed the verification section of the

postconviction application. From September 2004 to February 2005, Martinez attempted unsuccessfully to contact respondent by telephone and by mail. In February, Martinez filed a grievance with relator regarding respondent's failure to file the postconviction application. On April 2, respondent sent a letter to relator, claiming that she had filed the application and stating that the only thing remaining to be done was to appear in district court for the hearing. On May 12, relator advised respondent that the application had not been filed. Respondent ultimately filed the application on June 10.

With regard to count II of the formal charges, the referee found that in August 2002, respondent was retained by Barbara White to represent White's son, Christopher Graybill, in a postconviction action. White paid respondent a $5,000 retainer, the receipt of which respondent acknowledged. Thereafter, respondent conducted some investigation into filing a postconviction action on behalf of Graybill but failed to actually file the postconviction action. Respondent claims that she advised Graybill that she would not file the action. No evidence was offered at the hearing, however, showing any correspondence between respondent and Graybill advising Graybill that respondent would not be filing the postconviction action.

With regard to count III of the formal charges, the referee found that during respondent's representation of Graybill concerning the possible postconviction action, White and Graybill contacted respondent regarding an appeal of a prison administrative matter brought against Graybill for his involvement in a fight with another prisoner. Respondent advised White and Graybill that $1,200 of the original $5,000 retainer remained and that she would apply the $1,200 to her representation of Graybill in the administrative appeal.

The referee further found that while the administrative appeal was pending, the State filed in county court an assault charge against Graybill stemming from the prison incident. Pursuant to Graybill's request, respondent agreed to represent Graybill in the assault case for an additional fee. Respondent filed a plea in bar on the basis of double jeopardy and attended a March 17, 2004, hearing thereon. The county court gave respondent until April 21 to file a posthearing brief. On May 18, the county court

judge's office contacted respondent to see if she was filing her brief. Respondent informed the judge's office that she would file her brief. Respondent claims that thereafter, she attempted to hand deliver her brief to the judge's office and slid it under the judge's door when she found the office locked. The referee found that respondent failed to contact the judge's office after she purportedly delivered the brief to confirm that the judge had received the brief. The referee further found that on May 24, the county court, having not received respondent's brief, overruled respondent's plea in bar.

At some point, an appeal in connection with the plea in bar was filed in the Nebraska Court of Appeals, and the Court of Appeals, without opinion, summarily affirmed the county court's judgment. See *State v. Graybill*, 13 Neb. App. xxix (No. A-04-776, Apr. 19, 2005). Respondent claimed that she notified Graybill of the Court of Appeals' decision. Graybill denied receiving notice from respondent that his appeal had been decided. Respondent offered no evidence during the hearing showing that a transmittal letter or any other type of correspondence had been sent to Graybill regarding the decision.

Based upon the evidence offered during the hearing, the referee found that respondent's actions constituted a violation of respondent's oath of office as an attorney and the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), (4), and (5); DR 6-101(A)(3); and DR 7-101(A)(2). With respect to the discipline to be imposed, the referee recommended that respondent receive a public reprimand and be placed on probation for a period of 12 months, during which probationary period, respondent would engage and work with a practicing attorney to monitor respondent's practice.

No exceptions were filed to the referee's report. On June 6, 2006, relator filed a motion for judgment on the pleadings, in which relator moved this court to enter judgment in conformity with the referee's report and recommendation. We ordered that the case proceed to briefing and oral argument. In their briefs, the parties urge the court to accept the referee's findings and recommended discipline. The parties filed a stipulation waiving oral argument on December 4, 2006.

ANALYSIS

We note that all of respondent's conduct at issue in this case occurred prior to the September 1, 2005, effective date of the Nebraska Rules of Professional Conduct and is, therefore, governed by the now-superseded Code of Professional Responsibility.

[1-3] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Muia*, 271 Neb. 287, 711 N.W.2d 850 (2006). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Horneber*, 270 Neb. 951, 708 N.W.2d 620 (2006). Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. Counsel for Dis. v. Chapin*, 270 Neb. 56, 699 N.W.2d 359 (2005).

[4] As noted above, neither party filed written exceptions to the referee's report. Pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2005), relator filed a motion for judgment on the pleadings. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive. See *State ex rel. Counsel for Dis. v. Widtfeldt*, 271 Neb. 851, 716 N.W.2d 68 (2006). Based upon the undisputed findings of fact in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted, in part. Specifically, based upon the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated her oath of office as an attorney, § 7-104, and the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), (4), and (5); DR 6-101(A)(3); and DR 7-101(A)(2).

[5] We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Reilly*, 271 Neb. 465, 712 N.W.2d 278 (2006). Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

(A) Misconduct shall be grounds for

(1) Disbarment by the Court; or

(2) Suspension by the Court; or

(3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or

(4) Censure and reprimand by the Court; or

(5) Temporary suspension by the Court; or

(6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, rule 10(N).

[6-8] With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach attorney discipline case must be evaluated individually in light of its particular facts and circumstances." *State ex rel. Counsel for Dis. v. Widtfeldt*, 271 Neb. at 857, 716 N.W.2d at 72. 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. Reilly, supra*. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors. See *State ex rel. Counsel for Dis. v. Hart*, 270 Neb. 768, 708 N.W.2d 606 (2005). We have considered prior reprimands as aggravators. See, *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005); *State ex rel. Counsel for Dis. v. Sutton*, 268 Neb. 485, 684 N.W.2d 23 (2004).

We have considered the referee's report and recommendation, the findings of which have been established by clear and convincing evidence, and the applicable law. In his report, the referee recommended that with respect to the discipline to be imposed, respondent should receive a public reprimand and be placed on probation for a period of 12 months, during which probationary period, respondent would engage and work with a practicing attorney to monitor respondent's practice. We disagree with the referee's recommendation, and to the extent relator's motion for judgment on the pleadings requests that this court accept the referee's recommendation with respect to discipline

and enter judgment thereon, that portion of the motion for judgment on the pleadings is overruled.

This court is seriously concerned with respondent's repeated neglect of matters entrusted to her. See *State ex rel. Counsel for Dis. v. Sipple*, 265 Neb. 890, 902, 660 N.W.2d 502, 512 (2003) (discussing attorney's prior private reprimands and stating that "we have held that cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions"). We further note that the record reflects respondent has received two prior private reprimands, one of which involved similar neglectful conduct, which we consider as aggravating factors in imposing discipline in this case. Upon due consideration of the record, the court finds that respondent should be and hereby is suspended from the practice of law for a period of 12 months, effective immediately. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, she shall be subject to punishment for contempt of this court. At the end of the 12-month suspension period, respondent may apply to be reinstated to the practice of law, provided that respondent has demonstrated her compliance with rule 16, and further provided that relator has not notified this court that respondent has violated any disciplinary rule during her suspension. Should respondent apply for reinstatement, her reinstatement, if granted, shall be conditioned as follows: Respondent shall be on probation for a period of 2 years following reinstatement, during which period respondent will:

(1) be monitored by an attorney approved by relator;

(2) enter into engagement letters with each client, which letter will describe, at a minimum, the services to be provided by respondent to the client, the fee arrangement between respondent and the client, and any requirements imposed by respondent upon the client (i.e., delivery of documents);

(3) provide the monitoring attorney, on a monthly basis, with copies of each engagement letter entered into in the previous month, and a list of all cases for which respondent is then currently responsible, said list to include the following information for each case: (a) the date the attorney-client relationship began; (b) the type of case (i.e., criminal, dissolution, probate, contract); (c) the last date and type of work completed on the case; (d) the

next type of work and date to be completed on the case; and (e) any applicable statute of limitations and its date;

(4) meet on a monthly basis with the monitoring attorney to discuss respondent's pending cases; and

(5) work with the monitoring attorney to develop and implement appropriate office procedures to ensure that client matters are handled in a timely manner.

If at any time the monitoring attorney believes respondent has violated a disciplinary rule, or has failed to comply with the terms of probation, the monitoring attorney shall report the same to relator.

CONCLUSION

Relator's motion for judgment on the pleadings is sustained in part, and in part overruled. We find by clear and convincing evidence that respondent violated DR 1-102(A)(1), (4), and (5); DR 6-101(A)(3); and DR 7-101(A)(2), as well as her oath of office as an attorney. It is the judgment of this court that respondent should be and hereby is suspended from the practice of law for a period of 12 months, effective immediately. In the event respondent seeks and is granted reinstatement, her reinstatement will be conditioned on a 2-year period of monitored probation, subject to the terms set forth above. Respondent is directed to comply with rule 16, and upon failure to do so, she shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), rule 10(P), and Neb. Ct. R. of Discipline 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM C. FLOYD, JR., APPELLANT.

725 N.W.2d 817

Filed January 12, 2007. No. S-05-1376.

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. **Juries: Discrimination: Appeal and Error.** A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility.
4. ____: ____: ____. A trial court's determination that there was no purposeful discrimination in a party's use of his or her peremptory challenges and a trial court's determination of the adequacy of a party's neutral explanation of its peremptory challenges are factual determinations that will not be reversed on appeal unless clearly erroneous.
5. **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.
6. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
7. **Criminal Law: Trial: Jurors: Presumptions: Proof.** In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.
8. **Jury Misconduct.** The question of whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror.
9. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain the conviction before the cause is remanded for a new trial.
10. **Double Jeopardy: Appeal and Error.** Although the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction.
11. **Equal Protection: Jurors: Discrimination.** The Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race.
12. **Juries: Discrimination: Prosecuting Attorneys: Proof.** The evaluation of whether a party has used peremptory challenges in a racially discriminatory manner is a three-step process. First, the trial court must determine whether the defendant has made a

prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination.

13. **Juries: Discrimination: Proof.** A defendant satisfies the requirements of the first step in the evaluation of whether a party has used peremptory challenges in a racially discriminatory manner by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.
14. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Although the prosecutor must present a comprehensible reason, the second step in the evaluation of whether a party has used peremptory challenges in a racially discriminatory manner does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices.
15. ____: ____: ____: ____. The final step in the evaluation of whether a party has used peremptory challenges in a racially discriminatory manner involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
16. **Juries: Discrimination: Proof.** It is fundamental that a party claiming discrimination in the use of peremptory challenges make a record which supports an inference of discriminatory purpose. Facts must be included in the record by sworn testimony, exhibits, stipulations, admissions, or judicial notice.
17. **Trial: Prosecuting Attorneys.** It is improper for a prosecutor in oral argument to attempt to persuade the jury by giving an expression of his or her personal opinion of the guilt of the accused other than as a deduction from the evidence.
18. **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.
19. **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 Douglas County: THOMAS A. OTEPKA and J. MICHAEL COFFEY, Judges. Affirmed in part, and in part reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, for appellant.

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

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

MILLER-LERMAN, J.

I. NATURE OF CASE

William C. Floyd, Jr., was convicted in the district court for Douglas County of first degree murder, manslaughter of an unborn child, and being a felon in possession of a firearm. He was sentenced to life imprisonment on the murder conviction, to a consecutive sentence of 20 to 20 years' imprisonment on the manslaughter conviction, and to a concurrent sentence of 20 to 20 years' imprisonment on the possession of a firearm conviction. The charges against Floyd arose from the shooting death of Destiny Davis, who was pregnant at the time of her death. Floyd appeals his convictions. We affirm Floyd's conviction for being a felon in possession of a firearm, but we reverse Floyd's convictions for first degree murder and manslaughter of an unborn child and remand the cause for a new trial on those charges.

II. STATEMENT OF FACTS

On July 30, 2004, the State charged Floyd with first degree murder and manslaughter of an unborn child in connection with the October 7, 2003, shooting death of Davis, who was pregnant at the time of the shooting. The information against Floyd was subsequently amended to include a charge that Floyd was a felon in possession of a firearm. Floyd was also charged with two counts of first degree assault on two other individuals, but the assault charges were subsequently dismissed pursuant to Floyd's plea in abatement.

On the evening of October 7, 2003, Davis and several other individuals, including Davis' sister, Shantelle Vickers, were inside a home located in Omaha, Nebraska. Shortly before 10:30 p.m., Vickers went to the bathroom to prepare to take a bath, while Davis and the other individuals remained in the living room. While in the bathroom, Vickers heard shots. The shots were fired from outside through the living room window, and Davis and two others were hit. Davis died; the two other individuals were wounded but did not die. Vickers testified at trial that after hearing the shots, she looked out a window and saw a man she identified as Floyd outside the house.

Trial in this case began with jury selection on May 16, 2005. After jurors were chosen but before the jury was sworn, Floyd

raised a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to peremptory strikes the State had used against two prospective jurors. The parties agreed that Floyd and the two prospective jurors were African-American. Floyd acknowledged that a third prospective juror who was African-American was not struck and remained on the jury. The court determined that Floyd had made a prima facie showing that strikes had been used on the basis of race and put the burden on the State to articulate race-neutral explanations for its strikes. The State asserted that the first prospective juror had been stricken because he testified that he had read about the shooting in the newspaper, that he had friends who had talked about the shooting, and that he thought he had a friend who was a friend of one of the shooting victims. The State also noted that the first prospective juror testified that he was scheduled to take a civil service examination the next Tuesday. With regard to the second prospective juror, the State noted that the juror had testified that he had attended a Christian academy. Prosecutors stated that they did not want a juror who might have a "judge not lest you be judged type mentality." The court determined that the State's explanations were race-neutral and concluded that Floyd had not carried his burden of proving purposeful discrimination. The court denied Floyd's *Batson* challenge, and the trial proceeded.

The State's theory at trial was that Floyd shot through the window with the intent to shoot Vickers rather than Davis. Prior to trial, the State filed a motion pursuant to Neb. Rev. Stat. § 27-404(3) (Reissue 1995), seeking to admit evidence of previous assaults and threats Floyd had made against Vickers in the months and days prior to the shooting. The court determined that evidence of certain prior incidents was admissible for the purposes of establishing motive, intent, plan, and absence of mistake or accident.

Vickers testified at trial, and the State questioned her regarding the incidents. Floyd objected to most of the State's questioning, but he did not object to testimony regarding threatening telephone calls Floyd had made to Vickers on the night of the shooting. The court overruled Floyd's objections. After Floyd's first objection, the court instructed the jury that it could

consider the evidence for the limited purpose of deciding whether Floyd "had the motive, intent or plan to commit the acts for which he stands charged, or the absence of mistake or accident," but not for any other purpose "such as bad character or propensity." As subsequent testimony was admitted over Floyd's objections, the court referred the jury back to the limiting instruction, and the instruction was later repeated. In connection with Vickers' testimony regarding one of the prior incidents, the State offered into evidence an exhibit that included a protection order Vickers had obtained against Floyd. Attached to the protection order was a petition and affidavit in which, inter alia, Vickers described the acts Floyd had committed against her. The court allowed a redacted version of the exhibit to be admitted, over Floyd's objections.

During the course of the trial, evidence was presented which related to certain issues, including the charge that Floyd was a felon in possession of a firearm. In this regard, a former girl friend of Floyd's testified that Floyd had shown up at her house on the night of the shooting. She testified that at one point, Floyd "stood up and a gun fell out [of] his pocket." She described the gun as a semiautomatic, and she testified that Floyd said he had the gun "for protection." The State also entered into evidence a certified record showing that in 1997, Floyd had been convicted of felony criminal mischief and was sentenced to 1 to 2 years' imprisonment.

Closing arguments were presented to the jury on May 20, 2005. At the beginning of the State's closing argument, the prosecutor stated, "The evidence has proved that . . . Floyd is a murderer, that's what it proved, and if I don't have the courage to look him in the eye and call him what he is, I don't have the right to ask you to do the same." Floyd immediately objected to the prosecutor's statement and moved for a mistrial. The court instructed the jury "to disregard the last comment about the prosecutor's opinion and not be influenced by any statements of counsel not supported by the evidence." In a sidebar conference, the court warned that the prosecutor's statement was "very close" to an opinion but overruled Floyd's motion for a mistrial. The court then repeated its instruction to the jury "to disregard the last remark by the prosecutor when he pointed to

[Floyd].” The court noted that the members of the jury were “all nodding in the affirmative.” The State resumed its closing argument, and the prosecutor almost immediately said, “Why does the State think it has proven . . . Floyd to be guilty of —.” Before the prosecutor completed the sentence, Floyd objected. The court sustained the objection and instructed the jury to disregard the statement. The prosecutor then stated to the jury, “What I’m trying to say is let’s look at what the evidence has shown us, all right? Motive. Why is . . . Davis dead? Why do we think . . . Floyd did it? Why are we here?” Floyd again objected, and the court again sustained the objection and instructed the jury to disregard the statement. Floyd renewed his motion for a mistrial; the court overruled the motion and instructed the jury to disregard any reference to the prosecutor’s opinion. The State continued its closing argument, and some time into the argument, the prosecutor stated, “If you believe — and it is not an element of proof that the State has to prove where the shots were fired from, but I don’t see how reasonable minds could differ.” Floyd objected “to the personal opinion,” and the court sustained the objection and instructed the jury to disregard the prosecutor’s personal opinion. Floyd did not at that time renew his motion for a mistrial.

After Floyd presented his closing argument and the court gave its instructions, the jury began deliberations on Friday, May 20, 2005. On the morning of Tuesday, May 24, the jury was reassembled in open court. The foreperson of the jury stated that the jury could not come to a unanimous decision and indicated that the split of votes was 11 to 1. After discussion with counsel, the court instructed the jury to return to the jury room to continue deliberations. That afternoon, the jury returned to the courtroom and the foreperson stated that the jury had reached a verdict. The judge read a verdict finding Floyd guilty on all three counts. Floyd requested that the jury be polled. As the court polled the jury, each juror was asked whether the verdict of guilty was his or her verdict as to each count. Eleven of the jurors answered “[y]es” as to each count. When juror J.K. was asked whether her verdict was guilty as to each count, with respect to the count of first degree murder, she answered, “Probably,” with respect to the count of manslaughter of an

unborn child, she replied, "I don't know," and with respect to the count of felon in possession of a firearm, she replied, "Yes." After conferring with counsel, the court returned to questioning J.K. and told her that in order to be certain the court understood her responses, she would need to reply either "yes" or "no." With respect to the count of felon in possession of a firearm, J.K. again replied, "Yes"; however, with respect to the counts of first degree murder and manslaughter of an unborn child, J.K. responded, "No." The court directed the jury to return to the jury room and continue its deliberations.

Later that afternoon, Floyd moved for a mistrial on the basis that he had appeared before the jury in shackles during the proceeding in which the jury was polled as to its verdict. Floyd conceded that he had not been displayed in shackles at any prior point of the trial, but he argued that because the jury continued deliberations after that proceeding, his appearance in shackles was unduly prejudicial. The State agreed to stipulate that Floyd was shackled during the polling proceeding but would not stipulate that the jury had seen that Floyd was in shackles. The court overruled Floyd's motion for a mistrial after noting that there was no evidence whether or not the jury saw that Floyd was in shackles.

The jury continued deliberations on the afternoon of May 24, 2005, and the next morning. On the morning of May 25, the jury returned to the courtroom and announced that it had reached a unanimous verdict of guilty on all three counts. The jury was polled, and all jurors, including J.K., stated that the verdict of guilty on each of the three counts was his or her verdict. The court accepted the verdicts and judged Floyd guilty on all three counts.

On June 3, 2005, Floyd filed a motion for a new trial. A hearing on the motion was held August 5. At the hearing, Floyd made three arguments in support of a new trial. As his first and second arguments, Floyd raised the issues previously asserted relating to his appearing in shackles before the jury on the afternoon of May 24 and the issue of the prosecutor's statements of opinion during closing arguments. After considering these issues, the court stated that its rulings on the issues had not changed, and the court denied a new trial on the basis of each issue.

The third basis that Floyd asserted in support of a new trial was an allegation of improper communication between the bailiff and the jurors. At the conclusion of the August 5, 2005, hearing, the trial judge determined that the case should be temporarily assigned to a different judge to consider Floyd's motion for a new trial on the basis of the bailiff's communication. After reassignment, a hearing was held and Floyd presented evidence from J.K. and another juror regarding the bailiff's communication. J.K. was the juror who, when first polled, had stated that the verdicts of guilty on the murder and manslaughter counts were not her verdicts. J.K. testified that the communication with the bailiff occurred on May 24, after the jurors had been polled and the court had ordered the jury to resume deliberations. J.K. testified that as the jury was leaving the jury room at the end of the day, she asked the bailiff how long the jury would be required to continue deliberations. J.K. testified that the bailiff responded that the judge would " 'keep sending the jury back until you reach a unanimous decision' " and that deliberations " 'could last the rest of the week.' " J.K. stated in an affidavit, which the court admitted over the State's objection, that the bailiff's comment was "the primary factor which motivated changing [her] vote from 'not guilty' to 'guilty.' " Another juror stated in an affidavit that she was present during the exchange between J.K. and the bailiff and that the content of the exchange was as J.K. had testified.

The bailiff also testified at the hearing on the motion for a new trial. She testified that she recalled an exchange between herself and "three or four jurors" at the end of the day on May 24, 2005. However, the bailiff testified that after a juror asked whether there was a time limit to deliberations, her response was " 'there's no time limit.' " The bailiff then testified that another juror asked whether the jury could be required to deliberate until Friday and that she replied, " 'You could be.' "

Following the hearing, the court overruled Floyd's motion for a new trial. The court stated in its order that without determining whether the bailiff's recall of the conversation was more accurate than that of the jurors, the court would base its findings on the version related by the jurors because such evidence was more favorable to Floyd. The court concluded that the bailiff's

statements were not improper and that even if they were, the communication was not prejudicial to Floyd.

The case was reassigned to the original judge, and Floyd was sentenced on October 13, 2005. Floyd appeals.

III. ASSIGNMENTS OF ERROR

Floyd asserts that the district court erred in (1) overruling his objections to the State's peremptory challenges which he asserted were improperly based on race, (2) overruling his objections and admitting evidence of prior incidents between himself and Vickers in violation of Neb. Rev. Stat. § 27-403 (Reissue 1995) and § 27-404, (3) allowing the State to present evidence contained in the protection order over Floyd's hearsay objection, (4) overruling his motion for a mistrial on the basis of improper statements in closing arguments, (5) overruling his motion for a mistrial on the basis that he was presented to the jury in shackles, and (6) overruling his motion for a new trial on the basis of improper communications between the bailiff and jurors.

IV. STANDARDS 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. Lykens*, 271 Neb. 240, 710 N.W.2d 844 (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. *Id.*

[3,4] A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility. *State v. Robinson, ante* p. 582, 724 N.W.2d 35 (2006). A trial court's determination that there was no purposeful discrimination in a party's use of his or her peremptory challenges and a trial court's determination of the adequacy of a party's neutral explanation of its peremptory challenges are factual determinations that will not be reversed on appeal unless clearly erroneous. *Id.*

[5] 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. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

V. ANALYSIS

As an initial matter, we note that the State argues that certain of Floyd's assignments of error do not implicate his conviction for being a felon in possession of a firearm and that even if such asserted errors require reversal of the murder or manslaughter convictions, they do not necessarily require reversal of the firearm conviction. We have previously had occasion to reverse certain convictions while affirming a felon in possession of a firearm conviction. See *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). We conclude that one of Floyd's asserted errors requires reversal of the murder and manslaughter convictions but that no assignment of error requires reversal of the firearm conviction. Therefore, in the first section of our analysis, we consider Floyd's assignments of error as they relate to the murder and manslaughter charges, and in the second section of our analysis, we consider Floyd's assignments of error as they relate to the firearm conviction.

1. Murder and Manslaughter

(a) Communication Between Bailiff and Jury

Floyd asserts that the district court erred when it overruled his motion for a new trial on the basis of improper communications between the bailiff and jurors. A bailiff's failure to perform his or her duty can result in a reversal of a conviction. See *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999). The State argues that because the court did not make a finding whether the bailiff's version of the communication was accurate or whether the jurors' version of the communication was accurate, the record is not sufficient for this court to review the issue. We conclude that either version was an improper communication and that the district court abused its discretion when it denied Floyd's motion for a new trial on the murder and manslaughter charges based on the improper bailiff communication.

[6-8] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002). In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome. *Id*. The question of whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror. *Id*.

Improper communication between a nonjuror and a juror may involve communication between the bailiff and a juror if such communication goes outside certain limits. Such limits are set forth in Neb. Rev. Stat. § 29-2022 (Reissue 1995), which provides in relevant part:

> When 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. The officer having them in charge shall not suffer any communication to be made to them, *or make any himself*, except to ask them whether they have agreed upon a verdict, unless by order of the court; nor shall he communicate to anyone, before the verdict is delivered, any matter in relation to the state of their deliberations.

(Emphasis supplied.) We further note that Neb. Rev. Stat. § 25-1116 (Reissue 1995) provides that if, after the jury has begun deliberations, the jury desires "to be informed as to any part of the law arising in the case," then the jury "may request the officer to conduct them to the court where the information upon the point of law shall be given."

Although § 29-2022 states that the bailiff, as the officer having the jury in his or her charge, shall not make "any communication" to jurors except to ask whether they have agreed upon a verdict, we recognize that some incidental communication between the bailiff and jurors beyond that specified under § 29-2022 will unavoidably occur. When such communication is limited to simple, practical matters of logistics such as the

location of the facilities used for deliberations, such communication is not likely to be prejudicial to the defendant or deny the defendant a fair trial. We note in this regard:

> Many of a bailiff's legitimate functions involve perfunctory communication with the jury, from taking their meal orders to telling them where the restroom is located. Thus, it is too broad a statement to say that all communications from a bailiff to a jury are forbidden. . . . The law forbids only communications that could possibly influence deliberations. . . . Communications necessary for the proper care of the jury, such as lunch orders and other administrative matters, do not raise an inference of impropriety because communications are neutral and innocuous.

State v. Yonker, 133 Wash. App. 627, 636, 137 P.3d 888, 892 (2006).

While communications concerning administrative matters may not be prejudicial, when communications involve matters of law, the risk of prejudice is present and communication by the bailiff to jurors on such matters is improper. See *Alexander v. State*, 919 S.W.2d 756, 766 (Tex. App. 1996) ("[t]here is no error when the bailiff communicates to the jury on logistical matters not dealing with the case on trial; however, there are numerous . . . cases providing that a bailiff's communications with the jury about the case on trial constitutes error"). See, also, *State v. Merricks*, 831 So. 2d 156, 160 (Fla. 2002) ("the potential for prejudice is the same, if not greater, when a bailiff, rather than a trial judge, answers a jury's inquiry directly without notice to and outside the presence of defense counsel and the State"). When jurors have questions regarding the case on trial, including questions regarding the potential duration of deliberations, the bailiff should refer such questions to the court pursuant to § 25-1116.

With respect to the communication between the bailiff and jurors in this case, the State asserts that this court cannot review the trial court's decision on the matter because the court did not make a specific finding as to which version of the communication was accurate. We note that although the bailiff and the jurors gave descriptions that differed in certain respects, each person agreed that some question and answer regarding the potential

duration of deliberations occurred. All agreed that the bailiff told jurors that the deliberation could continue "the rest of the week" or "until Friday." The main difference in the testimonies is that juror J.K. testified that the bailiff said that the judge would "keep sending the jury back until you reach a unanimous decision," while the bailiff testified that she said "there's no time limit" to the deliberations.

We conclude that either version of the communication between the bailiff and jurors in this case was an improper communication. Because either version was improper, it is not necessary to remand the cause to the district court for a finding as to which version was accurate. Whether the bailiff in this case told jurors that they would be required to deliberate until they reached a unanimous verdict or whether she told them that there was no time limit to deliberations, either statement, combined with her statement that the jurors could be required to deliberate the rest of the week, was an improper communication. The communication went beyond simple administrative matters. The jurors' questions regarding continued deliberations should have been referred to the court, and the bailiff should not have attempted to give any direct answer to the question. The proper response on the part of the bailiff would have been to refer the question to the court. We therefore determine that the district court erred in concluding that there was no improper communication between the bailiff and jurors and in failing to find that jury misconduct had occurred.

Having determined that jury misconduct occurred, we further conclude that such misconduct was sufficiently prejudicial that Floyd was denied a fair trial. The question whether prejudice resulted from jury misconduct must be resolved by drawing reasonable inferences as to the effect of the occurrence on an average juror. See *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002). Although J.K. stated in her affidavit, admitted over the State's objection, that the communication from the bailiff affected her verdict, the question of prejudice in this case must be based on a determination of the effect on an average juror rather than the actual effect on J.K. In this regard, we note that Neb. Rev. Stat. § 27-606(2) (Reissue 1995) provides:

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

Disregarding statements made by J.K. in her affidavit regarding the effect of the communication, we conclude that the improper communication from the bailiff to the juror would have affected the average juror in a way that would have prejudiced Floyd and denied him a fair trial. In reaching this conclusion, we consider the circumstances surrounding the communication. At the time the communication was made, the jury had been ordered to return to deliberations after it was determined that the jury's verdicts on the murder and manslaughter charges were not unanimous. The communication was made to the juror who was known to be the lone dissenting juror. Either directly or indirectly, the communication focused on the potential effect that the juror's continued dissent would have on the length of deliberations. We determine that the communication could have pressured the average juror to change his or her vote in order to avoid protracted deliberations.

Because the communication occurred when the jury was not yet unanimous on the charges of first degree murder and manslaughter of an unborn child, we conclude that the improper communication was prejudicial to Floyd and denied him a fair trial on those charges. We note, however, that the jury was polled prior to the improper communication and that the jury was already unanimous as to Floyd's guilt on the charge of being a felon in possession of a firearm. We therefore conclude that the improper communication which occurred after the

unanimous verdict on the firearm charge had been announced was not prejudicial as to the firearm conviction. Because the improper communication denied Floyd a fair trial on the murder and manslaughter charges, we determine that the district court abused its discretion by failing to grant Floyd a new trial on these convictions. It is therefore necessary to reverse Floyd's convictions on the charges of first degree murder and manslaughter of an unborn child.

[9,10] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006). Although the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction. *Id*. Because the evidence admitted was sufficient to sustain convictions on the charges, we conclude that Floyd can be retried on the murder and manslaughter charges without violating double jeopardy. We therefore reverse the murder and manslaughter convictions and remand the cause for a new trial on first degree murder and manslaughter of an unborn child.

(b) Other Issues Not Likely to Recur on Remand

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. *Perry Lumber Co. v. Durable Servs.*, 271 Neb. 303, 710 N.W.2d 854 (2006). However, with regard to Floyd's remaining assignments of error, we do not find that such issues will inevitably recur on remand in a new trial for murder and manslaughter. The State's use of peremptory challenges, the prosecutor's repeated statements of personal opinion during closing arguments, and the appearance of Floyd in shackles during the polling proceeding were occurrences during the present trial that will not likely recur on remand, and we therefore determine that such issues

do not require discussion with regard to the retrial of the murder and manslaughter charges. We note that some of these assignments of error are discussed below as they relate to the firearm conviction.

With regard to the admission of evidence of prior incidents between Floyd and Vickers, we cannot say that the State will attempt to offer such historical evidence in a new trial. Further, we note that in its order finding evidence of certain prior incidents admissible under § 27-404, the district court, in a sweeping ruling, found that the evidence was admissible for the purposes of establishing motive, intent, plan, and absence of mistake or accident—a ruling which fails to follow our directives with respect to specificity and hinders appellate analysis. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). We therefore do not find it necessary to address Floyd's assignments of error with regard to the evidence of prior incidents between Floyd and Vickers.

2. Felon in Possession of a Firearm

As noted above, the improper communication between the bailiff and jurors was not prejudicial with regard to the felon in possession of a firearm charge and does not require reversal of that conviction on that basis. We therefore consider Floyd's remaining assignments of error to the extent they relate to the firearm conviction.

We note first that with respect to Floyd's assignment of error regarding his appearance before the jury in shackles, the proceeding at which Floyd was in shackles was the proceeding at which the jury was polled as to its verdicts. Although the jury was not unanimous with regard to the murder and manslaughter charges, the jury had already declared its unanimous verdict and found Floyd guilty with regard to the firearm charge. Because the jury had already unanimously determined Floyd to be guilty on the firearm charge, his appearance in shackles subsequent thereto was not prejudicial. We therefore reject the assignment of error regarding Floyd's appearance in shackles as it pertains to the firearm conviction. With respect to the assignments of error regarding admission of evidence of prior incidents between Floyd and Vickers and admission of the protection order,

we note that such evidence pertained to the murder and manslaughter charges and not to the firearm charge. We therefore reject these assignments of error as not relevant to the firearm charge. Floyd's two remaining assignments of error, regarding the State's use of peremptory challenges and the prosecutor's statements in closing arguments, are considered below as they pertain to the felon in possession of a firearm charge.

(a) *Batson* Challenge

Floyd asserts that the district court erred in rejecting his *Batson* challenge to the State's use of peremptory challenges to strike two potential jurors who were African-American. We conclude that the court's determinations with regard to the *Batson* challenge were not clearly erroneous, and we reject Floyd's assignment of error.

[11-15] In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the U.S. Supreme Court held that the Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race. *State v. Robinson, ante* p. 582, 724 N.W.2d 35 (2006). The evaluation of whether a party has used peremptory challenges in a racially discriminatory manner is a three-step process. *Id.* First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. A defendant satisfies the requirements of this step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination. The final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding

racial motivation rests with, and never shifts from, the opponent of the strike. *Id*.

In the present case, two African-Americans were stricken from the jury and one African-American served as a juror. The court in this case determined that Floyd had made a prima facie showing that strikes had been used on the basis of race. But after the State offered explanations that the court determined to be race neutral, the court concluded that Floyd had not carried his burden of proving purposeful racial discrimination, and the court denied Floyd's *Batson* challenge. A trial court's determination that there was no purposeful discrimination in the party's use of his or her peremptory challenges and a trial court's determination of the adequacy of a party's neutral explanation of its peremptory challenges are factual determinations that will not be reversed on appeal unless clearly erroneous. *State v. Robinson, supra*. We do not find the district court's findings in this case to be clearly erroneous. The explanations offered by the State were that one prospective juror may have known friends of one of the victims and may have heard them talking about the case and that the other juror may have had religious convictions that would have prevented him from judging another person and accepting the court's direction to apply the law. Whether or not these explanations were persuasive, they were race neutral, and the district court was not clearly erroneous in so finding.

[16] After the State gave its explanations, Floyd did not submit additional evidence and relied on his prima facie showing that the two jurors were African-American. In light of the State's race-neutral explanations, Floyd needed to present evidence of purposeful discrimination. It is fundamental that a party claiming discrimination in the use of peremptory challenges make a record which supports an inference of discriminatory purpose. *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003). Facts must be included in the record by sworn testimony, exhibits, stipulations, admissions, or judicial notice. *Id*. The stipulation in the record that the two stricken jurors were African-American was not sufficient to meet Floyd's burden to prove purposeful discrimination. We conclude that the district court was not clearly erroneous in determining that Floyd did not

prove purposeful discrimination, and we therefore reject Floyd's assertion that the court erred in denying his *Batson* challenge.

(b) Closing Arguments

Floyd asserts that the district court erred in overruling his motion for a mistrial on the basis of the prosecutor's statements in closing arguments regarding the State's opinions as to Floyd's guilt. We conclude that because the court instructed the jury to disregard the statements and because the statements essentially pertained to the murder and manslaughter charges, the court did not err in overruling the motion for a mistrial with respect to the felon in possession of a firearm charge.

[17-19] We have stated that it is improper for a prosecutor in oral argument to attempt to persuade the jury by giving an expression of his or her personal opinion of the guilt of the accused other than as a deduction from the evidence. *State v. Leonard*, 196 Neb. 731, 246 N.W.2d 68 (1976); *State v. Brooks*, 189 Neb. 592, 204 N.W.2d 86 (1973). However, before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006). Whether a prosecutor's inflammatory remarks are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. *Id*. A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

We note that each time Floyd objected to one of the prosecutor's statements in this case, the court instructed the jury to disregard the prosecutor's statement of personal opinion. We further note that the prosecutor's statements focused on the State's opinion regarding Floyd's guilt as to the murder and manslaughter charges. Because we have reversed Floyd's convictions on the murder and manslaughter charges on another basis, we consider the effect of the prosecutor's statements only as to whether such statements were sufficiently prejudicial as to prevent a fair trial on the firearm charge.

In the instant case, there was uncontroverted testimony that when Floyd was at his former girl friend's house on the night of the shooting, he had a semiautomatic gun in his possession. There was also evidence that Floyd had been convicted of a felony in 1997.

The felon in possession statute, Neb. Rev. Stat. § 28-1206(1) (Reissue 1995), provides: "Any person who possesses any firearm or brass or iron knuckles and who has previously been convicted of a felony or who is a fugitive from justice commits the offense of possession of a deadly weapon by a felon or a fugitive from justice." There was evidence as to each element at the trial of this case.

Because the prosecutor's statements of personal opinion essentially related to the murder and manslaughter charges and because the court promptly and clearly instructed the jury to disregard the statements, and the evidence of felon in possession was overwhelming and without contradiction, we determine that the prosecutor's statements did not prevent a fair trial on the firearm charge. We therefore conclude in connection with the prosecutor's statements during closing that the court did not abuse its discretion by denying Floyd's motion for a mistrial on the felon in possession of a firearm charge.

VI. CONCLUSION

We reject Floyd's assignments of error with respect to the conviction of being a felon in possession of a firearm, and we affirm Floyd's sentence of 20 to 20 years' imprisonment on that conviction. We conclude, however, that with regard to the convictions for first degree murder and manslaughter of an unborn child, the district court abused its discretion by failing to grant Floyd's motion for a new trial on the basis of the improper communication between the bailiff and jurors. We therefore reverse Floyd's convictions for first degree murder and manslaughter of an unborn child and remand the cause for a new trial on those charges.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

VICTORIA M. FOSTER, FORMERLY KNOWN AS VICTORIA M. COLLINS, APPELLANT, V. BRYANLGH MEDICAL CENTER EAST, A NEBRASKA CORPORATION, APPELLEE.

725 N.W.2d 839

Filed January 12, 2007. No. S-06-258.

1. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
3. **Workers' Compensation.** The Workers' Compensation Court can only resolve disputes that arise from the provisions of the Nebraska Workers' Compensation Act.
4. **Workers' Compensation: Attorney Fees.** The power of the Workers' Compensation Court to resolve attorney fee disputes is derived from Neb. Rev. Stat. § 48-108 (Reissue 2004).
5. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
6. **Statutes: Legislature: Intent.** An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent.
7. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
8. **Workers' Compensation: Attorneys' Liens: Jurisdiction: Case Disapproved.** The Workers' Compensation Court has jurisdiction to determine a fee dispute arising out of an attorney's lien perfected pursuant to Neb. Rev. Stat. § 48-108 (Reissue 2004), regardless of whether the attorney seeking enforcement had previously been discharged. *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005), is disapproved to the extent that it concluded the Workers' Compensation Court lacked jurisdiction to enforce a statutory attorney's lien.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, MOORE, and CASSEL, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Rolf Edward Shasteen, of Shasteen & Scholz, P.C., for appellant.

Jeffrey A. Silver also filing briefs and arguing on behalf of Victoria M. Foster.

No appearance for appellee.

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

GERRARD, J.

NATURE OF CASE

Before going to trial in her workers' compensation case, Victoria M. Foster, formerly known as Victoria M. Collins, discharged her attorney, Rolf Shasteen, and hired a new attorney. Shasteen perfected an attorney's lien in the Workers' Compensation Court pursuant to Neb. Rev. Stat. § 48-108 (Reissue 2004). Represented by a new attorney, Foster tried her case to a single judge of the Workers' Compensation Court. The single judge determined that Foster was entitled to certain benefits and, later, approved a lump-sum settlement.

Shasteen filed a motion with the compensation court to establish the amount of his attorney's lien. The single judge determined that Shasteen had been paid all he was entitled to and declined to award him further attorney fees or costs. Shasteen ultimately appealed to the Nebraska Court of Appeals, which dismissed the appeal, concluding that the Workers' Compensation Court did not have jurisdiction to decide the fee dispute. See *Foster v. BryanLGH Med. Ctr. East*, 14 Neb. App. lxvii (No. A-06-258, May 1, 2006). The issue before this court, on further review, is whether the Workers' Compensation Court has jurisdiction to determine a fee dispute arising out of an attorney's lien perfected under § 48-108. Because we conclude that it does, we reverse the judgment of the Court of Appeals and remand this cause with directions.

BACKGROUND

Foster retained Shasteen and his law firm to represent her with regard to a workers' compensation claim. Foster signed a fee agreement which provided in pertinent part that Shasteen would receive a one-third contingency fee and reimbursement for costs advanced. While Shasteen was counsel for Foster, he was paid a total of $5,419.37 for attorney fees and costs.

During Shasteen's representation of Foster, Foster was scheduled to have her deposition taken. Foster appeared at the deposition, and the defendant offered $15,000 to settle the case.

Foster initially said she would accept the settlement offer, without having her deposition taken. Approximately 2 months later, Foster discharged the Shasteen firm and rejected the $15,000 proposed settlement. The Shasteen firm then filed a motion to withdraw as counsel and establish an attorney's lien. The single judge of the compensation court entered an order granting the motion to withdraw and allowing the attorney's lien.

Foster hired a second lawyer to replace Shasteen as her attorney. With her new attorney, Foster's case was tried to the single judge. The single judge determined that Foster was entitled to certain indemnity benefits and subsequently approved a lump-sum settlement of $18,000.

Following the single judge's approval of the lump-sum settlement, Shasteen filed a motion to establish the amount of his attorney's lien. The single judge determined that Shasteen had been paid all he was entitled to under his agreement with Foster and declined to award him further attorney fees or costs. Shasteen appealed this decision to the review panel. The review panel reversed, and remanded with directions to the single judge to enter an order of dismissal, concluding that, pursuant to *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005), the Workers' Compensation Court did not have jurisdiction to determine a fee dispute between present and former counsel. Shasteen appealed to the Court of Appeals.

The Court of Appeals, citing *Wells, supra*, dismissed Shasteen's appeal for lack of jurisdiction. Shasteen petitioned this court for further review, which was granted.

ASSIGNMENTS OF ERROR

Shasteen assigns, consolidated and restated, that the Court of Appeals erred in (1) determining that the Workers' Compensation Court lacked jurisdiction to determine the allocation of an attorney fee between a claimant's former attorney and a claimant's attorney at the time of the hearing and (2) failing to award a lien for additional attorney fees and costs.

STANDARD OF REVIEW

[1] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004).

ANALYSIS

The issue presented in this appeal is whether the Workers' Compensation Court has jurisdiction to enforce an attorney's lien filed under § 48-108 when, at the time of the claimant's award, the attorney seeking enforcement of the lien no longer represents the claimant. We conclude that the Legislature intended the Workers' Compensation Court to have such jurisdiction pursuant to § 48-108.

[2-4] As a statutorily created court, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). The Workers' Compensation Court can only resolve disputes that arise from the provisions of the Nebraska Workers' Compensation Act. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). The power of the Workers' Compensation Court to resolve attorney fee disputes is derived from § 48-108 which states:

> No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the Nebraska Workers' Compensation Act shall be an enforceable lien against the amounts to be paid as damages or compensation or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial or, in case of settlement without trial, by a judge of the Nebraska Workers' Compensation Court. After such approval, if notice in writing be given the defendant of such claim or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation. When the employee's compensation is payable by the employer in periodical installments, the compensation court shall fix, at the time of approval, the proportion of each installment to be paid on account of legal services and disbursements.

[5-7] In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute. *Spaghetti Ltd. Partnership v.*

Wolfe, 264 Neb. 365, 647 N.W.2d 615 (2002). An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent. *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003). In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004).

Section 48-108 represents a legislative determination that the Workers' Compensation Court is an appropriate forum for determining fees payable to an attorney for the services rendered while representing the claimant before the Workers' Compensation Court. However, to a previously discharged attorney with a properly filed lien, the protection granted by this statute would be meaningless if the compensation court did not have jurisdiction to enforce his or her lien. In other words, so long as a lien created under § 48-108 remains effective, the compensation court's power to enforce that lien necessarily remains effective as well.

The statute's language does not expressly require that for the compensation court to have the authority to enforce the lien, the attorney seeking enforcement be the claimant's current attorney. Rather, the purpose of the statute is to provide a general mechanism by which an attorney, who has represented a claimant in a workers' compensation action, may secure a lien on the claimant's award to ensure that the attorney receives his or her fees. Under the circumstances presented here, the claimant's relationship with present counsel is necessarily implicated by the dispute. In this case, as in most instances, the fee dispute with former counsel is inextricably related to the issue of fees for the claimant's current counsel.

In short, we conclude that the Legislature did not limit the compensation court's authority to enforce § 48-108 liens to only those cases where the attorney seeking enforcement is presently representing the claimant. It would be illogical to conclude

that the compensation court may determine the fee of a claimant's present counsel, but not that of his prior counsel, particularly where those questions are essentially inseparable. For the Workers' Compensation Court's authority to grant an attorney's lien under § 48-108 to be completely effective, the compensation court must also have the power to enforce the lien, even if the attorney seeking the lien's enforcement is no longer representing the claimant.

The compensation court is also the most sensible venue for such determinations, since the court is aware of the circumstances of each case, is familiar with the facts and issues presented, and observes firsthand the efforts of each attorney involved in the dispute. Given this unique knowledge of the case, the compensation court, as opposed to the district court in a separate action, is in the best position to determine the proper fee to be distributed to respective attorneys.

[8] In sum, we hold that the Workers' Compensation Court has jurisdiction to determine a fee dispute arising out of an attorney's lien perfected pursuant to § 48-108, regardless of whether the attorney seeking enforcement had previously been discharged. By so holding, we disapprove *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005), insofar as it concluded otherwise. Because the compensation court's review panel has not considered the merits of the underlying fee dispute, it is premature for us to consider in this appeal Shasteen's assignment of error regarding the fee amount determined by the single judge.

CONCLUSION

The Court of Appeals erred in dismissing Shasteen's appeal for lack of jurisdiction. We reverse the decision of the Court of Appeals and remand the matter with directions to remand the cause to the review panel for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DAMIAN J. MARSHALL, APPELLANT.

725 N.W.2d 834

Filed January 12, 2007. No. S-06-494.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
3. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
4. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
5. **Postconviction.** A movant's subsequent postconviction claims are barred by his or her failure to raise available claims in a previous postconviction motion, even if the movant acted pro se in the previous proceeding.
6. **Actions: Judicial Notice: Records.** Where cases are interwoven and interdependent and the controversy involved has already been considered and decided by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Brian S. Munnelly for appellant.

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

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

HEAVICAN, C.J.

NATURE OF CASE

This is an appeal from the district court's denial of Damian J. Marshall's second motion for postconviction relief, without an evidentiary hearing. In 1996, after two mistrials, Marshall was convicted of second degree murder, attempted second degree murder, and two counts of using a firearm to commit a felony,

which convictions this court affirmed. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998) (*Marshall I*). We also affirmed the district court's denial of Marshall's first postconviction motion. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005) (*Marshall II*). In his second postconviction motion, Marshall claims ineffective assistance of counsel at his first trial and on direct appeal based on his trial counsel's failure to realize Marshall was entitled to 12 peremptory challenges.

BACKGROUND

At Marshall's first trial, the district court called 24 prospective jurors for voir dire from the larger jury venire panel. Each party exercised six peremptory challenges, and the remaining 12 jurors and an alternate, chosen from 3 additional prospective jurors, were sworn. Marshall's attorney did not object to the number of prospective jurors or attempt to exercise more than 6 peremptory challenges, although Neb. Rev. Stat. § 29-2005 (Reissue 1995) provides that a person arraigned for a crime punishable by life imprisonment shall have 12 peremptory challenges. During trial, the court sustained the prosecutor's motion for a mistrial, which Marshall opposed, on the ground that one of the jurors was potentially biased. There was no discussion of using an alternate juror.

Before the second trial, Marshall filed a plea in bar, alleging that the mistrial was granted in error and that a second trial would therefore subject him to double jeopardy. The court did not immediately rule on the motion. During the second trial, another juror disclosed that he had formed an opinion about Marshall's guilt. Defense counsel did not object to the court's declaring a mistrial and had argued a mistrial was correct.

Before the third trial, Marshall orally asserted another plea in bar, and the district court overruled both this plea and the one filed before his second trial. Marshall's counsel did not appeal from this order. The jury returned verdicts of guilty.

Marshall was represented by different counsel on direct appeal. His appellate counsel did assign ineffective assistance of trial counsel, but not for his trial counsel's failure to appeal from the district court's order on the pleas in bar. This court determined it did not have jurisdiction to reach the double jeopardy

issue because Marshall had not appealed from the order denying the pleas in bar. See *Marshall I*.

Marshall proceeded pro se in his first postconviction motion, but was represented on appeal by counsel different from trial or appellate counsel. On appeal from the denial of his first postconviction motion, this court affirmed the district court's conclusion that Marshall's claim of ineffective assistance regarding his trial counsel was procedurally barred because the claim could have been raised on direct appeal. Marshall's claim regarding his appellate counsel, however, was not barred, and whether his appellate counsel was ineffective in failing to assign as error his trial counsel's failure to appeal from the order denying the pleas in bar depended upon whether his trial counsel was ineffective in that failure. We rejected Marshall's argument that prejudice from the failure to appeal should be presumed, and determined that denials of potentially dispositive pretrial motions were analyzed under the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Applying *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003), we further determined that trial counsel's failure to appeal could be prejudicial only if an appeal would have resulted in a reversal and prevented Marshall's trial and convictions. See *Marshall II*.

We reasoned that where double jeopardy has attached but does not result in a final judgment, the prohibition against double jeopardy bars a retrial on the same charge only if the prior proceeding terminated jeopardy. We stated that jeopardy is not terminated if the State demonstrates a manifest necessity for a mistrial over the defendant's objection. Although the discovery of potential juror bias represented a manifest necessity for a mistrial, Marshall argued that a mistrial was unnecessary because the trial court should have seated an alternate juror. See Neb. Rev. Stat. § 29-2004 (Reissue 1995) (providing that if juror is discharged before final submission, court shall order alternative juror to replace discharged juror).

We agreed with the State, however, that the trial court's failure to afford Marshall 12 peremptory challenges in the first trial was structural error that would have warranted a reversal of a guilty verdict. We stated, "*The record reflects* that during the

jury selection that preceded the first mistrial, he received only six." (Emphasis supplied.) *Marshall II*, 269 Neb. at 68, 690 N.W.2d at 604. Because the first trial would have terminated due to a structural error regardless of the trial court's reasons for granting the mistrial, the mistrial did not terminate jeopardy to bar a retrial. The second mistrial did not terminate jeopardy because Marshall's trial counsel had argued it was necessary. Thus, Marshall's pleas in bar were without merit, and an appeal would not have prevented the third trial.

In his current motion, Marshall alleged that his trial counsel was ineffective at the first trial for failing to recognize that Marshall was entitled to 12 peremptory challenges, causing structural error, which was presumed to be prejudicial. Marshall also alleged that his appellate counsel was ineffective in failing to raise the issue on appeal, which would have led to a reversal. Finally, Marshall alleged that his claim should not be procedurally barred because he filed his first postconviction motion pro se and could not have been expected to understand the law more than his previous attorneys.

In its order, the district court stated:

> Here, [the State] correctly argues that once a motion for postconviction relief has been denied, any subsequent motion for such relief . . . may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed. [Marshall's] counsel argues that [Marshall] was pro se in [his] first postconviction proceeding and he should not be held to have known of the preemptory challenge issue when even his trial and appellate counsel had not recognized this issue, and the first time [Marshall] could realistically have known of this issue was after [the] Nebraska Supreme Court pointed it out in [its] Order in his first postconviction proceeding.
>
> *While the Court agrees that the State's position is correct*, the Court will nonetheless address the issue raised by [Marshall].

(Emphasis supplied.)

In addition to agreeing with the State that Marshall's claim was available at the time his first motion was filed, the district

court concluded that Marshall could not show he was prejudiced by his trial counsel's failure to object to the number of potential jurors at the first trial.

Marshall's main argument was that his trial counsel's deficient conduct caused a structural error that prevented his double jeopardy claims from being heard. The district court characterized the argument as follows: "[I]f his trial counsel had properly used all 12 peremptory challenges, the first mistrial may have created a successful argument of double jeopardy on appeal or in his postconviction proceeding."

In response, the district court stated that Marshall had not been convicted at the first trial and that even if he had been convicted, this court had indicated in *Marshall II* that any conviction would have been reversed for structural error. Second, the court concluded that an appeal claiming trial counsel was deficient for failing to assert Marshall's right to more peremptory challenges would have resulted in a new trial, which Marshall in fact received.

ASSIGNMENT OF ERROR

Marshall assigns that the district court erred in denying his motion for postconviction relief.

STANDARD OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Marshall II*.

ANALYSIS

The State argues that Marshall is procedurally barred from asserting this claim because he has failed to allege any newly discovered facts or allege any claim that could not have been raised in his first postconviction proceeding. In his reply brief, Marshall argues that he should not be held to the standard of an attorney for failing to raise this claim in his first postconviction proceeding.

[2-4] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights. See *State v. Hudson*, 270 Neb.

752, 708 N.W.2d 602 (2005). However, the need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *State v. Dandridge*, 264 Neb. 707, 651 N.W.2d 567 (2002). An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

[5] The State correctly points out this court held in *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002), that a movant's subsequent postconviction claims are barred by his or her failure to raise available claims in a previous postconviction motion, even if the movant acted pro se in the first proceeding. We concluded in *Parmar* that the movant failed to show that his asserted grounds for relief in his subsequent motion were not available in the previous proceeding. The disposition of the first proceeding therefore constituted a procedural bar to his motion. We stated:

> Although [the movant] argues that he appeared pro se in the [first] postconviction proceeding, this is of no avail because . . . there is no absolute requirement of appointment of counsel in postconviction cases, and the defendant has the right of self-representation. A pro se party is held to the same standards as one who is represented by counsel.

263 Neb. at 221-22, 639 N.W.2d at 112.

[6] As in *Parmar*, the record from Marshall's first postconviction appeal shows that he filed his motion pro se. Where cases are interwoven and interdependent and the controversy involved has already been considered and decided by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *Parmar, supra*. Because Marshall is held to the same standard as one who is represented by counsel, the disposition of his first postconviction motion acts as a procedural bar to any claim that could have been raised in that motion. See *id.*

In his current motion, Marshall admits that "[a]ppellant counsel had before him a record which 'reflected structur[al] error . . . .' " Indeed, this court concluded in *Marshall II* that the record

reflected structural error. Thus, all the facts necessary to raise this claim were available to Marshall when he filed his first postconviction motion, and the claim is now procedurally barred.

CONCLUSION

Marshall's postconviction claim is procedurally barred because it could have been raised in his first postconviction proceeding. His self-representation in the first proceeding does not affect that result because he is held to the same standard as a postconviction movant represented by counsel.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
GABRIEL RODRIGUEZ, APPELLANT.

726 N.W.2d 157

Filed January 19, 2007. No. S-04-631.

1. **Juror Qualifications.** If a person called as a juror has formed or expressed an opinion as to the guilt or innocence of the accused and such opinion was founded upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify, the dismissal of such a juror is mandatory. But if the opinion is founded instead on rumor, newspaper reports, or hearsay, and it shall satisfactorily appear that the character of such opinion is such that it will not interfere with the juror's rendering an impartial verdict, it is not error to admit him or her to the jury.
2. **Trial: Juries: Appeal and Error.** The trial court's decision to retain or reject a venireperson as a juror is discretionary and will be reversed only when clearly wrong.
3. **Juror Qualifications.** The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to the competency of jurors.
4. **Jurors: Appeal and Error.** Where a party's peremptory challenges are exhausted, the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.
5. **Appeal and Error.** To be considered by an appellate court, an appellant must both assign and specifically argue any alleged error.
6. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.
7. ____: ____. A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair and impartial jury.

8. **Venue: Juries: Presumptions: Due Process: Proof.** Mere jury exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. Instead, to warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity.
9. **Venue: Juries: Proof.** A court must evaluate several factors in determining whether the defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair trial and impartial jury. These factors include (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of challenges exercised during voir dire, (7) the severity of the offenses charged, and (8) the size of the area from which the venire was drawn.
10. **Venue: Juror Qualifications.** Voir dire examination provides the best opportunity to determine whether a court should change venue.
11. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impression or opinions and render a verdict based upon the evidence.
12. **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 the use of procedural safeguards that are effective to secure the privilege against self-incrimination.
13. **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.
14. ____: ____. Interrogation occurs when a person is placed under a compulsion to speak.
15. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.
16. **Miranda Rights: Evidence.** Statements made in a conversation initiated by the accused or spontaneously volunteered by the accused are not the result of interrogation and are admissible.
17. **Miranda Rights: Words and Phrases.** Interrogation does not include a course of inquiry related and responsive to a volunteered remark.
18. **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.
19. **Witnesses: Impeachment: Prior Statements.** Prior inconsistent statements of a witness are admissible as impeachment evidence.
20. **Rules of Evidence: Proof: Appeal and Error.** Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995) allows an appellate court to find error in an exclusionary ruling when the substance of the evidence was apparent from the context even without an offer of proof.

21. **Evidence: Proof.** When a trial court excludes evidence, the better trial practice is always to make an offer of proof.
22. **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.
23. **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.
24. **Rules of Evidence: Prior Statements.** Prior inconsistent statements of a witness are not admissible as substantive evidence, unless they are otherwise admissible under the Nebraska Evidence Rules.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Mark A. Johnson, of Johnson, Morland, Easland & Lohrberg, P.C., for appellant.

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

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

CONNOLLY, J.

A jury convicted Gabriel Rodriguez of five counts of first degree murder and five counts of use of a weapon to commit a felony. The convictions arose from an attempted bank robbery that left five people dead. The district court sentenced Rodriguez to five terms of life imprisonment for the murders and five terms of 10 to 20 years' imprisonment for the weapons convictions, to be served consecutively. He appeals, contending the district court erred in several respects. The dominant issue is whether the court erred in not striking several jurors for cause.

Under Nebraska law, jurors who have formed or expressed opinions that the accused is guilty founded on witness accounts of the crime—as opposed to newspaper reports, hearsay, or rumor—must be excused for cause. Despite extensive publicity, no jurors expressed an opinion regarding Rodriguez' guilt founded on witness accounts. We affirm.

I. RODRIGUEZ SCOUTS THE BANK; THE PLAN UNRAVELS

On September 26, 2002, Jose Sandoval, Jorge Galindo, and Erick Vela entered a bank in Norfolk, Madison County, Nebraska. They shot and killed four bank employees and a customer in a botched robbery. Rodriguez, Sandoval's half brother, acted as the "scout."

Galindo testified that he, Sandoval, and Rodriguez first discussed robbing the bank about a month before the killings. According to Galindo, Rodriguez was to drive the others near the bank and drop them off; then, Rodriguez would enter the bank and see how many people were inside.

On the morning of September 26, 2002, Rodriguez awoke at about 8 a.m. and informed his girl friend that he was leaving to take Sandoval to get a job application. About 8:20 that morning, Galindo testified, Rodriguez picked him up, with Sandoval and Vela already in the car. Galindo testified they drove by the bank "a couple times," and then Rodriguez dropped the others off about five blocks from the bank. A bank surveillance tape shows that Rodriguez entered the bank shortly after 8:30 a.m. He spoke briefly with a bank teller, looked around several times, and then left. He used a walkie-talkie to inform the others of how many people were inside the bank and their locations.

About 7 minutes after Rodriguez left the bank, Sandoval, Galindo, and Vela entered the bank, intending to rob it. Instead, the plan unraveled, and in a period of about 40 seconds, they shot and killed bank employees Samuel Sun, Jo Mausbach, Lisa Bryant, and Lola Elwood and customer Evonne Tuttle. Galindo testified that originally, he, Sandoval, and Vela planned to take a bank employee's car as their getaway. But because "[e]verything went wrong," they instead ran from the bank and stole a car from a nearby home. They then drove toward the hospital, where Rodriguez was supposed to pick them up. Before reaching the hospital, however, they decided to steal another car instead and fled toward O'Neill, Nebraska, where police later apprehended them.

According to Rodriguez' girl friend, Rodriguez arrived back at their apartment around 9 a.m. Rodriguez did not immediately tell her that he had been at the bank that morning. But just

before she left for work, he told her he had gone there to open an account. He told her that if anyone asked, she should say she had known he was opening an account and had gone with him.

Around 5 or 6 o'clock that evening, Rodriguez went to Denise Garvin's home in Columbus, Nebraska. While there, he cried in the presence of Garvin and her boyfriend, saying he had let his "brothers" down and felt bad because he was not there for them. Garvin, her boyfriend, and Rodriguez then went to Norfolk. Garvin testified that on the way there, Rodriguez cried and talked more about his "job." He said that his job that day was to look at the position of everyone in the bank and be the getaway driver. He also again stated that he let his "brothers" down because he got scared when he heard gunshots and took off. Once they arrived in Norfolk, they went to a residence there, where Rodriguez continued to discuss how he had let his brothers down. While at the residence, Rodriguez saw his picture on the news. He then left, stating that he was going to turn himself in. Police apprehended him outside his house around midnight.

II. ASSIGNMENTS OF ERROR

Rodriguez assigns, restated, that the trial court erred in (1) failing to strike jurors who had read or heard witness accounts of the crime, (2) failing to strike jurors who were equivocal about their ability to be impartial, (3) failing to change venue because of pretrial publicity, (4) failing to suppress statements made by Rodriguez before he had received *Miranda* warnings, (5) failing to allow evidence to impeach a witness' testimony, (6) failing to allow inquiry into the burglary where the guns used in the bank robbery were obtained, and (7) imposing unconstitutional sentences.

III. ANALYSIS

1. The Trial Court Did Not Err in Passing for Cause Jurors Nos. 7, 8, 25, 27, 39, and 44

Rodriguez contends that several of the jurors were incompetent to serve because they were exposed to excessive pretrial publicity detailing the crimes. He contends that under Neb. Rev. Stat. § 29-2006(2) (Reissue 1995), these jurors should have been

excused. That statute disqualifies jurors who have formed or expressed opinions of guilt founded on witness accounts.

(a) Publicity, Juror Questionnaires, and Voir Dire

The murders generated extensive publicity in Madison County. The district court conducted extensive voir dire to determine whether Rodriguez could obtain a fair and impartial jury. The district court clerk's office sent jury questionnaires to 300 prospective jurors. Many if not all the prospective jurors' responses indicated that they had had some exposure to news accounts of the killings. Despite this, about 63 percent responded that they could render a verdict from only the evidence and testimony presented at trial. During voir dire, 60 people were individually questioned to obtain a panel of 42, from which the final jury and alternates were selected.

Rodriguez contends that the court should have removed several jurors for cause because of their answers to the questionnaires and their answers during voir dire.

Juror No. 7 stated that he had heard about the murders on the radio and read articles in the newspaper, including witness accounts. He had seen headlines about the trials of the others charged in the crime, but he stated he had not read anything recently. He did not have or express an opinion about Rodriguez' guilt or innocence.

Juror No. 8 stated that he had been exposed to the facts of the case through newspaper, television, and radio accounts. He stated that he expressed an opinion as to Rodriguez' guilt "in passing," but that he had not formed an opinion in his "own mind" and believed Rodriguez was innocent until proved guilty. He also had read reports of witness testimony, but had not formed an opinion from the reports.

Juror No. 25 stated that he heard about the murders through newspaper and television coverage. He stated that he had not heard any accounts of the other trials. When asked whether he had reached a conclusion regarding Rodriguez' guilt or innocence, he stated he thought Rodriguez "probably facilitated the whole crime." He said this was his understanding because of the media and "hearsay . . . that there's videotapes" placing Rodriguez at the bank. But he had not heard that information

from any witnesses. Juror No. 25 also testified that he would be willing to presume Rodriguez was innocent, would make a decision based only on the evidence, and would require that the State meet its burden to prove him guilty.

Juror No. 27 stated that he had read newspaper accounts of the murders but that he had not formed or expressed an opinion regarding Rodriguez' guilt or innocence. He also stated he did not believe the death penalty was appropriate for Rodriguez because Rodriguez "didn't do the killings."

Juror No. 39 stated that he followed the media coverage of the murders in the newspapers and on television and radio. But he had not formed an opinion as to Rodriguez' guilt or innocence. He did testify, however, that he would require Rodriguez to present evidence of his innocence. But upon further questioning and clarification by the judge, he stated that he could hold the State to its burden to prove guilt beyond a reasonable doubt.

Juror No. 44 stated that she had read newspaper accounts and also had discussed the case with a coworker who witnessed part of the robbery. The coworker expressed the opinion that Rodriguez was guilty. Juror No. 44 stated, however, that she had not formed an opinion as to Rodriguez' guilt or innocence based on either the newspaper or witness accounts.

(b) Jurors Nos. 7, 8, 25, 27, 39, and 44 Did Not Express Opinions of Rodriguez' Guilt Founded on Witness Accounts

[1,2] Rodriguez contends that the court should have removed for cause jurors Nos. 7, 8, 25, 27, 39, and 44. Section 29-2006 governs the removal of jurors for cause. It provides in pertinent part:

> The following shall be good causes for challenge to any person called as a juror or alternate juror, on the trial of any indictment: . . . (2) that he has formed or expressed an opinion as to the guilt or innocence of the accused; *Provided*, if a juror or alternate juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror or alternate juror as to the

> ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, and *not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify*, and the juror or alternate juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror or alternate juror is impartial and will render such verdict, may, in its discretion, admit such juror or alternate juror as competent to serve in such case . . . .

(Emphasis supplied.) Thus, if a person called as a juror has formed or expressed an opinion as to the guilt or innocence of the accused and such opinion was "founded upon 'conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify' the dismissal of such a juror is mandatory." *State v. Myers*, 190 Neb. 466, 469, 209 N.W.2d 345, 348 (1973). Accord *Flege v. State*, 93 Neb. 610, 142 N.W. 276 (1913). But if the opinion is founded instead on " 'rumor, newspaper reports, or hearsay, and it shall satisfactorily appear that the character of such opinion is such that it will not interfere with [the juror's] rendering an impartial verdict, it is not error to admit him to the jury.' " *King v. State*, 108 Neb. 428, 437, 187 N.W. 934, 937-38 (1922). See, also, *Ringer v. State*, 114 Neb. 404, 207 N.W. 928 (1926); *Whitcomb v. State*, 102 Neb. 236, 166 N.W. 553 (1918). And the trial court's decision to retain or reject a venireperson as a juror is discretionary and will be reversed only when clearly wrong. See *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

In *Flege, supra*, this court reversed the defendant's conviction and remanded the cause because erroneous jury instructions and evidentiary rulings prejudiced the defendant. At his second trial, the defendant challenged several jurors for cause. Each challenged juror stated that he had read reports of witness testimony from the first trial, had formed an opinion of guilt based on the testimony, and would need a reason to change his opinion. After questioning, each juror agreed that he could render a fair and impartial verdict. But because the jurors based

their opinions on witness testimony, we held the jurors were not impartial. In contrast, in *Ringer, supra*, jurors who formed opinions based on newspaper articles but who stated they could lay aside those opinions were qualified.

Here, Rodriguez contends that six jurors were incompetent under § 29-2006(2). We disagree. Jurors Nos. 7, 27, 39, and 44 all unequivocally stated that they had not formed or expressed opinions regarding Rodriguez' guilt or innocence. Section 29-2006(2) does not disqualify jurors unless they have done so. Therefore, the statute and *Flege* do not apply. The district court did not err in failing to excuse these jurors for cause.

Although juror No. 8 testified he had expressed an opinion "in passing," he also stated that he had not formed an opinion. He testified he had read reports of witness testimony, but had not formed an opinion from them. Assuming that juror No. 8 had expressed an opinion that would bring him within § 29-2006(2), he did not state that his opinion was "founded" upon reading reports of witness testimony. Similarly, juror No. 25 expressed the opinion that Rodriguez had "facilitated" the whole crime. Yet, he testified that he had not heard any witness accounts. So, while jurors Nos. 8 and 25 both expressed an opinion, neither juror formed an opinion founded on witness testimony. Moreover, both jurors stated they could render an impartial verdict. The court properly exercised its discretion when it retained them as competent jurors. See, § 29-2006(2); *Ringer, supra*.

2. Rodriguez Did Not Show That He Was Prejudiced by the Court's Failure to Strike Prospective Jurors

In addition to jury members, Rodriguez argues prospective jurors Nos. 12, 19, 20, and 30 should have been struck under § 29-2006(2). Rodriguez used peremptory challenges to strike prospective jurors Nos. 12, 19, and 20, and the State used a peremptory challenge to strike prospective juror No. 30.

Rodriguez also contends the district court should have excused prospective jurors Nos. 9, 58, and 61 because they expressed opinions of guilt and stated that they would only "try" to be impartial, not that they would or could. He argues that this

prevented him from receiving a fair trial. These panel members, however, were not on the jury. Rodriguez used peremptory challenges to strike prospective jurors Nos. 9 and 58, and the State used a peremptory challenge to strike prospective juror No. 61.

[3,4] We have previously addressed whether a court's failure to strike prospective jurors who were not selected for the jury prejudices the defendant. In *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), the defendant argued that he was denied a fair trial because the court failed to strike a prospective juror whom he challenged for cause. The defendant instead had to use one of his peremptory challenges to remove the juror. In deciding that the defendant was not prejudiced, we stated:

> The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to the competency of jurors. . . . Even where a party's peremptory challenges are exhausted, the erroneous overruling of a challenge for cause will not warrant reversal *unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges*.

(Citations omitted.) (Emphasis supplied.) *Id*. at 52, 621 N.W.2d at 134. We further stated that the burden is on a defendant to show that he used all his peremptory challenges and that he would have used some of those challenges to remove other biased jurors if not for the error. Because the defendant did not show that he had used all his peremptory challenges or that a biased juror sat on the jury as a result of the trial court's ruling, we held that he was not prejudiced.

[5] Here, Rodriguez used all of his peremptory challenges. He did not, however, argue that he would have used his peremptory challenges on any of the jurors if he had not used them on these prospective jurors. He contended for the first time at oral argument that he would have used his challenges on other jurors, but he did not argue that point in his brief. To be considered by an appellate court, an appellant must both assign and specifically argue any alleged error. See *State v. Deckard, ante*

p. 410, 722 N.W.2d 55 (2006). Because Rodriguez did not argue that this alleged error was prejudicial, we do not consider whether the trial court abused its discretion in retaining the prospective jurors.

3. The Trial Court Did Not Err in Failing to Grant Rodriguez' Motion for Change of Venue

Because of extensive pretrial coverage, Rodriguez contends that the district court erred in not granting his motion for a change of venue. Rodriguez also argues that the number of prospective jurors who responded negatively to the questionnaires and at voir dire shows that he could not receive a fair trial in Madison County.

[6,7] Regarding a change of venue, Neb. Rev. Stat. § 29-1301 (Reissue 1995) provides: "All criminal cases shall be tried in the county where the offense was committed . . . unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein." A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair and impartial jury. *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999).

[8,9] But mere jury exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. Instead, to warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity. A court must evaluate several factors in determining whether the defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair trial and impartial jury. These factors include (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of challenges exercised during voir dire, (7) the severity of the offenses charged, and (8) the size of the area from which

the venire was drawn. *Strohl, supra*. Accord, *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

[10] In *Phelps*, the trial court denied the defendant's motion to change venue. We noted that there was extensive publicity, locally and nationally, covering the crime. In addition, the defendant introduced affidavits of Madison County citizens stating that they would be unable to give the defendant a fair trial. We, however, determined that voir dire examination provides the best opportunity to determine whether a court should change venue. *Id*. The district court was able to select a jury, with each juror swearing that he or she could fairly try the case. We found no error in denying the request to change venue. *Id*. Similarly, in *Jacob, supra*, the defendant argued that numerous newspaper articles and radio and television broadcasts made a fair trial impossible. The defendant conceded that the news accounts were " 'accurate as far as they went' " but claimed that they also portrayed him negatively and were misleading by omitting certain information. *Jacob*, 253 Neb. at 960, 574 N.W.2d at 130. But after individual and extensive voir dire, an impartial jury was selected. The trial court overruled the defendant's motion for change of venue, and we affirmed.

Rodriguez, however, argues that *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), supports his contention that the pretrial publicity prejudiced him. In *Irvin*, the U.S. Supreme Court found a " 'pattern of deep and bitter prejudice' " that denied the defendant a fair trial. 366 U.S. at 727. There, the media reported extensively on the defendant's criminal history, announced that he had confessed to the murders, portrayed him as "remorseless and without conscience," and took public opinion polls as to his guilt and what his punishment should be. 366 U.S. at 726. Out of a panel of 430 venirepersons, the court excused 268—nearly two-thirds—for cause because they held fixed opinions of guilt. *Id*.

Here, although the media coverage of these killings was extensive, we find no indication that it was misleading. While the record contains numerous newspaper articles and radio and television broadcasts covering the crimes, the stories were generally

factual. See *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999). And Rodriguez does not contend that they displayed any hostility or animosity toward him. See *Irvin, supra*. In addition, many of the articles Rodriguez points to as prejudicial relate only peripherally to his case—covering Nebraska's death penalty or the cost of the murder trials—and some do not even mention his name. The coverage does not rise to the level of that in *Irvin*.

[11] Moreover, the district court, after conducting voir dire, was able to seat an impartial jury. While the jurors did acknowledge exposure to the media, the law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impression or opinions and render a verdict based upon the evidence. *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 696 (1992). Accord *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). Seventy percent of the prospective jurors interviewed testified they could give Rodriguez a fair trial, and all 12 jurors stated they could do so. Cf. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987). The trial court did not abuse its discretion in denying the change of venue.

4. The Trial Court Properly Admitted Rodriguez' Statement

On September 27, 2002, after police arrested Rodriguez, he requested to speak with an officer; Det. Donnie Thorson was assigned to interview him. Rodriguez immediately made several statements to Thorson, without having his *Miranda* rights entirely read, and then requested that Thorson leave. A partial and incomplete transcript of the interview reveals the following exchange occurred before Rodriguez' request:

> [Thorson (T):] Since sitting in hand cuffs, have to read you rights.
>
> [Rodriguez (R):] I only turned myself in because I don't need that shit right now. I saw my girl on television. Fucked up. You put her on television.
>
> T: Just found that out[.]
>
> R: Came down because. . .
>
> T: Don't think you did it[.]

R: Have a baby girl. Trying to get information. . .

T: . . . if you never did anything wrong. . .

R: Why did you put me on television?

T: I didn't know. I didn't agree with [the] thing that took place . . .

R: [Crying] I didn't know my little brother was capable of doing that shit man. I went in because my girl and shit she'd say the same thing. Asking for a fucking savings account because she owned [sic] money; 100 or something. If I switched it to my name, she wouldn't have to pay for the savings account so she wouldn't have to pay the money.

Before trial, Rodriguez moved to suppress the interview. The district court sustained the motion regarding everything that Rodriguez said after he told Thorson to leave. But the court found that before Rodriguez told Thorson to leave, his statements were voluntary. At trial, the court allowed Thorson to testify regarding the conversation that took place before Rodriguez' request.

Rodriguez' girl friend's testimony contradicted the statement he made regarding why he was at the bank on the morning of the murders. Rodriguez argues that this statement should have been suppressed because Thorson engaged him in a conversation meant to solicit information without reading him *Miranda* warnings.

[12-18] *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 the use of procedural safeguards that are effective to secure the privilege against self-incrimination. See, *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006); *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). 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. *Ball, supra*. This court has determined that interrogation occurs when a person is placed under a compulsion to speak. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). " '[T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part

of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *State v. Buckman*, 259 Neb. 924, 935, 613 N.W.2d 463, 474 (2000), quoting *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Statements made in a conversation initiated by the accused or spontaneously volunteered by the accused are not the result of interrogation and are admissible. Further, we have excluded from the definition of interrogation a course of inquiry related and responsive to a volunteered remark. *Buckman, supra*. See, also, *Lamb, supra*. 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, will look to the totality of the circumstances. *Ball, supra*.

In *State v. Red Feather*, 205 Neb. 734, 289 N.W.2d 768 (1980), we addressed whether a conversation between an officer and the defendant constituted interrogation. There, an officer placed the defendant under arrest, and the following exchange occurred, according to the officer's testimony:

> " 'I said "[to the defendant], you're under arrest." . . . And [the defendant] says, "What for?" And I says, "You're under arrest for raping [the victim]." And he says, "How do you know I did that?" And I says: I got your evidence — I've got evidence. I've got your fingerprints in blood. And he says, "You got me." . . .' "

Id. at 738, 289 N.W.2d at 771. Although the defendant did not receive *Miranda* warnings, we determined that he spontaneously volunteered the statement.

Here, Rodriguez was clearly in custody during his interview with Thorson. Police arrested him and placed him in handcuffs, and he was not free to leave the police station. Despite this, the videotape and transcript of the interview do not show that Rodriguez was compelled to speak because of interrogation. Instead, his statements were like the spontaneous comments made by the defendant in *Red Feather, supra*.

Rodriguez' remarks were made in an abrupt, rambling manner and not in response to any questioning by Thorson. When

Thorson attempted to read the *Miranda* warnings, Rodriguez interrupted him by complaining about Rodriguez' and his girl friend's appearances on television. A review of the videotape reveals that Thorson then made several remarks that seemed focused toward calming Rodriguez rather than eliciting information. See *United States v. Voice*, 627 F.2d 138 (8th Cir. 1980). These remarks included telling Rodriguez that he believed him and acknowledging that Rodriguez had to take care of his children.

Further, Rodriguez voluntarily asked, "Why did you put me on television?" Thorson's reply that he "didn't know" and "didn't agree with [the] thing that took place" was merely responsive to Rodriguez' question. But it was then that Rodriguez attempted to explain why he had been in the bank the morning of the murders. Thorson could not have expected that Rodriguez would respond to his remarks by making a potentially incriminating statement. Nothing that Thorson said coerced or compelled Rodriguez to speak.

Rodriguez' statements were spontaneous, excited remarks that were not the result of any compulsion by the police. The trial court did not err in determining that the statements were voluntary and admitting them in evidence.

5. The Trial Court's Error in Excluding Claudia Solis' Testimony Was Harmless

Cortney Barritt, Galindo's girl friend, testified at trial that she knew of the attempted bank robbery before it took place and, more specifically, that she knew Rodriguez was involved. Further, Barritt testified she had told her friend, Claudia Solis, about the planned robbery and had also told her that Rodriguez was involved. Rodriguez attempted to elicit testimony from Solis that Barritt had never mentioned Rodriguez' involvement to her. The record shows the following exchange occurred on redirect examination of Solis:

> [Defense counsel:] [D]id . . . Barritt ever tell you who he [Galindo] was supposed to do a bank robbery with?
>
> [Solis:] Later, yes. Not after the robberies.
>
> [Defense counsel:] Who?
>
> [State:] Objection, it's hearsay. He was here to testify.

> THE COURT: Sustained.
>
> [Defense counsel:] Did . . . Barritt ever mention to you that . . . Rodriguez was supposed to —
>
> [Solis:] Never.
>
> [State:] Same objection, and move to strike, and move to strike the answer. I want to approach the bench.
>
> THE COURT: I'll sustain the objection and instruct the jury to disregard the answer that was given.

[19] Rodriguez argues that he intended to impeach Barritt through her prior inconsistent statement to Solis and that the trial court erred in sustaining the hearsay objection. Prior inconsistent statements of a witness are admissible as impeachment evidence. See *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986).

The State contends that because Rodriguez did not make an offer of proof to show what the testimony would have been, he cannot raise the exclusion of the evidence as error. Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995) provides:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> . . . .
>
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

See, also, *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). Here, the exclusion of evidence did affect Rodriguez' substantial right because he was prevented from impeaching an adverse witness. Thus, we must consider whether an offer of proof was necessary to preserve the error or if the substance of the evidence was apparent to the court from the context of the question.

In support of its argument that an offer was required, the State refers us to *State v. Navrkal*, 242 Neb. 861, 496 N.W.2d 532 (1993). There, while being questioned about the "nature" of a conversation, one of the defense witnesses testified, " 'Well, she said as far as she knew, it was not a faked burglary.' " *Id.* at 866, 496 N.W.2d at 535. The trial court sustained the prosecution's

hearsay objection. The defendant argued on appeal that the testimony was necessary to impeach another witness. We stated that the trial court was correct in sustaining the hearsay objection and pointed out that the defendant had not made an offer of proof to show that he offered the statement for impeachment purposes. Thus, we held that the defendant could not complain the trial court erred. *Id.*

[20] We do not find *Navrkal* controlling. Instead, we focus on the alternative in § 27-103(1)(b) which allows an appellate court to find error in an exclusionary ruling when the substance of the evidence was apparent from the context even without an offer of proof.

Was it apparent to the trial judge that Rodriguez' question, "Did . . . Barritt ever mention to you that . . . Rodriguez was supposed to —," and Solis' answer, "Never," were an attempt to impeach Barritt? Although it is a close call, we believe it is apparent from the record that Rodriguez was attempting to impeach Barritt. The substance of Solis' testimony was apparent, because she answered defense counsel's question regarding Barritt's prior inconsistent statement. Compare *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). In addition, during Barritt's cross-examination, defense counsel laid the foundation for impeachment by asking her, "And if [Solis] said you talked about [Sandoval, Vela, and Galindo's] committing this robbery and no mention of . . . Rodriguez, would she be wrong?" to which Barritt responded, "Yes, she would be." And when asked, "She'd be lying?" Barritt responded, "Yes, because I mentioned [Rodriguez'] name too." We believe it is apparent that Rodriguez was attempting to use Solis' testimony for impeachment, and thus it was not hearsay.

[21] Obviously, when a trial court excludes evidence, the better trial practice is always to make an offer of proof. See *Sherman County Bank v. Kallhoff*, 205 Neb. 392, 288 N.W.2d 24 (1980). But because it was apparent that Rodriguez was attempting to impeach Barritt, an offer of proof was not required. And because the evidence was not hearsay, we hold that the trial court erred in excluding it.

[22,23] The error, however, is not fatal to the State's case because it was harmless. In a jury trial of a criminal case, harmless

error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). 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*.

Here, other evidence supported the jury's verdict. The bank's security cameras showed that Rodriguez was in the bank on the morning of September 26, 2002, just before the murders. Galindo testified that Rodriguez had participated in the planning and execution of the robbery. Garvin testified Rodriguez had admitted his involvement after the murders occurred. And Rodriguez' girl friend contradicted his explanation for being at the bank and testified he had lied to her about what he was doing that morning. We conclude that the verdict rendered was surely unattributable to the error.

6. The Trial Court Did Not Err in Excluding Testimony Regarding the Sporting Goods Store Burglary

Some of the guns used in the murders were taken in a burglary from a local sporting goods store. Galindo initially told an investigator that Barritt had participated in the burglary. But in a later deposition, he recanted and said that Barritt had not participated and that his earlier story was a lie. Rodriguez, however, wished to use Galindo's prior statement to prove that Barritt had participated. Rodriguez' theory was that Barritt, instead of Rodriguez, was the "fourth" person involved in the bank robbery. Rodriguez claims that proving Barritt participated in the burglary would help tie her to the bank robbery by showing her involvement in the "prepa[ra]tory scheme," which in turn would suggest that Rodriguez was not involved. Brief for appellant at 45-46.

In an offer of proof, Rodriguez informed the court that he intended to question Galindo about his current position that Barritt had not participated in the burglary and his prior inconsistent statement that she had. Rodriguez argued this testimony

was admissible to prove that Barritt participated in the burglary. The trial court rejected Rodriguez' gossamer-like connection implicating Barritt as a participant. It overruled the offer of proof as a collateral matter because the sporting goods store burglary was not a crime either charged against or attributed to Rodriguez. The trial court ruled Rodriguez was not entitled to prove whether Barritt participated in the burglary as substantive evidence in his case. Further, the court held that because it was a collateral matter, it would be improper to admit it through testimony of a prior inconsistent statement.

[24] Under Nebraska law, prior inconsistent statements of a witness are not admissible as substantive evidence, unless they are otherwise admissible under the Nebraska Evidence Rules. See, *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986); *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985); *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976). See, also, Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1995). In *Isley*, a defense witness, Mike Slankard, testified that he had not witnessed the crime in which the defendant was charged and that he was not present at the scene. The defense then called Cathy Tucker, who testified that Slankard told her he had been present at the time of the incident. The defense attempted to elicit testimony from Tucker that Slankard had also told her the defendant was not one of the assailants. But this testimony was not contrary to anything Slankard had said in court. Instead, it was "an attempt to offer hearsay proof of substantive facts under the guise of impeachment testimony" and the court excluded the testimony. *Isley*, 195 Neb. at 543, 239 N.W.2d at 265-66.

Here, Rodriguez does not contend that the court should have admitted Galindo's testimony for impeachment. Instead, he argues that the court should have admitted Galindo's testimony about the burglary to show that Barritt participated. He argues that "this evidence was necessary to tie . . . Barritt, Galindo's girlfriend, into the planning and participation in the [bank] job, including the obtaining of weapons." Brief for appellant at 44. Thus, Rodriguez' goal was to use Galindo's prior inconsistent statement as substantive evidence. But the inconsistent statement is not admissible as substantive evidence. The trial court did not err in excluding the testimony.

7. Rodriguez' Sentences Were Constitutional

Rodriguez contends that his sentences were unconstitutional and require clarification or resentencing. He argues that after the murders, the Legislature, in a special session, changed the sentence for a Class IA felony from "Life imprisonment" to "Life imprisonment without parole." See 2002 Neb. Laws, L.B. 1, 3d Spec. Sess. (Nov. 22, 2002). See, also, Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006). Before trial, Rodriguez filed an amended motion to quash, arguing that L.B. 1 was unconstitutional. The trial court overruled the motion. In May 2004, the trial court sentenced Rodriguez to "life" in a correctional institution for each of the murder counts.

Subsequently, we decided *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005). In *Conover*, the appellant had been sentenced to two terms of life imprisonment without parole, after L.B. 1 was passed. We held, however, that this amendment to § 28-105(1) was unconstitutional because it was not related to the purpose for which the special session was called. And the previous version of the statute was still in effect. Thus, we held that "at the time of [the appellant'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." *Conover*, 270 Neb. at 452, 703 N.W.2d at 904. Because we concluded that the appellant's sentences were erroneous, we remanded the cause with directions to resentence the appellant to life imprisonment.

Rodriguez obliquely argues that because resentencing was necessary in *Conover*, it is necessary that the court clarify his sentences as well. Here, however, the district court sentenced Rodriguez to "life" for each count of first degree murder, the statutorily authorized sentence. See *Conover, supra*. The court did not add the phrase "without parole" to the sentences. Unlike in *Conover*, these sentences are valid under the preamendment version of § 28-105(1) and do not require clarification or resentencing. This assignment of error is without merit.

IV. CONCLUSION

An impartial jury from Madison County convicted Rodriguez of the crimes with which he was charged. Rodriguez' statement

to police regarding why he was in the bank on the morning of the robbery was made voluntarily and was properly admitted. Although the trial court erred in excluding Solis' impeachment testimony, the error was harmless. And Galindo's prior inconsistent statement could not be used as substantive evidence that Barritt participated in the sporting goods store burglary. Finally, Rodriguez' life sentences were constitutional under the valid version of the sentencing statute. Accordingly, we affirm.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
BRANDY M. BLAIR, APPELLANT.

726 N.W.2d 185

Filed January 19, 2007. No. S-05-544.

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. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Lesser-Included Offenses: 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.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal 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 is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
5. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
6. **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.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, Robert G. Hays, and Timothy M. Eppler for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Brandy M. Blair (Blair) was convicted of intentional child abuse resulting in the death of her 22-month-old son and was sentenced to 30 to 40 years in prison. On June 9, 2004, Christian L. Reifler (Christian) was found dead in the Lincoln, Nebraska, residence where he and Blair lived. It appeared that Christian had placed a staple in an electrical outlet and had been electrocuted. The jury was instructed that it could find Blair (1) guilty of intentional child abuse resulting in death, (2) guilty of intentional child abuse, or (3) not guilty. Blair's request for an instruction on negligent child abuse was refused. She appeals her conviction and sentence. We reverse, and remand for a new trial.

SCOPE 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. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). Whether jury instructions given by a trial court are correct is a question of law. *State v. Iromuanya, ante* p. 178, 719 N.W.2d 263 (2006). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

FACTS

BACKGROUND

At the time of Christian's death, Blair's brother Jason Blair (Jason), Elizabeth Frederick (Liz), Joshua Jones (Josh), and

Edward Simpson, Jr. (Eddie), were living in the house with Blair and Christian. The three bedrooms upstairs were used by Blair, Jason, and Christian. Testimony was offered that during the 3 days preceding Christian's death, Blair was visiting friends and smoking methamphetamine, and that she did not see Christian between Monday evening, June 7, 2004, and Wednesday morning, June 9.

Monday, June 7, 2004

On Monday, June 7, 2004, Jason, Josh, and Eddie left the house at 6:30 a.m. to look for work with a temporary employment agency. The landlord came to the house at about 8:30 or 9 a.m. to paint the windowsills inside the house, and Christian came downstairs while the landlord was painting. At 1:45 p.m., Blair, Christian, and Blair's friend, Melissa Jones (Melissa), accompanied Liz to a doctor's appointment. The group later returned so Christian could take a nap. Blair changed Christian's diaper, dressed him in shorts, put him in his crib, and closed the door to his room. She left with Melissa to run errands and asked Liz to watch Christian for a couple of hours.

At some time during the day, Liz made nachos for Christian, and he ate them in the dining room. When Blair and Melissa returned at 5 p.m., Blair went to Christian's room, changed his diaper, and took him downstairs. Jason and Eddie returned to the house at around 5 or 5:30 p.m., and each showered in the upstairs bathroom. At that time, Eddie noticed the door to Christian's room was closed. Blair said that she fed Christian a hamburger and mashed potatoes at about 5:30 p.m. and that he drank about 18 ounces of water.

Jason and Eddie left to go to a bar at 7:30 or 8 p.m. Blair changed Christian's diaper and put him to bed in his crib between 8 and 8:30 p.m. The railing of the crib had been removed because Christian was climbing over it and Blair did not want him to fall or get his leg caught. Blair left the house with Melissa at about 9 p.m., while Jason, Josh, Liz, Eddie, and a friend remained at the house watching television. Blair said she told "everybody who was listening to [her]" that she was leaving for a little bit. She did not specifically ask anyone to check on Christian. She said that usually no one checked on him at

night because if his bedroom door was opened, he would wake up and not go back to sleep.

Liz did not see Christian downstairs between 6 and 11 p.m. When Liz went upstairs to shower at 10 p.m., she saw that the door to Christian's room was closed, with a towel above the door. (Blair said she placed the towel there because Christian had learned how to open the door, and he sometimes got up earlier than the adults. Blair wanted to prevent him from "getting into the bathroom and getting into stuff he wasn't suppose[d] to.") Liz knocked on Blair's door and got no response. She tried to open the door, but it was locked from the inside. Liz went to bed at about 11 p.m.

TUESDAY, JUNE 8, 2004

When Jason and Eddie returned to the house around 12:30 or 1 a.m. Tuesday, neither saw Blair. Blair said she and Melissa went to Melissa's house, which was two houses east of Blair's house, at about 4 a.m. They smoked a rock of methamphetamine, and Blair stayed there the rest of the night.

On Tuesday morning, Jason and Eddie did not see Blair. Jason said he did not check on Christian. Eddie watched television with Josh and Liz. Liz did not leave the house on Tuesday and did not see or hear Christian or Blair all day. The door to Blair's room was open, but no one was inside, and the door to Christian's room was closed with a towel over the top of it. Josh said he heard Christian crying at some point. Josh opened the door, checked on Christian, closed the door, and went back downstairs. That afternoon, Liz told Melissa to tell Blair she needed to come home because Liz could not care for Christian alone and the men needed to go to work. Melissa gave Blair the message.

Jason was gone from the house that afternoon and then left again around 8:30 p.m. to go to a bar with Eddie. Jason did not see Blair at the house that day. Before Jason left, he opened the door to Christian's room and found Christian playing on the floor with some toys. Eddie said he saw Blair in the living room sometime that evening, but he did not see Christian or have any conversation with Blair about Christian. The door to Christian's room was closed when Eddie went upstairs to shower.

Blair said she sent a text message to Eddie's telephone at about 5 p.m., stating, "I'm fine. . . . I'll be home later, later tonight and . . . tell Liz sorry and thank you for watching Bubba." Liz said that Eddie gave her Blair's message at about 9 p.m. The message came as a surprise because she "had no clue" she was supposed to be caring for Christian. Liz heard Christian playing in his room and gave him a drink of water sometime between 9 and 10:30 p.m. Blair and Melissa spent the day visiting friends and eventually returned to Melissa's house at about 9:30 p.m.

WEDNESDAY, JUNE 9, 2004

Between midnight and 2:30 a.m., Melissa, Blair, and Eddie visited at Melissa's house and ended up on the porch of Blair's house. Jason arrived at about 1:30 a.m. Blair did not check on Christian during this period. Jason and Eddie went to bed at 2:30 a.m., and Blair and Melissa returned to Melissa's house, where they talked until about 3:30 a.m. Blair spent the remainder of the night there.

During the morning hours, Jason, Josh, Liz, and Eddie talked and watched television. At some point, Jason thought he heard Christian "rustling around," and Josh said he thought he heard a thumping sound, as if Christian were playing. Blair arrived home at 10:15 a.m. and went upstairs to check on Christian. According to Blair, Christian was sleeping on his stomach on the floor by his crib wearing a diaper. The diaper was not very wet, so she covered him with a light blanket and placed a stuffed animal next to him. She shut the door, went downstairs, and awakened Eddie. She did not ask any of the adults whether they had fed Christian or changed his diaper.

Blair and Eddie watched three movies over a 5-hour timespan, during which Blair did not check on Christian or see anyone else check on him. Eddie and Jason went to a pawnshop at about 4 p.m. While there, Eddie received a telephone call from Blair asking if he and Jason would watch Christian while she went to a lake with a friend. Blair said Eddie agreed as long as she was home by 7 p.m. When Jason and Eddie returned home, Blair told Jason that if he and Eddie wanted to go out later, Josh and Liz could watch Christian until Blair got home. Liz said Blair asked her to watch Christian if she was not home by the

time Eddie and Jason left for the bar. Josh said he told Blair to go upstairs and check on Christian, give him something to drink, and change his diaper before she left.

Blair went upstairs, and when she came back downstairs, Eddie asked if she had checked on Christian. Blair said he was fine. Liz also testified that Blair had checked on Christian and told Liz he was fine. Eddie said that when Blair left, she looked at everyone and asked if they would keep an eye on Christian while she went to the lake. When Blair left the house, Jason, Josh, Liz, and Eddie were all present.

Josh cooked dinner, and 30 to 45 minutes after Blair left, he asked Jason and Eddie to go get Christian. Eddie opened the door to Christian's bedroom and found Christian lying still on the floor. Eddie screamed that Christian was not moving or breathing, and he ran back downstairs to call the 911 emergency dispatch service. Ricky Janousek (Ricky), who had come to the house for dinner, had taken CPR classes, and he gave Christian CPR. When Ricky reached under Christian's left arm to roll him over, Christian was "cold and wasn't very limber." Ricky, Josh, and Liz left to find Blair. Meanwhile, Blair discovered she had missed two calls from Eddie. She returned them and was informed by Jason of Christian's death.

A call to 911 was received at 5:42 p.m. Peter Eppens, a firefighter paramedic, found Christian face down in his room. He had no pulse, and rigor mortis had set in. Eppens testified that rigor mortis usually occurs between 4 to 6 hours after death. Eppens saw what he believed to be burns on the index finger and second finger of Christian's left hand.

An autopsy determined that Christian died from electrocution. The chief electrical inspector for the city of Lincoln and Lancaster County stated that the electrocution appeared to have occurred when Christian's hands were both on a staple that was inserted into an outlet. Evidence was presented that an infant could be electrocuted by as little as 14 milliamps of current flow across the chest to stop the heart. Christian was also severely dehydrated at the time of his death.

Jason and Eddie testified that they did not care for Christian between June 7 and 9, 2004. Liz fixed him nachos on Monday at noon and gave him a drink on Tuesday night but provided no

other care during the 3-day period. Blair said she "[j]ust assumed" that someone else had fed Christian while she was gone because "[t]hey've all taken care of him before . . . ."

ASSIGNMENTS OF ERROR

Blair claims the trial court erred in failing to instruct the jury that negligent child abuse is a lesser-included offense of intentional child abuse and in failing to instruct on the definition of negligence.

ANALYSIS

The dispositive issue is whether an instruction on negligent child abuse was warranted by the evidence. Negligent child abuse is a lesser-included offense of intentional child abuse resulting in death. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). The jury was instructed that it could find Blair guilty of intentional child abuse resulting in death, guilty of intentional child abuse, or not guilty. The trial court gave the following elements instruction:

> Regarding intentional child abuse resulting in death, the elements of the state's case are:
>
> 1. That the defendant, Brandy M. Blair, caused or permitted Christian Lee Reifler to be placed in a situation that endangered his life or physical health; or to be cruelly confined; or to be deprived of necessary food or care;
>
> 2. That the defendant did so knowingly and intentionally;
>
> 3. That the defendant did so on, about or between June 7, 2004[,] and June 9, 2004, in Lancaster County, Nebraska;
>
> 4. That at the time defendant did so, Christian Lee Reifler was a minor child; and
>
> 5. That as a result of the above, Christian Lee Reifler died.
>
> Regarding intentional child abuse, the elements of the state's case are:
>
> 1. That the defendant, Brandy M. Blair, caused or permitted Christian Lee Reifler to be placed in a situation that endangered his life or physical health; or to be cruelly confined; or to be deprived of necessary food or care;
>
> 2. That the defendant did so intentionally and knowingly;

> 3. That the defendant did so on, about or between June 7, 2004[,] and June 9, 2004, in Lancaster County, Nebraska;
>
> 4. That at the time defendant did so, Christian Lee Reifler was a minor child.

The jury was given a step instruction and directed to first consider the crime of intentional child abuse resulting in death. If the State did not prove each element beyond a reasonable doubt, the jury was to proceed to the crime of intentional child abuse. If that crime was not so proved, then the jury was directed to find Blair not guilty of either crime.

Blair proposed a jury instruction that included possible verdicts of intentional child abuse resulting in death, intentional child abuse, and negligent child abuse. The proposed instruction also included step instruction language. The trial court refused to give the proposed instruction including negligent child abuse and refused to give an instruction defining negligence.

This court has held that negligent child abuse and intentional child abuse are lesser-included offenses of child abuse resulting in serious bodily injury and child abuse resulting in death. See *State v. Molina, supra*. "The proscribed conduct for each offense is exactly the same; it is the actor's state of mind which differentiates the offenses. If the abuse is committed knowingly and intentionally, it is a felony; if committed negligently, it is a misdemeanor." *State v. Parks*, 253 Neb. 939, 947, 573 N.W.2d 453, 459 (1998).

[3] 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. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Parks, supra*.

The rationale for requiring an instruction on a lesser-included offense when the evidence supports such instruction was set forth in *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Court quoted *Keeble v. United States*, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973), which states:

> [I]f 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.)

In the case at bar, Blair could not have committed the offense of intentional child abuse without also having committed the offense of negligent child abuse. The conduct is the same. See *State v. Parks, supra*. Because the first prong of the test set forth in *Molina* has been met, we consider whether the evidence provided a rational basis for acquitting Blair of intentional child abuse and convicting her of negligent child abuse.

We conclude the evidence provided at least a rational basis for the jury to acquit Blair of intentional child abuse and convict her of negligent child abuse. This is not to say that the jury would necessarily have believed the evidence presented by Blair. However, such evidence provided a rational basis for the jury to potentially find that the abuse was committed negligently and not knowingly and intentionally. Five adults were living in the house where the child was electrocuted. On Monday afternoon, June 7, 2004, Christian was placed in his bedroom for a nap. Blair allegedly asked Liz to watch Christian while Blair ran errands. Blair returned later, changed Christian's diaper, and took him downstairs. During the day, he was fed nachos and/or a hamburger and given water to drink. Blair claims that after she put Christian to bed, she told whoever was listening that she was leaving for a little while.

Eddie said he had received a text message from Blair on his cellular telephone at 5 p.m. Tuesday, stating she would be home later that night and asking Eddie to thank Liz for watching Christian. Liz denied that she had been asked to care for

Christian. She gave Christian a drink of water later that evening and heard him playing in his room.

Blair said Christian was sleeping when she checked on him Wednesday morning, June 9, 2004. She covered him and placed a stuffed animal beside him. She watched movies that afternoon and then called Eddie and Jason to ask them to watch Christian while she went to a lake. Blair asked Liz to watch Christian if she was not home by the time Eddie left. When Blair left for the lake, she asked "everybody who was listening to [her]" if they would keep an eye on Christian and she told Eddie and Liz that she had checked on Christian. Blair said she assumed someone had fed Christian while she was gone because the other adults had all taken care of him before.

In *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998), the defendant was convicted of knowing or intentional child abuse. The defendant contended that the district court erred in failing to instruct the jury on the offense of negligent child abuse. We concluded the court erred in not instructing on the lesser-included offense of negligent child abuse because the evidence was sufficient to support a finding that the defendant acted negligently rather than knowingly and intentionally.

The intent with which an act is committed may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *Id*. There was sufficient evidence that Blair knowingly and intentionally placed Christian in a situation that resulted in his death, but there was also evidence that Blair acted negligently. The proscribed conduct for each offense is exactly the same; it is the actor's state of mind which differentiates the offenses. *Id*. If the abuse is committed negligently, it is a misdemeanor. If the abuse is committed knowingly and intentionally, it is a felony.

Christian died as a result of touching a staple while it was inserted into an electrical outlet. Electrocution appeared to have occurred because both of his hands were touching the staple and current flowed across his chest and stopped his heart. There was evidence that Blair assumed someone in the house was caring for Christian because the adults had taken care of him before. She claimed she had asked the other adults to take care of Christian

while she was away from the house. The evidence was sufficient to warrant a finding by the jury that Blair negligently caused or permitted Christian to be placed in a situation that endangered his life and that as a result, he died.

[4,5] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (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. *Id.*

The instructions as given directed the jury to consider whether Blair's intentional actions caused Christian's death. The jury was not directed to consider whether Blair's actions were negligent. The jury was given the choice of determining whether Blair's intentional conduct did or did not result in the death of Christian or of finding that Blair was not guilty. The jury was not permitted to consider whether Blair's conduct was negligent as opposed to intentional. The jury was not permitted to consider whether Blair negligently caused or permitted Christian to be placed in a situation that resulted in his death.

At oral argument, the State claimed that the refusal to give an instruction on negligent child abuse was not prejudicial because the jury had been presented with the issue of intent in other properly given instructions. To address this claim, we consider our recent holding in *Molina*. Germai Molina was convicted of second degree murder and child abuse resulting in death following the death of his 2-year-old daughter. On appeal, Molina claimed that the jury should have been instructed as to the elements of intentional and negligent child abuse as lesser-included offenses of child abuse resulting in death. The instruction was denied, and instead, the jury was instructed that Molina could be found guilty of child abuse resulting in death, guilty of child abuse resulting in serious bodily injury, or not guilty.

The jury was also instructed as to the elements of second degree murder and manslaughter as lesser-included offenses of

first degree murder. The jury was directed that if it found Molina caused the death of his daughter intentionally but without premeditation, it should find him guilty of second degree murder. If the jury found that Molina killed his daughter unintentionally while in the commission of an unlawful act, he should be found guilty of manslaughter.

Molina argued that the jury could have concluded that he was merely negligent in allowing his wife to abuse their daughter and that his wife was responsible for the child abuse. If the jury had reached this conclusion, it could have found him guilty of negligent child abuse.

[6] We determined the court erred in not instructing on negligent child abuse. However, we held that the error was harmless because Molina was also convicted of second degree murder. The jury had been instructed on the elements of first degree murder and the lesser-included offenses of second degree murder and manslaughter. Based on his conviction of second degree murder, it was apparent that the jury had been given the opportunity to decide the issue of Molina's intent. " ' "[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." ' " *State v. Molina*, 271 Neb. 488, 520, 713 N.W.2d 412, 441 (2006), quoting *People v. Horning*, 34 Cal. 4th 871, 102 P.3d 228, 22 Cal. Rptr. 3d 305 (2004).

The jury in *Molina* was given the opportunity to determine whether Molina acted with or without intent when it was instructed on the lesser-included offenses of second degree murder and manslaughter. The district court's refusal to instruct on negligent child abuse was not prejudicial because "the jury necessarily rejected the evidence that would support a finding that only the lesser-included offense was committed." *Molina*, 271 Neb. at 521, 713 N.W.2d at 442.

In the case at bar, the jury was not given the opportunity to consider whether Blair acted negligently and the failure to instruct on the elements of negligent child abuse was not harmless error. We therefore reverse the judgment of conviction and remand the cause for a new trial.

CONCLUSION

The evidence was sufficient to sustain Blair's conviction; however, the trial court's refusal to give a jury instruction that included the lesser-included offense of negligent child abuse was reversible error. The judgment of conviction is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V.
THOMAS L. FISCHER, APPELLANT.

726 N.W.2d 176

Filed January 19, 2007. No. S-06-069.

1. **Constitutional Law: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error.
2. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **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. **Constitutional Law: Trial: Rules of Evidence: Hearsay.** Where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.
5. **Constitutional Law: Hearsay.** The initial step in a Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. If the statements are nontestimonial, then no further Confrontation Clause analysis is required.
6. **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.
7. **Jury Instructions: Appeal and Error.** 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.

Appeal from the District Court for Cheyenne County, KRISTINE R. CECAVA, Judge, on appeal thereto from the County

Court for Cheyenne County, CHARLES PLANTZ, Judge. Judgment of District Court affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Thomas L. Fischer was convicted in the county court for Cheyenne County of driving under the influence in violation of Neb. Rev. Stat. § 60-6,196 (Supp. 2003). Fischer appealed his county court conviction to the district court for Cheyenne County. On appeal to the district court, Fischer asserted, inter alia, that the county court erred in overruling his objection to admission of certain exhibits and in concluding that he did not have a right under the Confrontation Clause to confront and cross-examine the person who prepared the certificate verifying the concentration of the alcohol breath simulator solution that was used to calibrate the breath testing device that was used to test Fischer's breath. The district court rejected Fischer's claims of error and affirmed his conviction. Fischer appeals. We conclude that the certificate verifying the concentration of the simulator solution is not testimonial in nature and not subject to further Confrontation Clause analysis. Because we determine there is no merit to the assigned errors, we affirm.

STATEMENT OF FACTS

The State filed a complaint in county court charging that on June 18, 2004, Fischer was driving under the influence of alcoholic liquor in Sidney, Nebraska. The State cited § 60-6,196(1), which provides that it is "unlawful for any person to operate or be in actual physical control of any motor vehicle . . . (c) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath." Fischer pled not guilty and demanded a jury trial.

Prior to trial, Fischer filed a motion in limine seeking an order precluding the State from offering any evidence regarding the chemical test of Fischer's breath "unless the witness who prepared the simulator solution, which was used to calibrate the breath testing device herein, is present in Court and available for cross-examination." Fischer argued that the validity of the substance used to calibrate the breath testing device was critical to the ability of the device to give accurate results and that any assertion as to the validity of the substance was testimonial in nature and therefore subject to confrontation and cross-examination pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). After a hearing, the county court determined that title 177 of the Nebraska Administrative Code governed the admissibility of the chemical test results and that therefore, the foundation requirements were statutory and not evidentiary. See 177 Neb. Admin. Code, ch. 1 (2004). The court overruled Fischer's motion in limine, provided the State could show sufficient foundation for the admissibility of the test results under title 177.

Trial was held in county court on March 15, 2005. Sgt. Dale Miller of the Sidney Police Department testified that he was the department's site maintenance officer under title 177. As such, Miller was responsible for conducting the checks required under title 177 of the breath testing devices used by the department's officers. Miller testified that on June 12, 2004, a check was conducted on the device that was subsequently used to test Fischer's breath on June 18. Miller testified that the June 12 check showed that the device was functioning accurately. As part of the routine check, Miller used a breath simulator solution with a known concentration of alcohol. Miller testified that the solution was run through the device to determine whether the device accurately measured the known concentration of alcohol in the solution. Miller further testified that when he received the solution used to perform checks, he also received a document certifying that the solution was accurately prepared and that the stated concentration was accurate.

As part of Miller's testimony, the State offered into evidence exhibit 11, which was the document certifying the accuracy of the solution Miller used to test the device on June 12, 2004. The

document was titled "Chemical Analysis Certification of Alcohol Breath Simulator Solution" and stated that the solution was prepared on February 3, 2004, "at a value of .080 of a gram of alcohol per 210 liters of breath." The certificate was signed by Cecil B. Garner, president of the company that supplied the solution. Fischer objected to admission of exhibit 11 on hearsay, foundation, and Confrontation Clause grounds. The court received the exhibit over Fischer's objection. Also in connection with Miller's testimony, the State offered into evidence exhibit 14, which was the "Certification of Accuracy of the Internal Reference Standard used for Calibration Verification" that Miller prepared and signed in connection with a June 3, 2004, check that Miller performed on the breath testing device. The court received exhibit 14 over Fischer's objection on foundation, hearsay, and Confrontation Clause grounds.

Officer Curtis Hofrock, the Sidney police officer who arrested Fischer, also testified at trial. Hofrock testified that he performed the breath test on Fischer. In connection with Hofrock's testimony, the State offered into evidence exhibit 16, which was a checklist Hofrock completed detailing the steps he took in performing the breath test on Fischer. The State also offered exhibit 17, which was the test card related to Fischer's breath test. The results as reflected on the card showed an alcohol concentration of .150 grams per 210 liters. The court received both exhibits 16 and 17 into evidence over Fischer's objections on, inter alia, Confrontation Clause grounds.

In submitting the case to the jury, the county court instructed the jury on reasonable doubt. The reasonable doubt instruction given by the court was as follows:

> A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt is proof so convincing that, *once convinced*, you would rely and act upon it without hesitation in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

(Emphasis supplied.) The court rejected an instruction proposed by Fischer which read the same as the above-quoted instruction except that it omitted the phrase "once convinced" in the second

sentence. The instruction proposed by Fischer followed the text of the pattern instruction in NJI2d Crim. 2.0.

The jury found Fischer guilty, and the county court entered judgment based on the verdict. On May 12, 2005, the county court sentenced Fischer to 6 months' probation.

Fischer appealed his conviction to the district court for Cheyenne County. In his statement of errors, Fischer asserted, inter alia, that the county court erred in failing to sustain his motion in limine, in receiving the results of the breath test into evidence, and in rejecting his proposed instruction on reasonable doubt and instead giving an improper instruction. On December 12, 2005, the district court entered an order ruling on Fischer's appeal. The district court rejected Fischer's argument that he had a right under the Confrontation Clause to cross-examine Garner, the person who signed the certificate regarding the preparation of the simulator solution. The district court found that the State had shown compliance with title 177 and that therefore, the breath test results were admissible. The district court further concluded that the reasonable doubt instruction given by the county court was an accurate statement of law. Having rejected his arguments, the district court affirmed Fischer's conviction. Fischer appeals the district court's order affirming his conviction in county court.

ASSIGNMENTS OF ERROR

Fischer asserts that the district court erred in affirming his conviction and, specifically, in finding that (1) Fischer did not have a right under the Confrontation Clause to cross-examine Garner with respect to the simulator solution; (2) the county court did not err in admitting exhibits 11, 14, 16, and 17; and (3) the county court gave a proper instruction on reasonable doubt.

STANDARDS OF REVIEW

[1] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error. *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005).

[2,3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Iromuanya, ante* p. 178, 719 N.W.2d 263 (2006). When dispositive issues on appeal present

questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id*. 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*.

ANALYSIS

Statements in Solution Certificate Not Testimonial Under Confrontation Clause.

Fischer assigns error to the admission of exhibits 11, 14, 16, and 17, and at trial, he objected to admission of those exhibits on various bases. However, in his brief, Fischer limits his arguments on appeal to an argument that exhibit 11 was admitted in violation of his rights under the Confrontation Clause. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Iromuanya, supra*. Therefore, with regard to Fischer's first and second assignments of error, we consider only exhibit 11 and Fischer's assertion that its admission violated his rights under the Confrontation Clause.

Exhibit 11 is a document entitled "Chemical Analysis Certification of Alcohol Breath Simulator Solution." Exhibit 11 is signed by Garner and states that he is designated by the Department of Health and Human Services as the licensed supplier of alcohol breath simulator solutions. Exhibit 11 further indicates that the solution provided by Garner was prepared "at a value of .080 of a gram of alcohol per 210 liters of breath." The record shows that Miller subsequently used the simulator solution to maintain and test the breath testing device. Fischer argues that the admission of exhibit 11 regarding the concentration of the simulator solution violated his rights under the Confrontation Clause because he was not given the opportunity to cross-examine Garner.

[4] The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held that where "testimonial" statements are at issue, the

Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. Because *Crawford* involved what the U.S. Supreme Court found to be a testimonial statement, the Court was not required in that case to decide whether any Confrontation Clause analysis was required in ruling on the admissibility of nontestimonial statements. But recently, in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court again considered the application of the Confrontation Clause in two appeals combined for opinion. See *State v. Davis*, 154 Wash. 2d 291, 111 P.3d 844 (2005), *cert. granted* 546 U.S. 975, 126 S. Ct. 547, 163 L. Ed. 2d 458, and *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *cert. granted* 546 U.S. 976, 126 S. Ct. 552, 163 L. Ed. 2d 459. The Court determined that while the statements in *Hammon v. State* were testimonial, the statements in *State v. Davis* were nontestimonial. The Court stated that because the statements in *State v. Davis* were nontestimonial, it no longer had the "luxury of indecision" on "whether the Confrontation Clause applies only to testimonial hearsay." 547 U.S. at 823. The Court noted that the answer was "suggested" if not "explicitly held" in *Crawford* and that the text of the Confrontation Clause focused on testimonial hearsay in that it " 'applies to "witnesses" against the accused—in other words, those who "bear testimony." ' " 547 U.S. at 823. The Court also stated that only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause" and that "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." 547 U.S. at 821. After determining that the statements in *State v. Davis* were nontestimonial, the Court affirmed admission of the statements without further Confrontation Clause analysis. *Davis v. Washington, supra*.

[5] Therefore, the initial step in our Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. If the statements are nontestimonial, then no further Confrontation Clause analysis is required. See *Davis v.*

Washington, supra. The U.S. Supreme Court did not provide a comprehensive definition of "testimonial" in either *Crawford* or *Davis*. We have noted that in *Crawford*, the Court stated that testimonial statements included, at a minimum, prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations. See, *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005); *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004). We further noted that the U.S. Supreme Court in *Crawford* provided three formulations of the core class of testimonial statements:

> "In the first, testimonial statements consist of 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.' . . . The second formulation described testimonial statements as consisting of 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' . . . Finally, the third explained that testimonial statements are those 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' . . . While the Court declined to settle on a single formulation, it noted that, '[w]hatever else the term [testimonial] covers, it applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern abuses at which the Confrontation Clause was directed.' "

State v. Vaught, 268 Neb. at 325, 682 N.W.2d at 291, quoting *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004), *cert. denied* 543 U.S. 1093, 125 S. Ct. 971, 160 L. Ed. 2d 905 (2005).

In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the U.S. Supreme Court further refined its analysis of whether statements made in response to police questioning are testimonial for Confrontation Clause purposes. The Court contrasted the statements involved in the two appeals—a victim's statements in response to a 911 emergency dispatch

operator's questions which the Court found to be nontestimonial in the appeal from *State v. Davis*, 154 Wash. 2d 291, 111 P.3d 844 (2005), and a victim's written statements in an affidavit given to police officers which the Court found to be testimonial in the appeal from *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005). The Court stated:

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. at 822.

In the same vein, the U.S. Supreme Court had previously stated in *Crawford* that a statement is testimonial where it is " 'made for the purpose of establishing or proving some fact.' . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Based on this framework, we determine that the statements at issue in this case were not "testimonial" within the meaning of *Crawford* and *Davis*. The statements in exhibit 11 were limited to Garner's certifications regarding the concentration of the alcohol breath simulator solution. Unlike the statements found to be testimonial in *Crawford* and *Hammon*, the statements in the certificate did not occur in the context of structured police questioning and did not pertain to any particular pending matter. Although there was State involvement in the preparation of the statements contained in exhibit 11 in the sense that the certificate was in a form required by the Nebraska Department of Health and Human Services pursuant to title 177, the primary

purpose for which the statements in exhibit 11 were generated and provided to the Sidney Police Department was to assure that the solution used to calibrate and test breath testing devices was of the proper concentration. The statements made in the certificate were required to be made as an administrative function whether or not the statements would eventually be used in any criminal prosecution.

Exhibit 11 was prepared in a routine manner without regard to whether the certification related to any particular defendant. Indeed, the statements in exhibit 11 were made in February 2004, and the crime in this case did not occur until June 2004. The statements made in exhibit 11 were too attenuated from the prosecution of the charges against Fischer for the statements to be "testimonial" in the sense required under *Crawford*, *Davis*, and the Confrontation Clause.

Our conclusion, while based on the facts of this case, is consistent with the reasoning and conclusions of courts that have considered similar circumstances. In *People v. Lebrecht*, 13 Misc. 3d 45, 823 N.Y.S.2d 824 (2006), the court determined that statements in a simulator solution certificate were not testimonial under *Crawford*. The court in *Lebrecht* noted:

> The certificates were prepared in the course of the certifier's routine official duties and "systematically" produced "in the conduct of . . . business" . . . to fulfill an official mandate that the machines be maintained in working order. Although prepared, to an extent, in recognition of their necessity in the event of litigation and constituting a part of the foundational predicate for the admission of [blood alcohol content] test evidence, the certificates did not result from structured police questioning, they were not created at official request "to gather incriminating evidence against a particular individual" . . . and they did not constitute a direct accusation of an essential element of any offense . . . .

13 Misc. 3d at 49, 823 N.Y.S.2d at 827-28. Other courts, while not specifically addressing solution certificates, have found that statements in other certificates relating to maintenance of breath testing devices were nontestimonial. See, *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 129 P.3d 471 (Ariz. App. 2006); *Rackoff v. State*,

281 Ga. 306, 637 S.E.2d 706 (2006); *Neal v. State*, 281 Ga. App. 261, 635 S.E.2d 864 (2006); *People v. Kim*, 368 Ill. App. 3d 717, 859 N.E.2d 92, 307 Ill. Dec. 92 (2006); *Jarrell v. State*, 852 N.E.2d 1022 (Ind. App. 2006); *Com. v. Walther*, 189 S.W.3d 570 (Ky. 2006); *Green v. DeMarco*, 11 Misc. 3d 451, 812 N.Y.S.2d 772 (2005). But see, *Belvin v. State*, 922 So. 2d 1046 (Fla. App. 2006); *People v. Orpin*, 8 Misc. 3d 768, 796 N.Y.S.2d 512 (2005).

We note that the only evidence at issue in this appeal is the simulator solution certificate prepared by Garner, and therefore, our decision in this appeal is limited to the statements in that certificate. We further note that Fischer does not argue on appeal that exhibit 11 was admitted in violation of hearsay rules, and we do not address whether exhibit 11 was admissible under a hearsay exception.

We conclude that the statements in exhibit 11 were nontestimonial and that therefore, the admission of exhibit 11 was not subject to further Confrontation Clause analysis and did not violate Fischer's rights under the Confrontation Clause. We reject Fischer's first and second assignments of error.

Reasonable Doubt Instruction Not Prejudicial to Fischer.

Fischer also asserts that the district court erred in failing to find error in the county court's reasonable doubt instruction, which varied from the pattern instruction that he proposed. We conclude that although, in general, a trial court should give the pattern instruction, the instruction given in this case was not prejudicial to Fischer.

[6,7] 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. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). 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. Iromuanya, ante* p. 178, 719 N.W.2d 263 (2006).

The instruction given by the county court generally followed the pattern instruction provided in NJI2d Crim. 2.0 except that the words "once convinced" were added by the trial court to the second sentence so that the sentence read: "Proof beyond a

reasonable doubt is proof so convincing that, *once convinced*, you would rely and act upon it without hesitation in the more serious and important transactions of life." (Emphasis supplied.) Fischer argues that the instruction given by the county court creates a lower standard for reasonable doubt than does the pattern instruction because it requires only that the jury be "convinced" and not "convinced beyond a reasonable doubt." Brief for appellant at 12. We reject Fischer's argument.

Although we have stated that the Nebraska pattern jury instructions are to be used whenever applicable, we have recognized that a failure to follow the pattern jury instructions does not automatically require reversal. See *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003). We have also stated that as long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the U.S. Constitution does not require that any particular form of words be used in advising the jury of the prosecution's burden of proof. *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

Reading the reasonable doubt instruction given by the county court as a whole, we do not find the instruction to be unfair or misleading. Although we do not necessarily find the addition of the words "once convinced" to be an improvement to the language of the pattern instruction, the addition does not meaningfully change the instruction, nor does it lower the standard of proof. The instructions given by the county court make clear that the State is held to a standard of proof beyond a reasonable doubt, and the instruction at issue does not lower the standard of proof because the instruction defines "reasonable doubt" and does not impose a different standard of proof. The reasonable doubt instruction was not prejudicial to Fischer and does not require reversal of his conviction. We reject Fischer's third assignment of error.

CONCLUSION

We conclude that the statements contained in exhibit 11 which certified the concentration of the simulator solution were nontestimonial and that therefore, the admission of exhibit 11 was not subject to further Confrontation Clause analysis and did not violate Fischer's rights under the Confrontation Clause. We further conclude that the reasonable doubt instruction given by

the county court was not prejudicial to Fischer and therefore did not constitute error. We therefore reject Fischer's assignments of error and affirm the district court's affirmance of Fischer's county court conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. THOMAS M. PETERSEN, RESPONDENT.

725 N.W.2d 845

Filed January 19, 2007. No. S-06-182.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

The issue presented in this attorney discipline proceeding is what discipline should be imposed on Thomas M. Petersen, respondent, for his violation of certain provisions of the Code of Professional Responsibility and his oath of office as an attorney.

Relator, the Counsel for Discipline of the Nebraska Supreme Court, filed formal charges against Petersen alleging unprofessional violations. Petersen filed an answer in which he admitted the allegations in the formal charges. Relator filed a motion for judgment on the pleadings, and in an order dated June 7, 2006, this court granted relator's motion, in part, by adopting the facts alleged in the formal charges as the facts in this case. A referee was appointed who heard evidence and recommended discipline. In his report, the referee noted that as a result of attorney misconduct unrelated to the instant case, Petersen is presently suspended from the practice of law for an indefinite period of time, with no possibility of reinstatement prior to February 1, 2008. See *State ex rel. Counsel for Dis. v. Petersen*, 271 Neb. 262, 710 N.W.2d 646 (2006). The referee recommended that Petersen remain indefinitely suspended with no possibility of

reinstatement prior to February 1, 2008, and that in the event Petersen is reinstated in the future, his reinstatement be followed by monitored probation for not less than 2 years.

No exceptions were filed to the referee's report, and relator has filed a motion for judgment on the pleadings. We grant the motion for judgment on the pleadings and impose discipline as indicated below.

FACTS

The following facts are found in the formal charges: Petersen was admitted to the practice of law on April 14, 1995. On February 13, 2006, formal charges were filed by the office of the Counsel for Discipline, relator, against Petersen. The formal charges set forth three counts, which we summarize. The first count alleged that Timothy Diecker hired Petersen to represent Diecker in a criminal case and that Petersen neglected certain matters in Diecker's case, causing Diecker to retain other counsel. The second count alleged that Christopher Payne hired Petersen to represent him in two separate criminal cases, as well as in a marriage dissolution action, and that Payne paid Petersen certain funds representing advanced fees. The second count further alleged that Petersen neglected certain matters during his representation of Payne, causing Payne to retain other counsel; failed to account for the time he spent on Payne's legal matters so that Payne could determine whether Petersen earned the advanced fees; and failed to refund unearned fees. The third count alleged that both Diecker and Payne filed grievances against Petersen with relator and that Petersen, despite repeated requests for information from relator, failed to file any written responses to the grievances.

The formal charges alleged that by his actions, Petersen had violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 2, DR 2-110(A)(3) (refunding unearned fees upon withdrawal from employment); Canon 6, DR 6-101(A)(2) (handling legal matter without adequate preparation); DR 6-101(A)(3) (neglecting legal matter); Canon 7, DR 7-101(A)(2) (failing to carry out contract of employment for

professional services); and Canon 9, DR 9-102(A) (maintaining trust account); and DR 9-102(B)(3) (maintaining records of funds); as well as his oath of office as an attorney, see Neb. Rev. Stat. § 7-104 (Reissue 1997).

As noted above, Petersen filed an answer in which he admitted the allegations in the formal charges. Relator filed a motion for judgment on the pleadings, which this court granted, in part, and ordered that "the facts alleged in the formal charges stand admitted and adopted by this Court as the facts in this case." We appointed a referee to conduct an evidentiary hearing limited to the issue of the appropriate discipline. An evidentiary hearing was held on July 31, 2006. Twelve exhibits were admitted into evidence, and Petersen appeared and testified as the only witness.

The referee filed a report on October 5, 2006. The substance of the referee's findings relative to discipline may be summarized as follows: On January 17, 2006, Petersen began a 90-day residential treatment program at SouthCoast Recovery Treatment Center (SouthCoast) in Dana Point, California, for alcohol and drug addiction, which he successfully completed. He currently resides in Dana Point, where he is working at SouthCoast as an intake counselor. We note that the record contains a letter from SouthCoast's "Director of Sober Living," in which he states the following:

> [Petersen] is an example of applying all of the tools of recovery and a[n] example of how those tools can redirect a person[']s life into a positive and productive [lifestyle]. His success is truly a miracle, and his continued effort at rebuilding his life is . . . completely on the right track. He has been and is a perfect example of how recovery works. It gives me great pleasure and pride to say I have seen his growth from beginning to this day. Recovery needs more people like [Petersen] who are not afraid to live life on life's terms, and remain a great example to all of those who come in contact with him that recovery is possible.

Petersen admitted he is addicted to vodka and cocaine. He testified that he began to use drugs and alcohol in 2001 and that he was under the influence of drugs and alcohol during his representation of Diecker and Payne. He stated he is "a competent

attorney when [he is] sober, and when [he is] not sober [he is] not." He stated that he wants to "maintain [his] sobriety [and he] want[s] to practice law again." He further testified to the effect that originally he only represented clients in criminal matters and that he began to use drugs and alcohol after he expanded his practice to include civil cases. He stated that in the event he returned to practice, he would limit himself to representing only clients in criminal cases.

According to the referee's report, Petersen has been regularly attending meetings of Alcoholics Anonymous and similar support groups. Since January 17, 2006, he has been subjected to random drug testing and has not tested positive during any test. On or about February 28, Petersen entered into a monitoring contract with the Nebraska Lawyers Assistance Program (NLAP), and a copy of the contract was admitted into evidence. In the contract, Petersen agreed to abstain from alcohol and "mind-altering" drugs, unless such drugs were prescribed by a physician and taken as prescribed. Petersen also agreed to submit to an attorney monitor, to attend Alcoholics Anonymous meetings, to submit to random drug testing, and to comply with any additional terms and conditions imposed by this court.

Finally, Petersen testified that he had reimbursed Payne for any unearned fees. He also testified that he was liquidating assets in the event he needed to reimburse any other former clients with fee grievances.

The referee noted in his report that Petersen had been the subject of three other disciplinary proceedings. In *State ex rel. Counsel for Dis. v. Petersen*, 264 Neb. 790, 652 N.W.2d 91 (2002), the formal charges alleged that Petersen had retained settlement funds to which he was not entitled. The evidence adduced did not support the formal charges. Although we determined that the evidence in the case showed that Petersen failed to supervise and control the activities of his employees and that his office management was sloppy, Petersen was not charged with that conduct, and we dismissed the formal charges.

In the second proceeding, *State ex rel. Counsel for Dis. v. Petersen*, 267 Neb. 176, 672 N.W.2d 637 (2004), relator filed a motion for reciprocal discipline after Petersen was suspended by the U.S. Court of Appeals for the Eighth Circuit for a period

of 30 days after he neglected a client's appeal. We granted relator's motion and imposed as reciprocal discipline a 30-day suspension.

In the third proceeding, *State ex rel. Counsel for Dis. v. Petersen*, 271 Neb. 262, 710 N.W.2d 646 (2006) (*Petersen III*), the sole issue in the case was the discipline to be imposed against Petersen, following his "serial neglect of client matters." *Id.* at 263, 710 N.W.2d at 648. The referee who had been appointed to hear evidence recommended that Petersen receive a 180-day suspension. We did not accept the referee's recommendation and instead suspended Petersen indefinitely from the practice of law with no possibility of reinstatement prior to February 1, 2008.

In *Petersen III*, the record contained Petersen's testimony in which he admitted that he suffered from substance abuse. The record further reflected that Petersen had been accepted to, but had not yet attended, a formal treatment program for substance abuse and that Petersen had not entered into a monitoring contract with NLAP.

In rejecting the referee's recommended discipline in *Petersen III*, we stated as follows:

> 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.

271 Neb. at 271, 710 N.W.2d at 653.

In *Petersen III*, we determined that "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." *Id.* We further imposed conditions upon Petersen in the event he sought reinstatement to practice, by requiring him to show "by independent third-party proof that [he] has continued active participation in a recovery program and has maintained abstinence from the use of alcohol during the period of suspension" and by requiring him to submit, for the approval of this court, "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 [NLAP] and the Counsel for Discipline." *Id.* at 271-72, 710 N.W.2d at 653.

In the instant case, the referee, in making his recommendation regarding Petersen's discipline, stated that he found Petersen

> to be sincere and remorseful for his past behavior. While it arguably took a longer period of time than it should have, it is clear that [Petersen] has admitted he has a serious problem with vodka and cocaine, [and] he has voluntarily entered and successfully completed an inpatient treatment program.

The referee further noted Petersen's employment as an intake counselor at SouthCoast, his regular attendance at support group meetings, and his entering into an NLAP monitoring contract. Finally, the referee noted that relator was not seeking Petersen's disbarment, but, rather, " 'an indefinite suspension . . . with the burden being placed on . . . Petersen [to] demonstrate to the Court his ability to return to the practice.' " In his report, the referee recommended that Petersen remain indefinitely suspended

with no possibility of reinstatement until February 1, 2008, and that in the event he is reinstated, such reinstatement be followed by a 2-year period of monitored probation.

No exceptions were filed to the referee's report. On October 17, 2006, relator filed a second motion for judgment on the pleadings, in which relator moved this court to enter judgment in conformity with the referee's report and recommendation.

ANALYSIS

Findings.

We note that all of Petersen's conduct at issue in this case occurred prior to the September 1, 2005, effective date of the Nebraska Rules of Professional Conduct and is, therefore, governed by the now-superseded Code of Professional Responsibility.

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Muia*, 271 Neb. 287, 711 N.W.2d 850 (2006). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Horneber*, 270 Neb. 951, 708 N.W.2d 620 (2006). Under Neb. Ct. R. of Discipline 10(I) (rev. 2005), if no answer is filed to the formal charges, or if the answer does not raise an issue of fact or law, the Nebraska Supreme Court may, in its discretion, dispose of the matter on its own motion or on a motion for judgment on the pleadings. *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005). Petersen filed an answer in which he admitted the allegations in the formal charges, and relator filed an initial motion for judgment on the pleadings. As previously noted, in an earlier order, this court granted relator's motion, in part, by adopting the facts alleged in the formal charges as the facts in this case. Given this record, we find clear and convincing evidence that Petersen's conduct, set forth above, violated DR 1-102(A)(1) and (5), DR 2-110(A)(3), DR 6-101(A)(2) and (3), DR 7-101(A)(2), and DR 9-102(A) and (B)(3), as well as his oath of office as an attorney, see § 7-104.

Factors Affecting Discipline to Be Imposed.

We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the

circumstances. *State ex rel. Counsel for Dis. v. Reilly*, 271 Neb. 465, 712 N.W.2d 278 (2006). Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. Counsel for Dis. v. Hogan*, 272 Neb. 19, 717 N.W.2d 470 (2006).

Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, rule 10(N).

With respect to the type of discipline appropriate in an individual case, we have stated that each case justifying the 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. Hogan, supra*. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id*. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors. *Id*.

Discipline to Be Imposed.

In his report, the referee recommended that with respect to the discipline to be imposed, Petersen should remain indefinitely suspended from the practice of law with no possibility of reinstatement until February 1, 2008, and that in the event he is reinstated, such reinstatement be followed by a 2-year period of monitored probation. No exceptions were filed to the referee's report, and relator has filed a motion for judgment on the

pleadings, requesting that this court enter discipline against Petersen in conformity with the referee's recommendation.

Certainly under the circumstances presented in the instant case, disbarment could be an appropriate discipline. The disciplinary rules that Petersen has violated constitute serious misconduct, involving, in part, the mishandling of client funds. See, e.g., *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 480, 704 N.W.2d 216, 224 (2005) (stating that "[m]isappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts, and typically warrants disbarment. . . . In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney"). Moreover, we note that this is the fourth disciplinary proceeding in which Petersen has appeared before this court.

Nonetheless, in cases like the present one involving serious misconduct, this court has on occasion imposed suspensions instead of disbarment. In *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000), we suspended W. Mark Jensen indefinitely with no possibility of reinstatement for 2 years, at which time he would be required to submit to a 2-year probationary period and to comply with several reinstatement conditions. Jensen neglected clients and cases, failed to deposit client funds into his trust account, and failed to deliver promptly funds or other property in his possession to his clients. In determining the appropriate disciplinary measure, we considered Jensen's conduct both in the underlying events of the case and in the disciplinary proceedings. He admitted his misconduct and took responsibility for his actions. He made "sincere and productive efforts to confront" an alcohol problem, satisfactorily completed an alcohol treatment program, and remained sober thereafter. *Id.* at 814, 619 N.W.2d at 848. We ordered a sanction less than disbarment because of the mitigating circumstances that were present.

In *State ex rel. NSBA v. Pullen*, 260 Neb. 125, 615 N.W.2d 474 (2000), we ordered an indefinite suspension (for at least 18 months) with a conditional reinstatement. Daniel E. Pullen neglected legal matters entrusted to him, lied to a client about a motion he had not filed, agreed to a child custody modification

without his client's consent, failed to return file materials to a client despite the client's repeated requests, and mishandled his trust account. In determining the appropriate sanction, we considered the following mitigating circumstances: Pullen "readily admitted his misconduct[,] acknowledged responsibility for his actions [and] acknowledged that his violations ha[d] harmed the public." *Id*. at 132, 615 N.W.2d at 479. Those acknowledgments reflected positively upon his attitude and character. *Id*. Pullen also admitted he was addicted to alcohol and had satisfactorily completed an alcohol treatment program.

In the instant case, we note that Petersen has readily admitted his misconduct. Unlike *Petersen III*, the record in the instant case reflects that Petersen has taken steps to modify the behavior that has led to the imposition of attorney discipline. Moreover, Petersen's efforts to rehabilitate himself appear sincere and successful to some degree. The record reflects that Petersen has continued his involvement in support groups dealing with his addiction and that he has entered into an NLAP monitoring contract.

The referee has recommended discipline essentially concurrent with the discipline imposed against Petersen in *Petersen III*, and relator agrees with that recommendation. We agree with the referee's recommendation, and we grant relator's motion for judgment on the pleadings.

Upon due consideration of the record, the court finds that Petersen should remain indefinitely suspended from the practice of law with no possibility of reinstatement until February 1, 2008. In the event Petersen seeks reinstatement following his suspension, he will be required to show by independent third-party proof that he has continued active participation in a recovery program and has maintained abstinence from the use of drugs and alcohol during the period of suspension. He will further be required to submit a 2-year probation plan, for the approval of this court, whereby Petersen's recovery program, his office management, and his compliance with the Nebraska Rules of Professional Conduct would be monitored by NLAP and the Counsel for Discipline.

CONCLUSION

Relator's motion for judgment on the pleadings is sustained. We find by clear and convincing evidence that Petersen violated

DR 1-102(A)(1) and (5), DR 2-110(A)(3), DR 6-101(A)(2) and (3), DR 7-101(A)(2), and DR 9-102(A) and (B)(3), as well as his oath of office as an attorney. It is the judgment of this court that Petersen should be and hereby remain indefinitely suspended from the practice of law with no possibility of reinstatement until February 1, 2008. In the event Petersen seeks and is granted reinstatement, his reinstatement will be conditioned on a 2-year period of monitored probation, subject to the terms set forth above. Petersen is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

IN RE APPLICATION OF CHARLES J. ANTONINI III FOR ADMISSION TO THE NEBRASKA STATE BAR.

726 N.W.2d 151

Filed January 19, 2007. No. S-34-060002.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000), the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court has delegated the administrative responsibility for bar admissions solely to the Nebraska State Bar Commission; however, the Nebraska Supreme Court remains vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Rules of the Supreme Court: Attorneys at Law: Proof.** The Nebraska Supreme Court rules for admission of attorneys place on the applicant the burden of proving good character by producing documentation, reports, and witnesses in support of the application.
4. **Attorneys at Law.** A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant for admission to the Nebraska State Bar may constitute a basis for denial of admission.
5. ____. Abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar.

Original action. Application denied.

Robert W. Mullin and David S. Houghton, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for applicant.

Jon Bruning, Attorney General, and Tom Stine for Nebraska State Bar Commission.

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

PER CURIAM.

I. NATURE OF CASE

Charles J. Antonini III appeals the decision of the Nebraska State Bar Commission (Commission) denying his application for admission to the Nebraska State Bar Association (Bar Association). Antonini claims that the Commission erred in finding that he does not possess the present character and fitness to be admitted to the Bar Association. We affirm the decision of the Commission.

II. BACKGROUND

Antonini obtained his law degree from Creighton University School of Law in May 2005, and he applied to take the July 2005 Nebraska bar examination. After reviewing Antonini's application, the Commission permitted Antonini to sit for the examination, pending an ongoing investigation into his character and fitness. The Commission's investigation into Antonini's character and fitness included an inquiry into three prior incidents in Antonini's past that resulted in criminal charges and university suspensions, as well as his honesty on his law school applications. The Commission also required Antonini to undergo a psychological and chemical dependency evaluation.

1. INVESTIGATION

(a) Prior Incidents

In his application, Antonini answered yes to the following questions:

> 9. Have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled or requested to resign or allowed to resign in lieu of discipline from any school above the elementary school level, college or university, or otherwise subjected to discipline

> by any such school or institution or requested or advised by any such school or institution to discontinue your studies therein?
>
> . . . .
>
> 11. Despite whether the record has been expunged, canceled or annulled, or whether no record was made, have you ever been subject to proceedings before a school honor court or council (or any similar body)?
>
> . . . .
>
> 20. Have there ever been or are there now pending any civil actions or have any judgments been filed against you or have you ever filed any civil action against another party?

The incidents giving rise to Antonini's answers to questions Nos. 9, 11, and 20 occurred between 1997 and 2002, during the time Antonini was living in California; then while enrolled as an undergraduate at George Washington University in Washington, D.C.; and, finally, while enrolled as a first year law student at Syracuse University in New York. These incidents are briefly summarized below for background purposes.

(i) 1997 Incident

In May 1997, when he was 19 years old, Antonini was arrested and charged with brandishing a deadly weapon and the destruction of property. Antonini ultimately pled no contest to destruction of property. These charges and conviction stemmed from an altercation between Antonini and another individual whose car Antonini damaged when he threw a bottle at it.

(ii) George Washington University Incident

In December 1997, Antonini, then a student at George Washington University, was charged with burglary, assault, making threats, possession of a prohibited weapon (a butter knife), destroying property (a chair), unlawful entry, and stalking. Antonini pled no contest to destruction of property and stalking, and the remaining charges were dropped. Antonini was ordered to attend domestic violence and anger management counseling, stay away from the victim, pay restitution for the chair, pay a $100 fine, and serve 9 months' probation. The record reflects that Antonini went to a fellow student's dormitory

room and an altercation between him and the student ensued. In the record before us, however, the specifics of the incident are conflicting.

The incident report prepared by the Washington, D.C., police department described the events as follows. After Antonini entered the victim's dormitory room uninvited, an altercation occurred and Antonini grabbed the victim, threw her onto the bed, and attempted to jump on her. The victim kicked Antonini off, and Antonini grabbed a knife and threw it at her. The victim attempted to leave, and Antonini blocked her path by picking up a chair and slamming it on the floor, causing it to break. Antonini then began striking himself on the head with the broken chair leg. The victim again attempted to leave, knocking Antonini over a chair. Antonini, however, continued to block her escape. The victim began to scream for help, and Antonini exited the room.

In his statement to the police, Antonini stated that the victim had not asked him to leave the room, that they had not engaged in a heated argument, that he had not prevented her from leaving the room, that he had not thrown a knife at her, that he had not pushed her onto the bed, and that he had not hit himself with the chair leg. He did admit, however, to breaking a chair.

In his application for admission to the bar, Antonini explained that in December 1997, he received a telephone call from the victim who was upset, that she threatened to kill herself, and that she invited him to her dormitory room. Antonini claimed that after the victim invited him into her room, their conversation became heated and, in his frustration, he knocked over the chair he was leaning on, causing one of its legs to break.

At the hearing, Antonini testified that he swung the chair to the side and that it hit a wall, causing one of the legs to break. Antonini stated that after he broke the chair, he told the victim he was leaving, and that as he started to walk out the door, the victim began to strike him with the chair leg. He further testified that as a result of this altercation, he was suspended from George Washington University for 6 months.

(iii) Syracuse University Incident

In May 2002, while a first-year law student at Syracuse University, Antonini was arrested and charged with aggravated

harassment and harassment. These charges, which Antonini testified were ultimately dropped, stemmed from an altercation between Antonini and two fellow law school classmates, Sarah W. and Richard S.

Antonini testified at the hearing that he had attempted to end a romantic relationship with Sarah. He stated that after he had been drinking, he called Sarah, who agreed to meet him. At that time, Richard got on the telephone and began calling Antonini names, including a "son of a bitch." Antonini testified that he then went to Sarah's residence and that pursuant to his request his roommate delivered a note to Sarah.

In his bar application, Antonini stated that when Richard called him a "son of a bitch," he demanded an apology, which Richard declined to give. He stated that he then drafted a note to Richard "demanding [Richard] apologize for his accusations and that [Antonini] no longer intended to carry on a relationship with [Sarah]." In contrast, in a written statement to the Syracuse University's department of public safety, Antonini stated that he wrote Richard a note "about [Richard's] backing up his allegations of [Antonini's] mother being a Bitch." The note states verbatim, including grammatical errors, "Son of A Bitch Whatch your Ass Bit — My MA! Fuck You Fag — I'll Fuck You up." Upon the Commission's receipt of the letter from Syracuse University, Antonini issued a written declaration, further explaining the letter. Antonini explained that the note directed at Richard was in response to language used by Richard when telling Antonini what Richard would do to Antonini and that it "returned his specific language to him."

As previously noted, Antonini faced criminal charges of aggravated harassment and harassment as a result of this incident. Antonini testified that these charges were ultimately dismissed. Antonini was also subject to a civil protection order which limited his contact with Sarah. Additionally, he faced disciplinary actions by Syracuse University on the ground that he violated the university's code of student conduct. The record reflects that Antonini was placed on what the university referred to as an interim suspension. Antonini requested an appeal of his interim suspension, and following the hearing, the university appeals

board issued an opinion in which the board affirmed Antonini's interim suspension.

(b) Law School Application Inaccuracies

Following Antonini's suspension from Syracuse University, Antonini applied to and was admitted to Creighton University School of Law.

In his application to the law school, Antonini answered yes to the following question: "Have you ever been convicted of any crime other than a minor traffic violation? (You must include all offenses involving alcohol. If you are not sure about the nature or the ultimate disposition of a particular charge, it is your responsibility to check with the courts before you answer.)" The application requested that if an applicant answered yes to this question, the applicant was to attach a separate sheet giving the dates, cause, outcomes, and circumstances related to the event. On a separate sheet, Antonini referred the reader to his statement in a prior application to Creighton University School of Law, explaining events occurring before his earlier application. In his earlier application, Antonini answered no to the above-quoted question. Accordingly, there was no statement to which a reader could refer for an explanation of Antonini's conviction.

At the hearing, Antonini testified that he had answered no to the question in his earlier application because he believed that because the convictions had been expunged, he had not been convicted. He also testified that he had not sought legal advice regarding what it meant to be convicted. With regard to the later application, Antonini testified that he answered yes to the question because he understood then that he had been convicted of the 1997 charges. He explained that in the later application, he referred to his earlier application for an explanation of the charges, even though he had answered no on that application because he thought that he had answered yes to the question in his earlier application.

Patrick Borchers, dean of Creighton University School of Law, testified on Antonini's behalf regarding Antonini's applications to that school. Borchers testified that since Antonini had applied to the law school, the school has changed its application so that it now asks an applicant if he or she has ever

been charged, even if that charge has been expunged. Borchers explained that the previous version of the application used by the law school, which asked applicants if they had ever been convicted of a crime, caused too many problems. This was because a minor offense may get expunged or dismissed, and there were many circumstances when applicants would answer no to the question in good faith and would subsequently have problems when they came before the Commission. When questioned by the Commission, however, Borchers testified that he did not learn the details of Antonini's convictions until approximately 1 to 2 weeks before the hearing, when he spoke with Antonini's attorney. Borchers also testified that at no time did Antonini come to him to request an amendment to his law school applications.

2. Denial of Admission

Antonini received a passing score on the bar examination, but was denied admission to the Bar Association on the basis that he did not possess the present character and fitness for admission. In particular, the Commission concluded that Antonini has significant deficiencies in the following eligibility requirements set forth in Neb. Ct. R. for Adm. of Attys. 3 (rev. 2005), which states in relevant part:

> (c) The ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct;
>
> . . . .
>
> (f) The ability to exercise good judgment in conducting one's professional business;
>
> (g) The ability to avoid acts that exhibit disregard for the health, safety, and welfare of others;
>
> . . . .
>
> (j) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

Pursuant to Neb. Ct. R. for Adm. of Attys. 10 (rev. 2000), Antonini requested a hearing on the denial of his admission. The hearing was held on November 9, 2005, and continued until March 29, 2006. Following Antonini's appeal hearing, the Commission again denied Antonini admission to the Bar Association. This denial was based on Antonini's failure to

comply with rule 3(a), which is "[t]he ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations," as well as rules 3(c), (f), (g), and (j).

Pursuant to rule 10 and Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000), Antonini perfected the present appeal.

III. ASSIGNMENTS OF ERROR

Antonini assigns that the Commission erred in concluding that he does not possess the present character and fitness to be admitted to the Bar Association.

IV. STANDARD OF REVIEW

[1] Under rule 15, the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. *In re Application of Roseberry*, 270 Neb. 508, 704 N.W.2d 229 (2005).

V. ANALYSIS

[2] This court has delegated the administrative responsibility for bar admissions solely to the Commission. *In re Application of Silva*, 266 Neb. 419, 665 N.W.2d 592 (2003). However, this court remains vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *Id*.

Pursuant to Nebraska statutory law, "[n]o person shall be admitted . . . unless it is shown to the satisfaction of the Supreme Court that such person is of good moral character." Neb. Rev. Stat. § 7-102(1) (Cum. Supp. 2006). Rule 3, which governs the admission of attorneys, describes the applicable standards for character and fitness of attorneys as follows:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission.

The rule 3 requirements include:

> (a) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
>
> . . . .
>
> (c) The ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct;
>
> . . . .
>
> (f) The ability to exercise good judgment in conducting one's professional business;
>
> (g) The ability to avoid acts that exhibit disregard for the health, safety, and welfare of others;
>
> . . . .
>
> (j) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

The character and fitness standards are further clarified by appendix A to the rules for admission of attorneys:

> The primary purposes of character and fitness screening before admission to the bar of Nebraska are to assure the protection of the public and to safeguard the justice system. . . . The public is adequately protected only by a system that evaluates character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their attorneys.

[3,4] Our "rules place on the applicant ' "the burden of proving good character by producing documentation, reports, and witnesses in support of the application." ' " *In re Application of Roseberry*, 270 Neb. 508, 516, 704 N.W.2d 229, 235 (2005), quoting *In re Application of Silva, supra*. " ' "A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission." ' " *Id*. at 516, 704 N.W.2d at 234, quoting *In re Application of Silva, supra*.

[5] Reflecting adversely on Antonini's character and fitness to practice law is his history of intemperate behavior. We have held that " 'abusive, disruptive, hostile, intemperate, intimidating,

irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar.' " *In re Application of Silva*, 266 Neb. at 427, 665 N.W.2d at 598, quoting *In re Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367 (1996).

Antonini has been involved in three serious incidents involving abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, and turbulent behavior. In each of these incidents, Antonini showed complete disregard for others as well as a lack of self-control. Two of these incidents occurred approximately 9 years ago; however, the most recent occurred in 2002, while Antonini was a first-year law student.

The court is also concerned with Antonini's lack of candor. The record reflects that Antonini's admission and description of the incidents described above have been less than forthcoming during his law school and bar application processes.

We have stated that a lack of candor in completing applications to the bar may constitute a ground for a finding of lack of requisite character and fitness. See, *In re Application of Silva*, 266 Neb. 419, 665 N.W.2d 592 (2003); *In re Application of Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993).

As previously described, Antonini was less than candid in his applications to Creighton University School of Law when he failed to provide full disclosure of his misdemeanor record. Antonini's explanation as to why he failed to provide full disclosure is less than credible. Antonini was also not fully candid in his bar application when he failed to honestly describe the nature of the note he wrote to Richard. In his application, Antonini described the note as a demand for an apology, but the note can only be interpreted as a threat, not a demand for an apology.

Antonini has continually tried to justify and gloss over his lack of candor. We therefore conclude that the Commission did not err in determining Antonini should not be admitted to the Bar Association.

APPLICATION DENIED.

STATE OF NEBRASKA, APPELLEE, V. JESSE M. GUTIERREZ, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. ADAM P. SOMMER, APPELLANT.

726 N.W.2d 542

Filed January 26, 2007. Nos. S-05-979, S-05-980.

1. **Equal Protection: Jurors: Discrimination.** The Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race.
2. **Juries: Discrimination: Prosecuting Attorneys: Proof.** The evaluation of whether a party has used peremptory challenges in a racially discriminatory manner is a three-step process. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. A defendant satisfies the requirements of this step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Second, if the requisite showing has been made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination. The final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
3. **Pretrial Procedure: Witnesses: Intent.** The intent of Neb. Rev. Stat. § 29-1929 (Cum. Supp. 2006) is to ensure that criminal defendants have the opportunity to prepare to meaningfully confront the testimony of a jailhouse informer at trial and challenge the witness' credibility.
4. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.
5. ____: ____. A trial court's decision with respect to Neb. Rev. Stat. § 29-1929 (Cum. Supp. 2006) will not be reversed in the absence of an abuse of discretion.
6. **Pretrial Procedure: Evidence: Prosecuting Attorneys.** Whether a prosecutor's late disclosure of evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.
7. **Motions for Continuance: Evidence.** When a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court.

8. **Trial: Evidence: Appeal and Error.** The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion.
9. **Trial: Evidence: Testimony: Proof.** Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.
10. ____: ____: ____: ____. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice.
11. **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.
12. **Conspiracy: Rules of Evidence.** To be admissible under Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 1995), the statements of a coconspirator must have been made while the conspiracy was pending and in furtherance of its objects. If the statements took place after the conspiracy had ended, or if merely narrative of past events, they are not admissible.
13. ____: ____. For an out-of-court statement to be admissible under Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 1995), there must be evidence that there was a conspiracy involving the declarant and the nonoffering party and that the statement was made during the course and in furtherance of the conspiracy.
14. **Conspiracy: Hearsay: Evidence.** Before the trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence.
15. **Conspiracy: Rules of Evidence.** Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 1995), is irrelevant to the direct testimony of a coconspirator.
16. **Trial: Evidence: Appeal and Error.** Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal.
17. **Conspiracy: Rules of Evidence: Words and Phrases.** The "in furtherance" language of Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 1995), is to be construed broadly.
18. **Conspiracy: Rules of Evidence.** Statements made by a coconspirator in furtherance of avoiding capture or punishment are made in furtherance of the conspiracy within the meaning of Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 1995).
19. **Trial: Evidence: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.
20. **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.

21. **Conspiracy: Rules of Evidence.** A coconspirator's idle chatter or casual conversation about past events is generally not considered to be in furtherance of the conspiracy for purposes of Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 1995).
22. **Jury Instructions: Appeal and Error.** 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.
23. **Courts: Juries.** The decision whether to reply to questions from the jury regarding the applicable law is entrusted to the discretion of the trial court.
24. **Jury Instructions.** If it becomes necessary to give further instructions to the jury during deliberation, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.
25. **Trial: Waiver: Appeal and Error.** The failure to make a timely objection waives the right to assert prejudicial error on appeal.
26. **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.
27. **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.
28. **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.
29. **Pretrial Procedure: Evidence.** Pursuant to Neb. Rev. Stat. § 29-1912 (Reissue 1995), 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. In order that the defendant receive a fair trial, requested and material information must be disclosed to the defendant.
30. **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.
31. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.
32. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
33. **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.

34. **Trial: Expert Witnesses.** When an opinion involves scientific or specialized knowledge, this court 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).
35. ____: ____. Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), 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.
36. **Trial: Evidence.** Only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.
37. **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.
38. ____: ____: ____: ____. 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.
39. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

Appeals from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Michael P. Meckna and Jill A. Daley, of Gallup & Schaefer, for appellant Jesse M. Gutierrez.

Jerry M. Hug and Alan G. Stoler, P.C., L.L.O., for appellant Adam P. Sommer.

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

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

GERRARD, J.

I. NATURE OF CASE

In separate informations filed October 1, 2004, Jesse M. Gutierrez and Adam P. Sommer (collectively the defendants) were each charged with two counts of first degree murder, one count of attempted first degree murder, and three counts of use of a deadly weapon to commit a felony in connection with the killings of Daniel Lopez and Maria Ojeda and the attempted killing of Marcos Lucero. The cases were consolidated for jury trial, and the jury returned verdicts of guilty on all charges. Both of the defendants were sentenced to consecutive terms of life imprisonment for the first degree murder convictions and consecutive terms of 50 to 50 years' imprisonment for each of the remaining convictions. Both of the defendants have appealed. Because the cases were tried together and the defendants' appellate arguments are substantially the same, we consider these appeals together. For the reasons that follow, we affirm the convictions and sentences in both cases.

II. BACKGROUND

Generally described, the State's theory of the cases was that Lucero, Lucero's nephew Gutierrez, and Gutierrez' friend Sommer had been involved in the transportation and distribution of marijuana. Lucero, who lived in Arizona, obtained marijuana from Mexico through his connections there and transported it to Nebraska for sale. Differences arose between Gutierrez and Lucero, so Lucero ended his partnership with Gutierrez and established a partnership with Lopez. The State theorized that Gutierrez and Sommer tried to kill Lucero so they could stay in business by dealing with Lucero's connections directly.

Lucero explained at trial that he had been involved in smuggling and used his connections to establish a marijuana business with Gutierrez. Sommer helped, as did Ojeda, Lucero's girl friend. David Bowen, a friend of Gutierrez, testified that in November 2003, Gutierrez invited him to join the marijuana distribution business, and he agreed. Bowen was introduced to Lucero, who served as Bowen's contact in Arizona for obtaining marijuana. Bowen lived in a house on Drexel Street in

Omaha that was used to distribute the marijuana. Bowen explained that Carlos Carreon, Ojeda's brother, was at the top of the drug operation.

Lucero said that from the beginning, Gutierrez shortchanged Lucero the money that Gutierrez was supposed to pay him after the marijuana was distributed. Later, marijuana started to disappear as well, but Lucero did not confront Gutierrez about his suspicions. After Ojeda made a trip to Omaha, however, Ojeda told Lucero that Gutierrez had shortchanged her, treated her disrespectfully, and made sexual advances toward her. Lucero finally confronted Gutierrez, and then told Sommer that he was taking his business elsewhere. But Lucero told Gutierrez that he still expected Gutierrez to pay the money that Gutierrez owed. Bowen confirmed that in the days prior to March 9, 2004, Gutierrez and Lucero had argued and that Gutierrez had told Bowen that Gutierrez owed Lucero money. Lucero said that Lopez, who also lived in Arizona, was a close friend and that when Gutierrez became unreliable, Lucero and Lopez agreed to a new arrangement to distribute marijuana in the Omaha area. Eventually, Lucero and Ojeda came to Omaha to attempt to collect the money Gutierrez owed. Lucero tried to call Gutierrez and searched for him, but was unable to reach him.

Nicole Van Woensel, a girl friend of Gutierrez, testified that in January or February, Lucero had contacted her demanding the money that Gutierrez owed Lucero. Van Woensel testified that

> the conversation that I had with [Lucero] was [Lucero] asking me for money, wanting me to wire him approximately $1500, and when I told him I didn't have that money, he started telling me that [Gutierrez] was shorting money on the loads and that [Gutierrez] wasn't paying on time and that [Gutierrez] wasn't keeping in contact with [Lucero] and [Ojeda] and so there was just a lot of conflict. And [Gutierrez] was very upset that I had talked to him about that and told me that [Lucero] was going crazy and he had to get rid of him and told me that if [Lucero] ever called me again, not to answer and just pretend like we had broken up.

John Griego testified that he had been brought into the marijuana business by Gutierrez and transported marijuana for him. On March 8 or 9, 2004, Griego gave Gutierrez' new telephone

number to Ojeda. Lucero directed Ojeda to call, hoping that Gutierrez would answer because Gutierrez might not recognize Ojeda's telephone number. Ojeda reached Gutierrez and discovered that Gutierrez was in Arizona.

Lopez had also traveled to Omaha with his fiancée, Esperanza Carranza. They had planned to leave Omaha on March 8, 2004, but had been unable to travel, and Lopez made arrangements with Lucero to get back to Arizona. Lucero picked up Lopez and Carranza from their hotel and took them to a restaurant. From there, they went to a house rented by Lucero and Lopez for Thomas Romero, who was also involved in the marijuana operation, and Lopez and Carranza spent the night of March 8 there with Lucero and Ojeda.

The next day, Lucero used the new number to call Gutierrez again, from a pay telephone, and said that Gutierrez sounded "surprised" when he answered the telephone and found it was Lucero. Lucero again demanded payment, and Gutierrez said Lucero "would be contacted" by Sommer shortly, because Sommer and the money were in Omaha. Sommer called Lucero and told Lucero to meet him at Bowen's house on Drexel Street.

Lucero described how he and Lopez went to Bowen's house, but Sommer was not there. Bowen testified that Lucero and Lopez knocked on Bowen's door, claiming that Sommer had told them to come there to pick up their money. Lucero tried to call Gutierrez and Sommer, but was unable to reach them. Then, after leaving, Lucero received another call from Sommer, who told him to come back to the house to meet Sommer and get the money he was owed. They returned, and again Bowen told them that Sommer was not there.

By the time Lucero and Lopez left Bowen's house on Drexel Street for the second time, Lopez was driving and Lucero was riding in the front passenger seat, while Ojeda was in the back seat on the driver's side and Carranza was on the passenger's side. Lucero explained that after they drove away the second time, Sommer called again and suggested meeting at a nearby restaurant. Carranza said that Lucero received the call just after leaving the house, as they reached a stop sign. Then, Lucero said, "I still had the phone in my hand when all the bullets started flying." Someone began shooting at the vehicle, shattering the

windows on the driver's side. Lopez and Ojeda were shot. Because the driver had been shot, the vehicle rolled forward out of control, until Lucero gained control of the vehicle and stopped it. Carranza called the 911 emergency dispatch service, but Lopez and Ojeda died of gunshot wounds. Lucero waited at the scene for the police. Telephone records are consistent with Lucero's testimony regarding the calls that were made.

Det. Ken Kanger was working for the Omaha Police Department's homicide/assault unit at the time and was called to investigate the killings. Kanger was informed that the victims had been at a house near 19th and Drexel Streets, later identified as Bowen's, and that broken glass and spent shell casings had been found a couple of blocks away, at the intersection of 21st and Drexel Streets. The glass fragments were found in the street, while the shell casings were found behind some bushes at the corner of the intersection. The victims' vehicle had been found approximately four blocks away. Several bullet holes were found in the vehicle, as were several bullet jackets and fragments. In short, the physical evidence suggested that the victims had left Bowen's house at 19th and Drexel Streets and driven to the intersection of 21st and Drexel Streets. At that intersection, the perpetrators had shot at the vehicle from behind the bushes. The vehicle continued moving until it came to rest some distance away.

Christina Mace, a girl friend of Gutierrez, testified that in late February, Gutierrez told her that he and Lucero were arguing because of Ojeda and because Gutierrez owed Lucero money. Mace said that she traveled to Arizona in March 2004, and Gutierrez joined her on March 8. Gutierrez made a trip to Mexico and explained that he had gone to talk to someone about "cutting out" Lucero, because, according to Gutierrez, Lucero had threatened his life. While in Arizona, Gutierrez used an automatic teller machine, and Mace testified that Gutierrez explained he had to do that "so they would know he was in Arizona." Mace said that later, after a telephone call to Omaha, Gutierrez told her that "it's done," that "they," meaning Sommer and a companion, had killed Lucero. However, after Gutierrez and Mace got back to Omaha, Gutierrez and Sommer told Mace that Lucero was not hit and that two other people, including

Ojeda, had been killed instead. Mace also overheard a conversation between Gutierrez and Sommer, in which Sommer wanted more money and Gutierrez refused because Sommer "didn't do the job right."

The day after the killings, Gutierrez called Griego and told him to get his family out of town because "they just killed [Ojeda] last night." Later, Gutierrez had dinner with Van Woensel and said that he had gotten permission from Carreon, Ojeda's brother and Lucero's marijuana supplier, to take Lucero "out of the game" before the killings. Van Woensel said Gutierrez explained that

> some shit went down up in Omaha and he didn't know exactly what happened. [Gutierrez] said that [Ojeda] had been murdered and [Lucero]'s driver had been murdered and he didn't know what happened to [Lucero]. He told me that he was in Arizona. He had specifically gone down there so that there was no way they could pin it on him. He said he had plane tickets and transaction receipts and stuff from down there that proved his whereabouts for the murders. He said that he was very scared because [Carreon] was coming after him and there had already been threats made. He said that once he could explain to [Carreon] what happened and that [Ojeda] was not supposed to be involved in the murders, that everything would be all right. He told me that — he told me that [Ojeda] was not supposed to be up in Omaha; that it was only supposed to be [Lucero] and [Lucero's] driver in the attack.

Daniel King had been involved in purchasing substantial quantities of marijuana from Gutierrez and reselling it. King testified that Gutierrez came to King's apartment in early April 2004. Gutierrez said the police were looking for him because they suspected him of murder. According to King, Gutierrez denied involvement in the killings, but said "his boy," whom King took to mean Sommer, had been involved. However, Gutierrez also said that "it was something that had to be done." King asked again whether Gutierrez had been involved, to which Gutierrez replied, "what do you think?" Gutierrez asked if he could stay at King's residence, but King refused.

On July 2, 2004, Kanger received a telephone call from Christopher Haukaas, who was in the Douglas County Correctional Center. Kanger met with Haukaas, who provided information about the shooting. Haukaas testified that he was a friend of Sommer and had become involved in selling marijuana with him.

Sommer introduced Haukaas to Gutierrez in January or February 2004. Haukaas said that during their conversation, Gutierrez made references to having Lucero "taken out" so that Gutierrez could take over his business. Essentially, Gutierrez indicated that with Lucero out of the way, Gutierrez could go directly to the people who supplied Lucero with marijuana.

On the evening of March 9, 2004, Haukaas was at his girl friend's apartment. Sommer came to the apartment and took Haukaas to pick up some marijuana. On the way, Sommer used pay telephones to make some calls; in particular, he used a pay telephone at 60th and Grover Streets. After the call, Sommer told Haukaas that he wanted Haukaas to steal a car. Haukaas agreed, and they stole a white Buick. Sommer had a bag full of money and two guns, one of which he gave to Haukaas. The two drove to a location near Drexel Street, where they waited in some bushes, and Sommer made some calls on Haukaas' cellular telephone.

Telephone records corroborated Haukaas' testimony and established that a telephone call was made to Lucero's telephone from a pay telephone at 60th and Grover Streets. Telephone records also show that around the time of the pay telephone call, two cellular telephone calls were made from Sommer's cellular telephone to Gutierrez' telephone and that Sommer's calls were connected through the southeast sector of a cell tower at 71st Street and West Center Road, a little over a mile northwest of 60th and Grover Streets.

Haukaas said that he was expecting a marijuana deal to occur. A truck pulled up, and Haukaas went through the bushes toward the street. Then, Haukaas said, he heard gunshots and saw Sommer shooting at the truck. Haukaas drew his gun and fired in the same direction as Sommer. Haukaas and Sommer ran back to the stolen car, and Sommer directed Haukaas to drive in the direction of the truck, saying "I have to get him, I have to get

him. Just follow him." According to Haukaas, after they left the scene, Sommer explained that "that was [Gutierrez'] uncle and we were going to get paid for what we did if we got him." Haukaas refused, and sped in the other direction. Haukaas said that they went to an apartment complex near the 60th and Grover Streets location where Sommer had used the pay telephone and that they called a friend for a ride home.

Haukaas continued to associate with Sommer and Gutierrez after the killings. Sommer later told Haukaas that they had killed the wrong people.

Based on Haukaas' information, Kanger investigated the possibility of a stolen white Buick and found that a Buick consistent with Haukaas' information had been reported stolen on March 9, 2004, and recovered from the approximate location where Haukaas said the vehicle had been abandoned. Telephone records were also consistent with the rest of Haukaas' testimony, indicating that approximately 30 minutes after Carranza called 911, Sommer's cellular telephone received a call from Gutierrez' telephone, and that the call was connected to Sommer's telephone through the cell tower at 71st Street and West Center Road. Ballistics evidence also established a connection between the weapons used to kill Ojeda and Lopez and the weapons fired by Sommer and Gutierrez on rural property owned by Sommer's relatives.

Testifying for the defense, Kip Kelly said that he had been Romero's boyfriend and that Romero had said to him that Lopez had been killed because he "knew too much and they wanted to shut him up." Romero denied both the statement and the romantic relationship. In addition, Sommer's parents and fiancée offered alibi testimony, generally indicating that Sommer was home on the night of the killing.

III. ASSIGNMENTS OF ERROR

Both of the defendants assign, consolidated and restated, that the district court erred in (1) overruling their *Batson* objections to the removal of juror No. 66; (2) denying their motions to exclude Haukaas' testimony because of the State's alleged failure to comply with the notice requirements applicable to jailhouse informers; (3) permitting a chart as a demonstrative

exhibit; (4) overruling their objections to the admission, as coconspirator statements, of purported hearsay; and (5) issuing supplemental instructions to the jury. Separately, Gutierrez assigns that the court erred in (6) denying his request for a continuance and motion for mistrial based on incomplete discovery. Sommer assigns that the court erred in (7) overruling his relevance and *Daubert* objections to the admission of cellular telephone records. Finally, both of the defendants assign that the court erred in (8) finding the evidence to be sufficient to support the verdicts and (9) committing cumulative error.

IV. ANALYSIS

1. *Batson* Objection

(a) Background

Juror No. 66 was single and had worked for a manufacturing company for about 1½ years, and before that job, she had done clerical work. She had attended technical college, but had not obtained a degree, and has one child. It appears from the record that juror No. 66 was Hispanic and lived near the scene of the killing. It is also worth noting that juror No. 200, another juror who was struck by the State, lived approximately six blocks from the scene of the killing.

After the parties exercised their peremptory strikes, both of the defendants joined in a *Batson* objection to the State's use of a peremptory strike to remove juror No. 66 from the venire. See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The court responded:

> It's my understanding that under a Batson motion, I have to find that there is — let's see. I don't want to say this off the cuff. I have to find that the facts and other relevant circumstances give rise to an inference that the prosecutor used those — or I guess in this case the challenge to exclude a potential juror because of race or in this case [ethnicity].
>
> I looked up that juror's address and it's . . . right in the heart of the area where the shooting in this case took place. I am not sure that I should even go any further with this, but because of the fact that you have made the motion and it's a very serious case, I will ask the State to articulate

> your reason, but, frankly, I am not sure there is even a necessity, given the address of the person.

The State explained that it had exercised strikes against both juror No. 66 and juror No. 200 because they lived close to the relevant area. The State also explained that juror No. 66 was single, had a short work history, and had "very little or less education than some of the other women that we kept." Based on that explanation, the court overruled the *Batson* objection.

(b) Standard of Review

A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility. *State v. Robinson, ante* p. 582, 724 N.W.2d 35 (2006). A trial court's determination that there was no purposeful discrimination in a party's use of his or her peremptory challenges and a trial court's determination of the adequacy of a party's neutral explanation of its peremptory challenges are factual determinations that will not be reversed on appeal unless clearly erroneous. *Id.*

(c) Analysis

[1] In *Batson*, the U.S. Supreme Court held that the Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race. See *Robinson, supra*. The defendants argue that the State exercised a peremptory challenge to remove juror No. 66 solely on account of race.

[2] The evaluation of whether a party has used peremptory challenges in a racially discriminatory manner is a three-step process. See, *Rice v. Collins*, 546 U.S. 333, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006); *Robinson, supra*. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. See *id*. A defendant satisfies the requirements of this step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. *Johnson v. California*, 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005); *Robinson, supra*. Second, if the requisite

showing has been made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. See, *Rice, supra*; *Robinson, supra*. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. *Id*. Third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination. See *id*. The final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. *Id*.

In these cases, while there was some question whether the defendants had made a prima facie case at the first step in the analysis, the State was nevertheless asked to tender a race-neutral explanation for the strike. The trial court then evaluated the persuasiveness of that explanation in determining, pursuant to the third step, that the defendants failed to carry their burden of proving a racial motivation for the strike. Thus, whether or not the defendants made a prima facie showing is moot, and we consider whether the trial court's final determination was clearly erroneous. See, *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); *State v. Robinson, ante* p. 582, 724 N.W.2d 35 (2006).

For Gutierrez' part, he makes a bare assertion that the State "propounded a bogus explanation" to remove juror No. 66 from the jury on account of her race. Brief for appellant Gutierrez at 63. But a prospective juror's residence close to the scene of the crime can be a legitimate race-neutral explanation for a strike. See *Robinson, supra*. Gutierrez offers nothing in the way of argument as to what in the record affirmatively demonstrates that the court clearly erred in believing the State's explanation. Nor, upon our review, is there much in the record that would support such an argument.

In other cases, for example, courts reviewing a *Batson* determination have relied on factors such as (1) whether members of the relevant racial or ethnic group served unchallenged on the jury and whether the striking party struck as many of the relevant

racial or ethnic group from the venire as it could, (2) whether there is a substantial disparity between the percentage of a particular race or ethnicity struck and the percentage of its representation in the venire, and (3) whether there is a substantial disparity between the percentage of its representation on the jury. See, e.g., *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005), *cert. denied* 549 U.S. 952, 127 S. Ct. 380, 166 L. Ed. 2d 268 (2006). This is because the act of striking jurors of a particular race takes on meaning only when coupled with other information, such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck. See *id*.

The record in these cases does not permit us to consider such a context for the State's peremptory strikes, because the defendants' perfunctory *Batson* challenge established little more than that a single Hispanic member of the venire had been removed. We have no information about the racial composition of the venire or the jury that was sworn. The only information the record contains about peremptory strikes is that jurors Nos. 66 and 200 were struck by the State—the remaining strikes are unknown. Therefore, the record in these cases does not demonstrate that the court clearly erred in determining that the defendants failed to carry their burden of proving purposeful discrimination.

Sommer's argument is slightly different. Although he appears to concede that juror No. 66's residence near the crime scene was a valid reason for the State's strike, Sommer argues that the district court aided the State by propounding its own race-neutral explanation for the strike before one was offered by the State. From that, Sommer concludes that the *Batson* challenge should have been sustained.

But Sommer is simply incorrect in arguing that the court erred in commenting on the strength of the defendants' prima facie showing that the State had engaged in purposeful discrimination. A trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial. *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996). Moreover, Sommer seems to be conflating the merits of his *Batson* challenge with the way in which it was overruled. Even

if the trial judge acted improperly in ruling on the *Batson* challenge, the problem would be the impropriety, not the State's use of peremptory strikes. In other words, the issue in this appeal is still whether the court's ultimate determination on the *Batson* challenge was clearly erroneous.

And more significantly, Sommer did not object to the court's remarks. One cannot know of improper judicial conduct, gamble on a favorable result as to that conduct, and then complain that he or she guessed wrong and does not like the outcome. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). If Sommer believed that the trial judge's conduct was improper, it was incumbent upon Sommer to move for recusal or mistrial at the time of the alleged misconduct—or, since trial had not yet begun, at least ask for a new venire. He did not do so then, so he is precluded from demanding a new trial now.

The district court did not clearly err in crediting the State's race-neutral explanation for its use of a peremptory strike on juror No. 66, and we reject Sommer's claim that the court erred in commenting on the defendants' prima facie showing of purposeful discrimination. The defendants' assignments of error with respect to the overruling of their *Batson* challenge are without merit.

2. "Jailhouse Informer" Statute

(a) Background

On March 15, 2005, both of the defendants joined in a motion to exclude Haukaas' testimony, pursuant to Neb. Rev. Stat. § 29-1929 (Cum. Supp. 2006). The defense took the position that Haukaas was a "jailhouse informer" within the meaning of the statute and that the State had not met the 10-day statutory notice requirement. More precisely, the defendants argued that although the State had notified them 11 days prior to trial that Haukaas would testify pursuant to a plea agreement that had not yet been memorialized, the defendants had not been notified of the specific terms of the State's offer. However, at Haukaas' deposition, Gutierrez' counsel had received actual notice of the terms of the offer from Haukaas. The district court overruled the defendants' motion. At trial, Haukaas explained that he had been charged with two first degree murders, attempted first degree

murder, robbery, and two weapons charges. In exchange for his testimony, the charges against Haukaas were to be reduced to a second degree murder charge and a weapons charge.

(b) Analysis

Neb. Rev. Stat. § 29-1928 (Cum. Supp. 2006) defines a "jailhouse informer" as "a person in custody as: An accused defendant, a convicted defendant awaiting sentencing, a convicted defendant serving a sentence, or a criminal suspect." The parties do not dispute that Haukaas was a jailhouse informer within the meaning of the statute. Section 29-1929 provides:

> Before the testimony of a jailhouse informer is admissible in court, the following requirements must be met:
>
> At least ten days before trial, the state shall disclose to the person against whom the jailhouse informer will testify, or to such person's counsel:
>
> (1) The known criminal history of the jailhouse informer;
>
> (2) Any deal, promise, inducement, or benefit that the state or any person acting on behalf of the state has made or may make in the future to the jailhouse informer;
>
> (3) The specific statements allegedly made by the person against whom the jailhouse informer will testify and the time, place, and manner of disclosure;
>
> (4) All 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; and
>
> (5) Whether at any time the jailhouse informer recanted testimony or statements and, if so, a transcript or copy of such recantation.

The dispute in these cases arises from the requirement of § 29-1929(2) that at least 10 days before trial, the State should disclose "[a]ny deal, promise, inducement, or benefit that the state or any person acting on behalf of the state has made or may make in the future to the jailhouse informer." The defendants argue the State did not comply with this requirement.

We begin our analysis of this issue by considering the appropriate standard of review. The Legislature explained that §§ 29-1928 and 29-1929 were enacted because "the interests of justice may be thwarted by unreliable testimony at trial." § 29-1928. The Legislature further found that "the testimony of a jailhouse informer is sometimes unreliable. A jailhouse informer, due to the receipt or promise of a benefit, is presumed to provide testimony that may be unreliable." *Id*. Consequently, the Legislature determined that "[t]here is a compelling state interest in providing safeguards against the admission of testimony the reliability of which may be or has been compromised through improper inducements." *Id*.

[3] Those safeguards are present in § 29-1929. It is evident, from the requirements of § 29-1929, that the intent of this section is to ensure that criminal defendants have the opportunity to prepare to meaningfully confront the testimony of a jailhouse informer at trial and challenge the witness' credibility. See, also, *Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2000) (explaining that court-adopted procedure identical to § 29-1929 was intended "to ensure complete disclosure so that counsel will be prepared to cross-examine an informant-witness"). In this respect, § 29-1929 is effectively a discovery provision, insofar as "[t]he discovery process . . . provides an opportunity for pretrial preparation so that a litigant may conduct an informed cross-examination." See *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 846, 636 N.W.2d 170, 177 (2001). See, also, *State v. Eskew*, 192 Neb. 76, 218 N.W.2d 898 (1974). Exclusion of testimony based upon a failure to comply with § 29-1929 is effectively a statutory sanction for failure to comply with a discovery requirement. Compare, e.g., Neb. Rev. Stat. §§ 29-1912 and 29-1919 (Reissue 1995).

[4,5] The general rule is that trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion. See *Martindale v. Weir*, 254 Neb. 517, 577 N.W.2d 287 (1998). We conclude that by extension, that standard of review is also applicable here. Therefore, we hold that a trial court's decision with respect to § 29-1929 will not be reversed in the absence of an abuse of discretion. The same

principles lead us to conclude that the district court in this case did not abuse its discretion, because the State timely notified the defendants that Haukaas would testify pursuant to a plea agreement and Gutierrez was actually notified, more than 10 days before trial, of the terms of the plea agreement.

We addressed an argument similar to the defendants' in *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). In *Larsen*, the defendant filed a notice of intention to rely upon an insanity defense, as required by Neb. Rev. Stat. § 29-2203 (Reissue 1995). The State obtained an ex parte order requiring the defendant to undergo a mental examination. Because the State did not notify defense counsel of its request for the order, as § 29-2203 required, defense counsel was denied the opportunity to be present at the examination. On that basis, the defendant moved for exclusion of the expert witness evidence. *Larsen, supra*.

[6] However, we rejected the defendant's argument, finding that defense counsel's effective exclusion from the examination was not prejudicial. Citing § 29-1912, we explained that whether a prosecutor's late disclosure of evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal. *Larsen, supra*. While recognizing that the circumstances placed a "heavy burden" on defense counsel, we determined that because the defendant was provided with the opportunity to depose the witness prior to his testimony, the defendant had not been prejudiced. *Id*. at 545, 586 N.W.2d at 651. Thus, we concluded the trial court had not abused its discretion by overruling the defendant's motion to exclude the expert witness testimony. *Id*.

The defendants' objections in these cases are even less compelling than the argument made in *Larsen*. Here, the record affirmatively demonstrates that the defendants were not prejudiced by the fact that the State did not inform the defendants of the terms of Haukaas' plea agreement more than 10 days prior to trial. The State did inform the defendants, by letter dated March 4, 2005, that although it had "not finalized any deal, promise inducement or benefit in exchange for [Haukaas'] testimony,"

the State did "expect to have a written agreement with . . . Haukaas prior to March 10th, 2005," and would "transmit that agreement to you as soon as it is completed." Gutierrez, through Haukaas' deposition, had actual knowledge of the terms of the State's offer.

[7] Nor did the defendants move for a continuance to enable them to prepare to cross-examine Haukaas. When a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). The defendants' failure to move for a continuance indicates that they were less concerned with their ability to cross-examine Haukaas than they were with attempting to preclude his testimony entirely. While this is understandable, it is not the intent of § 29-1929. So long as the defendants were meaningfully prepared to cross-examine Haukaas, they were not prejudiced by any belated disclosure.

At oral argument, Sommer's counsel contended, for the first time, that he was not present at Haukaas' deposition. Interestingly, neither of the defendants denied, at trial, having actual notice of the terms of Haukaas' plea agreement. But in any event, if the defendants felt that the notice they were given was inadequate, they should have either asked for a continuance to prepare for trial or explained how they were prejudiced in a way that a continuance could not have cured. They did neither.

Even now, the defendants have not explained how they were prejudiced by any delay in disclosing the terms of the plea agreement. Section 29-1929 permits a defendant to effectively cross-examine a jailhouse informer by requiring notice of particular data that the Legislature have deemed necessary to evaluate the jailhouse informer's credibility. The only required data that the defendants claim were missing from the State's notice were the precise terms of the State's plea offer, which Gutierrez obtained from Haukaas. Even had the defendants only learned the terms of the agreement at trial, they do not explain how more advance notice would have substantially assisted them in their impeachment of Haukaas' testimony, given the other information available to them. See *id*. And, in point of fact, our review of their cross-examination of Haukaas indicates that

they were able to make effective use of the information provided to them, including the terms of the plea agreement.

We do not condone the State's failure to timely notify the defendants of the terms of the plea offer that had apparently been tendered to Haukaas, and we do not foreclose the possibility that under other circumstances, such a lapse could give rise to reversible error. In these cases, however, the State substantially complied with the requirements of § 29-1929, and any technical noncompliance was not prejudicial to the defendants. The district court did not abuse its discretion in overruling the defendants' motion to exclude Haukaas' testimony.

3. Demonstrative Exhibit

(a) Background

During its opening statement, the State displayed a demonstrative exhibit—a chart depicting the relationships among many of the people involved in the cases, including personal and business relationships. The chart is best described as a hierarchical chart of the members of the marijuana distribution organization, although it also depicts relevant personal acquaintances of some of the participants. No objection to the use of the chart during opening statements appears in the record. At trial, the jurors asked the court, in a note to the bailiff, if the chart could be left up for their reference during the trial. The defendants objected, on the basis that there was no foundation for the information in the exhibit, and later added that it was unfairly prejudicial and would be distracting to the jury.

However, the court overruled the objections. The court disagreed with the defendants' characterization of the jury, stating:

> They would have to be infantile to only be focusing on some exhibit when someone is testifying, and I don't believe that's the caliber of jury that we have. I am going to let you put this up and have it sitting there, but as a witness is testifying, if you need this for them . . . you can bring it up and have that there during the witness' testimony. After Direct Examination, it will be taken down unless the Defendants' attorneys want to use it during their Cross-Examination to point something out to the witness.

The court specifically instructed the jury that the chart was not an exhibit in the cases, and the chart was not sent to the jury room for deliberation.

(b) Standard of Review

[8] The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003). See *State v. Apker*, 204 Neb. 577, 284 N.W.2d 14 (1979).

(c) Analysis

[9,10] Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial. *Ford, supra*. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice. *Id*. The defendants argue that the chart should not have been displayed during the trial, because many of the individuals represented on the chart did not testify at trial and, according to the defendants, the relationships depicted were speculative. The defendants also argue that the chart was distracting.

Our review of the record, however, finds clear support for all of the information depicted on the chart. In fact, our analysis of the evidence in these cases was helped by our own reference to the chart during our review of the record. This was a complicated trial with many witnesses and even more people and relationships to remember, and it was not unreasonable for the district court to conclude that the chart could assist the jury in understanding the evidence presented. While we question the claim that the chart would have distracted from the testimony, the court's ruling permitted the defendants to remove the chart during their examination of the witnesses, allowing the defendants to make any pertinent points without distraction, and minimizing any prejudice.

The district court's ruling demonstrates that it carefully considered the advantages and disadvantages of displaying the chart, and it did not abuse its discretion in concluding that the chart would help the jury by illustrating the evidence the State presented. The defendants' assignments of error are without merit.

4. Coconspirator Statements

(a) Background

Both of the defendants also objected to Haukaas' testimony on the basis of hearsay, arguing that Haukaas' testimony as to statements made by Sommer and Gutierrez was not admissible as coconspirator testimony because the existence of a conspiracy had not been proved before Haukaas testified. The court overruled the objections, indicating that it would determine, as the evidence was adduced, whether there was evidence of a conspiracy. The defendants now argue that the admission of this testimony was error.

(b) Standard of Review

[11] 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. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

(c) Analysis

Hearsay is not admissible except as provided by the Nebraska Evidence Rules, by other rules adopted by the statutes of the State of Nebraska, or by the discovery rules of this court. See Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Cum. Supp. 2006). The testimony primarily at issue here, Haukaas' testimony regarding Gutierrez' and Sommer's out-of-court statements implicating them in the killings, was admitted pursuant to Neb. Evid. R. 801(4)(b), Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1995), which provides that a statement is not hearsay if it "is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

The defendants claim that Haukaas' testimony was not admissible because *at the time the testimony was offered*, the State had not offered evidence of a conspiracy. The defendants' argument implicates two separate issues: what foundation must be laid for the admission of a coconspirator's statement and when that foundation must be laid.

[12,13] In *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977), we noted the parallel between our rule 801(4)(b)(v) and Fed. R. of Evid. 801(d)(2)(E) and stated that to be admissible, the statements of the coconspirator must have been made while the conspiracy was pending and in furtherance of its objects. If the statements took place after the conspiracy had ended, or if merely narrative of past events, they are not admissible. *Bobo, supra*. In other words, for an out-of-court statement to be admissible under rule 801(4)(b)(v), there must be evidence that there was a conspiracy involving the declarant and the nonoffering party and that the statement was made during the course and in furtherance of the conspiracy. See *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).

[14] In *Bobo*, we further explained that although rule 801(4)(b)(v) is applicable regardless of whether the defendant is charged with conspiracy,

> [t]he rule is well established that before the trier of facts may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence. . . . The purpose of requiring that the conspiracy be established by independent evidence is to prevent the danger of hearsay evidence being lifted by its own bootstraps, i.e., relying on the hearsay statements to establish the conspiracy, and then using the conspiracy to permit the introduction of what would otherwise be hearsay testimony in evidence.

198 Neb. at 557, 253 N.W.2d at 861. Accord, *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). The defendants argue, based on *Bobo*, that foundation was lacking in the instant cases because when Haukaas took the stand, independent proof of the conspiracy had not been established.

In *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), we warned trial courts about the perils of admitting coconspirator evidence conditioned on later evidence of a conspiracy. We held that the evidence of conspiracy required by the rules of evidence could be established by evidence presented to the jury as substantive evidence of the crimes charged. But we cautioned that

> [a]dmission of evidence from a coconspirator, subject to the State's later completing proof of a prima facie case of conspiracy, presents some procedural problems which may result in unwarranted, or even unfair, prejudice to a defendant, for example, the necessity of a motion to strike evidence conditionally received, a request to withdraw the coconspirator's testimony from consideration by the jury, or an instruction that the jury shall disregard the evidence which has been presented but not linked to a conspiracy. Whatever procedure might seem most appropriate on failure of proof after a conditional admission of evidence, there is an ever-present risk that the court's later instruction may not erase a prejudicial impression on the jury—with the specter of a mistrial.

Id. at 694-95, 401 N.W.2d at 157.

That having been said, there is some question whether the preference we expressed in *Copple* rises to the bright-line requirement urged upon us by the defendants. See, *Hansen, supra*; *State v. Conn*, 12 Neb. App. 635, 685 N.W.2d 357 (2004). But we do not confront that issue here because of a more fundamental problem in the defendants' argument.

[15] The defendants' argument is based on the mistaken premise that evidence of a conspiracy was necessary before *any* of Haukaas' testimony was admissible. In fact, rule 801(4)(b)(v) governs only the admissibility of testimony about out-of-court statements made by a coconspirator—not the admissibility of all the other testimony offered by the same witness. Rule 801(4)(b)(v) is simply irrelevant to the direct testimony of a coconspirator. See *United States v. Smith*, 692 F.2d 693 (10th Cir. 1982). See, also, *Laughlin v. United States*, 385 F.2d 287 (D.C. Cir. 1967). There is no reason why a witness cannot testify

to the existence of a conspiracy, and that the defendant was a participant, and then testify to out-of-court statements made by the alleged coconspirators.

Here, Haukaas testified about statements made to him by Gutierrez and Sommer that were admitted as nonhearsay coconspirator statements. But before any of that testimony, Haukaas explained, based on personal knowledge, how he, Gutierrez, and Sommer were involved in a conspiracy to distribute marijuana. The statements made by Sommer and Gutierrez, to which Haukaas testified, were made in furtherance of that conspiracy. The State was not required to prove the existence of the conspiracy before Haukaas took the witness stand, and nothing in the Nebraska Evidence Rules barred Haukaas, as a witness, from testifying about the conspiracy and providing the foundation for admission of the coconspirator statements Haukaas attributed to Gutierrez and Sommer. Haukaas' testimony established prima facie evidence of a conspiracy before he testified to the statements of Gutierrez and Sommer.

[16] Gutierrez' argument is limited to Haukaas' testimony and is disposed of by that conclusion. Sommer also directs the same legal argument at testimony from Bowen, Lucero, and King. The record reveals no more than general hearsay objections to the testimony of Bowen and Lucero, and no hearsay objection at all to King's testimony. Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal. *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005). But in any event, our reasoning above with respect to Haukaas' testimony is also dispositive of Sommer's argument with respect to other witnesses.

Finally, Sommer argues that the statements allegedly made by Gutierrez were not made in furtherance of the conspiracy, as required for admissibility under rule 801(4)(b)(v). Assuming that Sommer's general hearsay objections were sufficient to preserve the issue for appellate review, Sommer's argument presents no basis for reversal.

[17,18] The two statements at which Sommer's argument is directed are (1) Gutierrez' statements to King at King's apartment and (2) a statement that Haukaas testified Gutierrez made to him, after they were both in jail, in which Gutierrez asked Haukaas why Haukaas "told" on Gutierrez. Gutierrez' statement to King, a participant in the marijuana distribution operation, was part of a conversation initiated by Gutierrez while seeking refuge in King's apartment from the police. It is well established that the "in furtherance" language of rule 801 is to be construed broadly. See, e.g., *U.S. v. Phillips*, 219 F.3d 404 (5th Cir. 2000); *U.S. v. Garcia*, 893 F.2d 188 (8th Cir. 1990). It is also well established that statements made by a coconspirator in furtherance of avoiding capture or punishment are made in furtherance of the conspiracy within the meaning of rule 801. See, e.g., *U.S. v. Triplett*, 922 F.2d 1174 (5th Cir. 1991); *Garcia, supra*; *United States v. Sears*, 663 F.2d 896 (9th Cir. 1981). Gutierrez' alleged statement to King falls into that category.

[19,20] As for Gutierrez' alleged statement to Haukaas in jail, it does not implicate Sommer in any way, and its admission as to Sommer was at worst harmless error. Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant. *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Iromuanya, ante* p. 178, 719 N.W.2d 263 (2006).

[21] A coconspirator's idle chatter or casual conversation about past events is generally not considered to be in furtherance of the conspiracy for rule 801 purposes. See, *U.S. v. Shores*, 33 F.3d 438 (4th Cir. 1994); *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981). But this was a single comment, made during a long trial, that was directly inculpatory only to the declarant, Gutierrez, and not to Sommer. Compare, e.g., *United States v. Schepp*, 746 F.2d 406 (8th Cir. 1984); *United States v. Mackey*, 571 F.2d 376 (7th Cir. 1978). We also note

that the statement was clearly admissible as to Gutierrez and Sommer did not request a limiting instruction regarding the jury's use of the testimony.

Based on a thorough review of the record, we conclude that Sommer's conviction was unattributable to the error. In the absence of a request for a limiting instruction, or any prejudice to Sommer from the admission of the statement, we find no reversible error in the district court's decision to permit the testimony.

For the foregoing reasons, we reject the defendants' assignments of error with respect to coconspirator statements.

5. Supplemental Instructions

(a) Background

The day after the cases were submitted to the jury, the jury asked the court to define "abets and procures." The precise context for this question is not apparent, since the actual jury instructions do not appear in the record. The court held a telephonic conference with counsel and proposed to instruct the jury as follows: "In response to your question regarding the definition of abets and procures, Nebraska law provides as follows: one who incites or instigates the commission of a felony when he's neither actually nor constructively present is an aider, abettor, or procurer." The State agreed, but the defendants objected. The court stated:

> I am looking at instruction number 16 right now, which is our definition instruction. It starts off with deliberate and then it defines malice, premeditated, purposely, firearm, and so forth, but I do note for the record that there isn't a definition or an explanation of abets or procures and I agree with the State. I believe that those are words when used in a legal context that if the jury requests it, that I should provide them with some type of guidance. So I am going to note your objection, but I am going to overrule it and I am going to respond.

The court replied to the jury as set forth above.

The same morning, the jury asked, "if we don't believe that the victim was the intended victim, can first-degree murder apply?" The court proposed the following answer:

> I am unable to answer your question. The Court does, however, provide you with a supplemental instruction, where

> one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed.

Again, the State agreed but the defendants objected. The court determined that "this is a case where the doctrine of transferred intent applies and the jury was not instructed on that originally and actually I should have included this in the original set of instructions, and so I am going to give that instruction to them now."

(b) Standard of Review

[22,23] 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). However, the decision whether to reply to questions from the jury regarding the applicable law is entrusted to the discretion of the trial court. See *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995).

(c) Analysis

[24] Both of the defendants assign error to the district court's supplemental instructions. Gutierrez argues, first, that the district court erred in issuing instructions to the jury neither in open court nor in the presence of the parties and counsel. As pertinent, Neb. Rev. Stat. § 25-1116 (Reissue 1995) provides that "[a]fter the jury have retired for deliberation . . . if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given . . . ." We have stated that if it becomes necessary to give further instructions to the jury during deliberation, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

[25] However, counsel in this case was informed by telephonic hearing of each of the jury's questions, and while they objected to the instructions, they did not object to the procedure. The failure to make a timely objection waives the right to assert

prejudicial error on appeal. *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005). Furthermore, Gutierrez has not shown how he was prejudiced by the court's procedure. Counsel was informed of the jury's questions, informed of the court's proposed reply, and given the opportunity to object. "Although communication between the trial judge and jurors should always take place with the parties and their counsel present (unless waived), the record before us does not affirmatively show that the communications in this case resulted in prejudice." See *Jackson*, 264 Neb. at 431, 648 N.W.2d at 291-92.

Sommer argues that the second supplemental instruction, on transferred intent, was prejudicial. Sommer claims that the supplemental instruction "allowed the jurors to improperly consider a felony murder type of instruction where specific intent is not required as it is in first degree murder." Brief for appellant Sommer at 76.

[26,27] However, in an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). 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.*

Although Sommer seems to suggest otherwise, there is little question that as a general proposition, the court's supplemental instruction correctly stated the law with respect to transferred intent. See *State v. Iromuanya, ante* p. 178, 719 N.W.2d 263 (2006). There is also little question that the doctrine of transferred intent, as described, is pertinent to this case, given the evidence suggesting that Lucero was the defendants' real target.

That having been said, it is difficult for us to evaluate whether the supplemental instruction was prejudicial, because the record does not contain the instructions given to the jury prior to submission of the case. It is impossible to read the instructions together, as a whole, when the whole of the instructions is not present. In the absence of the other instructions, since the supplemental instruction standing alone is a correct statement of

law and is pertinent to the issues presented in the case, we conclude that Sommer has failed to demonstrate that he was prejudiced by the court's supplemental instruction.

Neither of the defendants has shown how he was prejudiced by the court's supplemental instructions, either in substance or in the procedure by which the supplemental instructions were given. We find no merit in the defendants' assignments of error.

6. Incomplete Discovery

(a) Background

On cross-examination of Kanger, Gutierrez asked about several police reports detailing Kanger's contact with persons related to the investigation. In response to a State objection, Gutierrez' counsel explained that he was just trying to make sure he had all of the police reports relevant to the case. The State indicated that "[e]verything that we have has been turned over" but that defense counsel could examine the State's index to make sure that nothing had been missed.

On the next day of trial, after the midday recess, the State made the following statement for the record:

> I would like to put one quick thing on the record if I might. I want to make sure that the record is very clear in terms of any — it seems like on a daily basis we have discovery issues that are arising. I want the record to be very clear[.] I am prepared — if there is anything that either defense attorney needs or believes they don't have, I will be — witness addresses, anything, we are available to provide that to them. It's my understanding they do have everything, but I certainly don't want anyone to think they can't ask us or let us know if there's something they feel they don't have. I just don't want the record to continually reflect discovery issues 'cause I think that's problematic. I think we have given everything . . . . We remain ready to turn over anything they think they don't have.

Both defense attorneys indicated their understanding.

After that statement, the State directly examined Bowen, and the court recessed for the day before cross-examination. The next morning, Gutierrez' counsel said that he was missing several police reports. Counsel explained that after Bowen's testimony,

he found that there were reports relevant to Bowen that he did not have. Counsel said that he had obtained those reports at 10 o'clock the previous evening, and they pertained to Bowen and the other witnesses scheduled to be called during that day. The State explained that it believed everything had been provided to all of the defendants, but also indicated that at that point, because the State had only a "bulk receipt," it could not prove what Gutierrez' counsel had been provided and what he had not. The State declined to engage in a "he said, she said" debate, but explained that it had an "open-file" policy, and had provided the defendants both with records and the opportunity to review the State's records to ensure complete discovery.

The court stated that it had "some trouble believing" that of the six sets of copies that had been made of the discovery materials, only Gutierrez' set was missing the disputed police reports. The court initially denied a continuance, but offered a "few minutes" to look over the reports. The State, however, asked the court to give Gutierrez' counsel more time to review the reports.

Ultimately, although Gutierrez made a motion for mistrial, Gutierrez' counsel indicated that he would require "a couple of hours" to read the reports relating to Bowen and prepare for cross-examination. The court said that Gutierrez had no grounds for a mistrial and recessed for the morning to give counsel the opportunity to review the discovery material. The State then agreed to defer its other witnesses referenced in the disputed discovery material until the following Monday morning. The dispute had arisen on a Friday morning, and the State agreed to give Gutierrez' counsel the weekend to review the discovered material. Gutierrez accepted this concession, but preserved his motion for mistrial.

The police reports that Gutierrez claimed had not been provided to him were entered into the record as exhibit 200. This court has examined exhibit 200, as part of its review of the record. Exhibit 200 contains 533 pages of police records, discounting some police reports that were duplicated. A substantial majority of that material, 369 pages, are exhaustive records of the investigation of the crime, describing such matters as: inventories from search warrants, impounded vehicles, and evidence collection at the crime scene and hospital; documentation of

forensic analyses, laboratory tests, photographs, and recordings of interviews; and the canvassing of the neighborhood in which the killings took place. The transcripts of 911 calls reporting the crime occupy 19 pages, and the police report describing the interview of Carranza is 16 pages long. Another 35 pages are devoted to the pursuit and apprehension of Gutierrez, Sommer, and Mace, and the largely fruitless interviews with them after their apprehension.

The police report of an interview with Kip Kelly is another 17 pages long. What remains are 77 pages of police reports, describing interviews with Bowen, Lucero, Romero, and King. Broadly characterized, those interviews reveal no glaring inconsistency with the testimony of those witnesses at trial, except that some of the witnesses, particularly Bowen, were initially reluctant to volunteer the extent of their involvement in marijuana distribution. It should be noted that Bowen's initial prevarication to police was thoroughly explored on cross-examination by the defendants, as were other inconsistencies between witnesses' trial testimony and their initial statements to police.

(b) Standard of Review

[28] 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. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

(c) Analysis

[29] Gutierrez claims that the district court erred in overruling his request for a continuance and motion for mistrial based on the allegedly omitted police reports. But, as set forth above, Gutierrez' counsel was given the time he said he would need to review the material relevant to Bowen and was given additional time to review the remaining material. Thus, the issue on appeal is really whether a mistrial was warranted. We assume without deciding, for purposes of this analysis, that the State was under a duty to provide Gutierrez with the disputed reports and that those reports were not actually provided to Gutierrez. As previously noted, pursuant to § 29-1912, 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 that the defendant receive a fair trial, requested and material information must be disclosed to the defendant. *Id.*

In support of his argument, Gutierrez cites the U.S. Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and this court's decision in *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). But there is a critical distinction between those cases and the instant case, which is that in *Brady* and *Castor*, the prosecution failed to disclose exculpatory information until after the defendant in each case had been convicted. This is not such a case. Instead, the issue here is whether Gutierrez was prejudiced by the State's alleged failure to make a timely disclosure. Despite relying on *Brady* and *Castor*, Gutierrez concedes that he was eventually provided with the reports about which he is now complaining. The real question in this case is whether Gutierrez was irreparably harmed by the belated disclosure.

[30] Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *Harris, supra*. When a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court. *Id*. Gutierrez has not explained, in this case, why the continuance that was granted was insufficient to cure any prejudice resulting from the allegedly belated disclosures. In the absence of such an explanation, it is difficult to conclude that the court abused its discretion in denying Gutierrez' motion for a mistrial.

Furthermore, Gutierrez does not explain, even in his appellate brief, how he was prejudiced by the State's alleged failure to disclose information. Gutierrez simply asserts, in the most general terms, that counsel did not have adequate time to investigate and review the information prior to trial. Yet in his appellate brief, he does not identify any specific way in which he was prejudiced. Compare *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). The disputed reports primarily dealt with the collection and examination of physical evidence, which was not the subject of much controversy in this case. The police reports

about interviews with witnesses are, in our view, largely consistent with the trial testimony. No promising lines of inquiry or investigation made themselves apparent in our review, and more to the point, Gutierrez has not called them to our attention. Compare *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997). Gutierrez does not specifically identify any facts contained in the police reports that were pertinent to the case but unknown to him, nor does he explain what he might have found, given additional time, that would have been material.

Instead, the closest we have here to an explanation of what might have been found in the police reports is counsel's assertion, at oral argument, that on cross-examination at trial, he would have more thoroughly inquired into Bowen's relationship with Lucero. Counsel specifically mentioned that there was a reference, in the police reports, to Lucero's contacting Bowen after the falling out with Gutierrez in an attempt to maintain the marijuana business.

But it is not clear, from Gutierrez' argument or our own review of the record, what part of exhibit 200 would have provided more of a basis for that inquiry than what Gutierrez would have been able to learn during the continuance he was given to examine the 59 pages of reports relating to Lucero's and Bowen's interviews. The only pertinent reference in the police reports is Bowen's statement, in an interview conducted well after the killings, that Lucero had spoken to him in jail after they were both incarcerated on drug charges. The utility and import of this fact is neither apparent nor explained by Gutierrez.

In short, Gutierrez has not explained how the continuance that he was afforded was insufficient to allow him to prepare to resume trial. The fact that no prejudice has been explained lends support to our determination that the district court did not abuse its discretion in denying Gutierrez' motion for mistrial.

7. *Daubert* Objection

(a) Background

Before the State adduced testimony relating to the use of cellular telephones, the defendants objected and requested a *Daubert* hearing on the admissibility of that evidence. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,

113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Both of the defendants later objected to the admission of telephone records from Sprint Telecommunications, on the basis of relevance. Generally, the defendants argued that because there was cell tower location information contained in the records, the jury might infer that particular telephone calls were made from particular areas. The district court overruled the objection.

The State adduced testimony that although the precise location of an individual could not be determined through cellular telephone records, the location of the tower through which a call is placed does establish that the person using the telephone is somewhere within the general "zero- to three-mile range" of the tower.

As we previously noted, telephone records were used to corroborate Haukaas' testimony and establish that a telephone call was made to Lucero's telephone from a pay telephone at 60th and Grover Streets at around the time Haukaas claimed that Sommer made such a call. More pertinently, the Sprint Telecommunications telephone records objected to by Sommer also show that around the time of the pay telephone call, two cellular telephone calls were made from Sommer's cellular telephone to Gutierrez' telephone and were connected through a cell tower at 71st Street and West Center Road, a little over a mile from 60th and Grover Streets.

(b) Standard of Review

[31,32] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Iromuanya, ante* p. 178, 719 N.W.2d 263 (2006).

(c) Analysis

[33-35] Sommer first contends that the telephone records at issue should have been excluded pursuant to *Daubert, supra.*

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. Robinson, ante* p. 582, 724 N.W.2d 35 (2006). 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). See *Robinson, supra*. Under the *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. *Id.*

But in *Robinson, supra*, we recently rejected an argument effectively identical to Sommer's. In *Robinson*, the defendant similarly raised a *Daubert* objection to cellular telephone records. We rejected that argument, explaining that

> *Daubert* does not create a special analysis for answering questions about the admissibility of all expert testimony. . . . Not every attack on expert testimony amounts to a *Daubert* claim. . . . Here, the defendant's purported *Daubert* claim is suspect because the defendant's *Daubert* objection was made, not to expert opinion testimony, but to business records evidencing historical facts. Moreover, even if the objection is extended to the testimony based upon those records, the testimony given was not expert opinion testimony.

Robinson, ante at 618, 724 N.W.2d at 68, citing *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005). We concluded that *Daubert* was not pertinent to the records objected to in that case, because *Daubert* applies to expert opinion testimony and the records at issue in that case "contained nothing resembling 'expert opinion testimony,' since they did not refer to an expert, an opinion, or any testimony." *Robinson, ante* at 619, 724 N.W.2d at 69.

The same is true in this case. The telephone records to which Sommer objected did not represent expert opinion testimony. The testimony presented by the telephone company employee through whom the records were admitted was not opinion testimony, but instead foundational testimony explaining the data in the records. Any question about the foundation for the cellular location data contained in the records would properly have been framed under the business records exception to the hearsay rule, not *Daubert*. See, *id.*; Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Cum. Supp. 2006).

Sommer's tour of the Nebraska Evidence Rules also makes a stop at rule 401. Under rule 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. Evidence which is not relevant is not admissible. Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1995). As we understand Sommer's argument, it is that the telephone records were not relevant because the data could not precisely place the telephone in a particular location when it was used.

But although the records could not place the telephone in an exact location, the foundation established at trial indicated that the records could place Sommer's telephone in the general vicinity of 60th and Grover Streets at the time Haukaas testified they were there and that Sommer's telephone was used to call Gutierrez. This was relevant evidence because it corroborated Haukaas' testimony about the sequence of events leading to the killing. While it was possible for the telephone records to be imprecise, that possibility was testified to at trial by the witness who laid foundation for the telephone records, was explored on cross-examination, and was discussed in Sommer's closing argument. The challenge made by Sommer went to the weight of the evidence, not to its admissibility. See *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004).

In his appellate brief, Sommer also suggests that the telephone records should have been excluded under rule 403. It is unclear from the record whether Sommer made a rule 403 objection at trial, although the basic premise of his rule 403 argument is the same as his rule 401 argument. Under rule 403,

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. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000). Sommer argues that "[t]he concern from [Sommer's] standpoint was that the jury would look at those records, derive the location of the cellular phone tower from those records and inappropriately conclude that the cell tower information was showing the vicinity from where the call was made." Brief for appellant Sommer at 68.

[36] But, had the jury done so, it would have been a determination supported by the testimony presented at trial. As previously noted, the evidence established the approximate range of the cell sites through which cellular telephone calls are placed, and established the site through which Sommer's telephone placed calls on the night of the killings. That evidence was attacked by Sommer on cross-examination and in closing argument. The evidence may have been prejudicial to Sommer, but only evidence tending to suggest a decision on an *improper* basis is *unfairly* prejudicial. *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994). The telephone records in this case did not suggest a decision on an improper basis.

In sum, we conclude that the court did not abuse its discretion in permitting the Sprint Telecommunications telephone records into evidence. Sommer's assignment of error is without merit.

8. Sufficiency of Evidence

(a) Standard of Review

[37,38] 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*, 271 Neb. 160, 710 N.W.2d 101 (2006). When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

(b) Analysis

Both of the defendants question the sufficiency of the evidence to support their convictions. The defendants challenge the credibility of the State's witnesses and the quality of the police investigation of the crime. The defendants contend that their witnesses were more credible; that Lucero, Haukaas, and King all had motive to have Lopez killed; and that the police failed to fully consider other suspects. The defendants note that most of the State's key witnesses were convicted drug traffickers testifying pursuant to plea agreements and call our attention to facts in the record that, according to the defendants, are inconsistent with the State's theory of the cases and raise suspicion about whether someone else was actually responsible for the killings.

[39] But those arguments are not persuasive in light of our standard of review. In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). The defendants may not think the jury should have believed the testimony of Lucero, Haukaas, and King, but a conviction may be based upon the uncorroborated testimony of an accomplice. See *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999). While there was conflicting testimony in this lengthy trial, the evidence was certainly sufficient to support the jury's determination that the defendants were guilty of the crimes charged. We find no merit to the defendants' assignments of error.

9. Cumulative Error

Both of the defendants contend that the cumulative effect of the other errors they assigned deprived them of a fair trial. While any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish that the defendant did not receive a fair trial, a new trial must be granted. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). The question, then, is whether in the aggregate the claimed

errors denied the defendants a fair trial. See *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). Having rejected each of the defendants' assignments of error to this point, we also conclude that the defendants were not denied a fair trial, and we reject the defendants' final assignments of error.

V. CONCLUSION

None of the defendants' assignments of error merit reversal. We find the evidence sufficient to sustain the convictions and reject the defendants' claim to have been denied a fair trial by cumulative error. Therefore, we affirm the convictions and sentences entered by the district court.

AFFIRMED.

HEAVICAN, C.J., not participating.

HEADNOTES
Contained in this Volume

Abatement, Survival, and Revival 346, 738
Acceleration Clauses 839
Actions 41, 113, 139, 162, 219, 251, 410, 462, 669, 738, 867, 924
Administrative Law 8, 131, 390, 669
Adoption 394, 789
Adverse Possession 103
Affidavits 314, 547
Aiding and Abetting 89, 502
Alimony 452
Annexation 867
Appeal and Error 1, 8, 19, 28, 41, 62, 71, 81, 89, 103, 113, 123, 131, 139, 162, 169, 178, 219, 240, 251, 263, 276, 295, 314, 320, 337, 346, 370, 376, 385, 390, 394, 401, 410, 421, 428, 434, 443, 452, 462, 471, 489, 502, 523, 534, 547, 554, 567, 573, 582, 638, 647, 662, 669, 700, 713, 725, 738, 744, 749, 758, 770, 781, 789, 797, 811, 829, 839, 846, 859, 867, 889, 898, 918, 924, 930, 951, 963, 985, 995
Attorney and Client 19, 81
Attorney Fees 385, 443, 452, 918
Attorneys' Liens 918
Attorneys at Law 113, 337, 582, 829, 985

Board of Pardons 573
Boundaries 62
Breach of Contract 219
Brokers 669

Case Disapproved 534, 918
Case Overruled 320
Child Custody 370, 452, 567, 647
Child Support 452, 567
Circumstantial Evidence 41
Claims 162, 700, 744, 770
Collateral Attack 123
Compromise and Settlement 385, 554
Confessions 725, 930
Consideration 219
Conspiracy 995
Constitutional Law 71, 89, 123, 295, 346, 410, 428, 462, 471, 573, 669, 725, 738, 749, 811, 867, 924, 930, 963
Contractors and Subcontractors 28
Contracts 1, 162, 219, 554, 669, 700, 839
Convictions 178, 410, 421, 502, 582, 725, 749, 951, 963, 995
Corporations 113, 219, 251, 263, 758

Courts 8, 295, 320, 394, 462, 471, 489, 523, 669, 725, 995
Criminal Law 71, 89, 139, 178, 421, 428, 502, 582, 725, 898, 930, 995

Damages 41, 162, 169, 240, 489, 669, 744, 859
Death 738
Debtors and Creditors 839
Decedents' Estates 219
Declaratory Judgments 669, 700
Derivative Actions 113, 669
Directed Verdict 995
Disciplinary Proceedings 19, 56, 337, 781, 889
Discrimination 41, 582, 725, 898, 995
Divorce 452, 534, 567
Domicile 567
Double Jeopardy 428, 502, 898
Due Process 930

Easements 103
Effectiveness of Counsel 89, 139, 410, 523, 725, 749, 811
Ejectment 62
Employer and Employee 41, 434
Employment Security 8
Equal Protection 582, 898, 995
Equity 62, 219, 263, 462, 669, 867
Estoppel 219
Evidence 62, 139, 178, 421, 452, 502, 547, 582, 638, 669, 725, 797, 898, 930, 951, 995
Expert Witnesses 139, 582, 995

Federal Acts 8, 28, 131, 489, 846
Fees 314
Final Orders 8, 81, 700, 859
Forbearance 219
Fraud 462, 669

Governmental Subdivisions 669
Guaranty 839

Habitual Criminals 582, 638
Hearsay 582, 963, 995
Homicide 139, 178, 582

Immunity 320, 669
Impeachment 930
Indian Child Welfare Act 846
Indictments and Informations 89, 139, 725
Initiative and Referendum 295, 471
Injunction 219, 669
Insurance 1, 385, 554, 700
Intent 1, 62, 178, 295, 376, 421, 502, 567, 582, 700, 829, 867, 918, 995

Judges 89, 139, 811
Judgments 28, 71, 89, 123, 131, 178, 219, 240, 251, 276, 295, 314, 320, 370, 385, 394, 428, 434, 462, 471, 534, 547, 647, 662, 725, 738, 744, 749, 758, 846, 867, 898, 924, 951, 963
Judicial Construction 320
Judicial Notice 410, 924
Juries 89, 178, 582, 725, 898, 930, 995
Jurisdiction 81, 251, 263, 295, 314, 346, 394, 471, 567, 647, 662, 669, 846, 867, 918
Juror Qualifications 930
Jurors 89, 582, 898, 930, 995
Jury Instructions 89, 139, 178, 240, 582, 951, 963, 995
Jury Misconduct 582, 898
Jury Trials 462
Justiciable Issues 669
Juvenile Courts 370

Legislature 178, 295, 320, 346, 376, 669, 867, 918
Lesser-Included Offenses 582, 951
Liability 28, 502, 700, 839
Limitations of Actions 162, 219, 401, 713, 839
Liquor Licenses 390

Mandamus 276, 758
Marriage 744
Medical Assistance 131
Mental Competency 523, 725
Mental Health 797
Minors 370
Miranda Rights 725, 930
Moot Question 669
Motions for Continuance 139, 811, 995
Motions for Mistrial 178, 582, 898, 995
Motions for New Trial 582, 898
Motions to Dismiss 113, 263, 276, 394, 489, 846
Motions to Suppress 547, 725
Motions to Vacate 462
Municipal Corporations 867

Names 638
Negligence 28, 113, 169, 240
New Trial 240, 502, 898
Notice 89, 251, 867

Ordinances 867

Parental Rights 789
Parol Agreement 219
Parties 62, 263, 669, 700, 738, 846
Paternity 394, 738, 789

Penalties and Forfeitures 434
Photographs 139, 178
Pleadings 113, 263, 276, 394, 428, 462, 489, 669, 700, 846
Pleas 410, 523, 725, 749
Police Officers and Sheriffs 547, 930
Postconviction 71, 139, 410, 749, 811, 924
Prejudgment Interest 770
Presumptions 178, 346, 376, 390, 410, 749, 898, 918, 930
Pretrial Procedure 81, 725, 995
Prior Convictions 582, 638
Prior Statements 930
Probable Cause 547
Probation and Parole 662
Products Liability 401
Proof 1, 19, 41, 56, 71, 89, 103, 113, 139, 178, 219, 240, 251, 276, 346, 401, 410, 452, 462, 489, 502, 523, 547, 554, 582, 638, 669, 700, 725, 749, 758, 797, 811, 829, 846, 889, 898, 930, 951, 963, 985, 995
Property 62, 103, 276
Property Division 452, 534
Prosecuting Attorneys 502, 582, 725, 898, 995
Prosecutorial Misconduct 502
Proximate Cause 169, 502
Public Meetings 867
Public Officers and Employees 276, 314, 669
Public Policy 41, 320, 669
Public Purpose 669
Public Service Commission 346

Quantum Meruit 669
Quiet Title 62

Real Estate 443
Receivers 263
Records 89, 139, 178, 410, 582, 725, 811, 924
Recreation Liability Act 320
Recusal 811
Res Judicata 123
Right to Counsel 582, 725
Robbery 502
Rules of Evidence 89, 139, 178, 582, 638, 930, 963, 995
Rules of the Supreme Court 56, 113, 263, 276, 394, 829, 846, 985

Sales 443, 758
Search and Seizure 547
Search Warrants 547
Securities Regulation 669
Self-Defense 178
Self-Incrimination 725, 930
Sentences 71, 123, 139, 178, 523, 573, 582, 638, 725
Specific Performance 219
Speedy Trial 811
Standing 113, 489, 669, 738, 867

States 131, 263, 314, 647
Statutes 8, 28, 103, 123, 131, 178, 251, 320, 346, 376, 385, 390, 394, 434, 443, 489, 573, 647, 669, 738, 758, 789, 846, 867, 918
Stock 113, 219
Summary Judgment 1, 28, 41, 103, 113, 169, 276, 320, 401, 554, 700, 713, 770, 789, 839, 846
Supreme Court 295, 471, 534

Taxation 669
Taxes 346
Termination of Employment 41
Testimony 62, 89, 995
Time 8, 41, 131, 162, 219, 251, 573, 582, 797, 811, 846
Title 62
Trial 62, 89, 139, 178, 502, 523, 582, 638, 725, 898, 930, 963, 995

Uniform Commercial Code 113
Unjust Enrichment 489

Vendor and Vendee 489
Venue 930
Verdicts 178, 930, 995

Wages 434
Waiver 8, 178, 410, 534, 582, 638, 725, 749, 829, 846, 995
Waters 276
Weapons 178
Witnesses 62, 89, 178, 582, 811, 930, 995
Words and Phrases 41, 103, 113, 139, 178, 219, 276, 346, 376, 390, 443, 471, 567, 582, 647, 669, 725, 744, 758, 846, 867, 898, 930, 995
Workers' Compensation 41, 797, 859, 918